THE
ALL INDIA REPORTER

1940

DONATED
BY
SHRI AMAR NATH RAINA
(1910-1990)
Former Advocate General,
Jammu and Kashmir.

MADRAS SECTION.

WITH PARALLEL REFERENCES TO

(1) I. L. R. (1940) MADRAS
(2) (1940) 1 & 2 MADRAS LAW JOURNAL
(3) 51 & 52 MADRAS LAW WEEKLY
(4) 1940 MADRAS WEEKLY NOTES
(5) 1940 MADRAS CRIMINAL CASES
(6) 41 CRIMINAL LAW JOURNAL
(7) 185 TO 190 INDIAN CASES

* * *

CITATION : A. I. R. 1940 MADRAS

* * *

PUBLISHED BY
D. V. CHITALEY, B.A., LL.B., VAKIL,
NAGPUR, C. P.
1940

(All Rights Reserved)

TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

UNIVERSITY
Iqbal
NO 17723
Dated

SV,02

PRINTED BY D. G. RANADE

AT THE ALL INDIA REPORTER PRESS

NAGPUR.

MADRAS HIGH COURT
1940

Chief Justice:

The Hon'ble Sir Alfred Henry Lionel Leach, Kt., Bar-at-law.

Puisne Judges:

The Hon'ble Sir S. Burn, Kt., I.C.S.
" Mr. Vere Mockett, M.B.E., M.A., Bar-at-law.
" " V. Pandrang Row, B.A., I.C.S., Bar-at-law.
" " A. J. King, I.C.S.
" " S. Wadsworth, I.C.S., Bar-at-law.
" Rao Bahadur P. Venkataramana Rao Nayudu, B.A., B.L.
" Diwan Bahadur K. P. Lakshmana Rao, B.A., B.L.
" Mr. F. W. Gentle, Bar-at-law.
" " J. C. Stodart, I.C.S. *(Retired)*.
" Dr. Sir Abdur Rahman, Kt., LL.D., Khan Bahadur.
" Mr. K. S. Krishnaswami Ayyangar, B.A.,B.L.
" " B. Somayya, B.A., B.L.
" " M. Patanjali Sastri, B.A., B.L.
" " L. C. Horwill, I.C.S.
" " A. C. Happell, I. C. S. *(Actg.)*.

Advocate General:

Sir Alladi Krishnaswami Ayyar, Kt., B.A., B.L.

Government Pleader:

Mr. B. Sitarama Rao, B.A., B.L.

Government Solicitor

H. M. Small Esqr.

EDITORIAL COMMITTEE

DR. SUDISH CHANDRA ROY, M.A., LL.B., PH.D., BAR-AT-LAW, Calcutta.
SIR M. V. JOSHI, Kt., K.C.I.E., Ex-Law Member, C. P. Government, Nagpur.
MR. E. VINAYAKA RAO, B.A., B.L., Advocate, Madras.
Mr. V. V. CHITALEY, B.A., LL.B., Senior Advocate, Federal Court of India, Nagpur.

EDITORIAL STAFF

MR. R. K. MANOHAR, B.A.. LL.B., Advocate, Bombay (O.S.) and Nagpur.
MR. S. G. GADGIL, B.A., LL.B., Advocate, Bombay and Nagpur.
MR. D. D. DATAR, B.Sc., LL.B., Advocate, Nagpur.
MR. R. D. DATAR, High Court Vakil (Bom.), Nagpur.

REPORTERS

Privy Council
DR. A. Majid, M.A., LL.D., BAR-AT-LAW, London.

Federal Court of India
Mr. Rang Behari Lall, B.A., LL.B., Senior Advocate, Federal Court of India, Delhi.

Allahabad
Mr. Sri Rama, B.A., LL.B., Advocate, Allahabad.

Bombay
Mr. S. C. Joshi, M.A., LL.B., M.L.C., Advocate (O.S.), Bombay.

Calcutta
Mr. Monindra Nath Mukerji, B.L. Advocate, Calcutta.
Mr. Surajit Chandra Lahiri, M.A., B.L., Advocate, Calcutta.
Mr. Baidyanath Banerji, M.A., B.L., Advocate, Calcutta.
Mr. A. K. Bhattacharjee, BAR-AT-LAW, Calcutta.
Mr. Subodh Chandra Basak, M.Sc., B.L., Advocate, Calcutta.

Lahore
Mr. Amolak Ram Kapur, B.A. (HONS.), LL.B., Advocate, Lahore.
Mr. Anant Ram Khosla, B.A. (HONS.), LL.B., Advocate, Lahore.
Mr. Kedar Nath Chopra, B.Sc., LL.B., Advocate, Lahore.

Madras
Mr. P. R. Srinivasa Iyengar, M.A., B.L., Advocate, Madras.
Mr. C. R. Krishna Rao, B.A., B.L., Advocate, Madras.

Nagpur
Mr. R. K. Manohar, B.A., LL.B., Advocate, Bombay (O.S.) and Nagpur.

Oudh
Mr. Surendra Nath Roy, M.A., LL.B., Advocate, Lucknow.
Mr. G. C. Roy, B.A. (HONS.), LL.B., Vakil, Lucknow.

Patna
Mr. Subal Chandra Muzumdar, M.A., B.L., Advocate, Patna.
Mr. Laxmidhar Mahanty, B.A., B.L., M.L.C., Vakil, Circuit Court, Cuttack.
Mr. Jagat Bandhu Kar, B.A., B.L., Pleader, Circuit Court, Cuttack.

Peshawar
Pandit Raghunath, B.A., LL.B., Vakil, Peshawar.

Rangoon
Mr. Sydney Loo-Nee, BAR-AT-LAW, M. H. R., Rangoon.
Mr. K. C. Sanyal, M.A., B.L., Advocate, Rangoon.

Sind
Mr. Hakumatrai M. Eidnani, B.A., LL.B., Advocate, Karachi.
Mr. P. K. Vaswani, M.A., LL.B., BAR-AT-LAW, Karachi.

NOMINAL INDEX

Abdul Hameed v. Mohammad Yoonus 153
Abdul Khadir v. Pachaiyappa Chetti 9
Abdul Khadir v. Subramanya Pattar 946
Abdul Kudus v. Abdul Gani 955
Abubucker Ebrahim v. Maganlal K. Javeri: 683
Addagalla Venkanna, *In re* 240
Adinarayana v. Venkatasubbayya 625
Adinarayana Rao v. Kothandaramayya 538
*Ahamed Ibrahim v. Allapichai Rowther 534
*Ahmad Bux Alla Jovaya v. Fazal Karim 49
*Ahmad Ibrahim Sahib v. Meyyappa Chettiar: 285
Alagami Achi v. Palaniappa Chettiar 580
*Alagiri Chetty v. Muthuswami Chetty 102
*Ambu Bai v. Soni Bai (FB) 804
Ammoo v. Pokkan 817
*Anandam v. Muthukumaraswami Mudali 52
*Anandaramayya v. Subbayya 901
*Anandarao v. Co-operative Credit Society, Pedatadepalli 828
Anantha Sayana v. Kondappa Naidu 479
*Annamalai Chettiar v. Vellayan Chettiar 826
Annamalai Mudali, *In re* 372
Annapoornamma v. Veeraraghava Reddi 547
Annapurni Ammal, *In re* 816
Appa Rao v. Ramamurthi 675
Arasu Bennani v. Chennappa Hegde 165
Arunachalam Chettiar v. Official Receiver, Coimbatore 733
Assya Umma v. Paloonteakath Moossa 707
Athiyappa Goundan v. Ramanathan Chettiar 420
*Audinarayana Naidu v. Panchayat Board of Mangapaka 660
Audinarayana Rao v. Lakshminarayana Rao: 588

Balakrishna Nadar, *In re* 746
Bangaru Reddi, *In re* 699
Bhadrachalam v. Nagarupavatamma 885
*Bhagavat Sastrulu v. Lakshmikantam 511
Bhaktavatsaludu v. Venkatanarasimha Rao: 530
Boya Lingadu, *In re* 509
Byre Gowdu v. Muniammal 5

Calicut Bank Ltd. v. Devani Ammal 621
Chandrasekara Iyer v. Official Receiver, West Tanjore 915
Chandrayya v. Seethanna 689
Chennana Gowd v. Official Receiver, Bellary: 241
**Chennappa v. Onkarappa (FB) 33
Chenna Reddi, *In re* 710
Cheria Mammu v. Payankavil Seyina 577
*Cherutty v. Nagamparambil Ravu 664
Chidambaram Chettiar, *In re* 383
Chidambaram Chettiar v. Muthukumaraswami Chettiar 417
Chidambaram Iyer v. Manekavasagam Pillai: 796
Chidambara Thevar v. Swaminatha Rao Peshwa 426
**Chikkana Chettiar v. Perumal Chettiar (FB) 474
China Venkayya v. Suryanarayana 203
Chinna Papiah, *In re* 136
Chinnappayan v. Narayana Pattar 59
Chinnaswami Udayar v. Narasimha Bhattar: 28
Chokkalingam Chettiar v. Official Assignee, Madras 837
Chokkappa Chetty v. Santhubava Rowther: 926
*Commissioner of Income-tax, Madras v. Bosetto Brothers Ltd., Madras (SB) 366
———— v. Harveys Ltd., Tuticorin (SB) 602
———— v. Lakshmanan Chettiar (SB) 942
**———— v. M. & S.M. Railway Co. Ltd. (SB) 598
———— v. Meyyappa Chettiar (SB) 416
*———— v. Muhammad Ismail (SB) 433
**———— v. Nadimuthu Pillai (SB) 593
———— v. Salem District Urban Bank Ltd., Salem (SB) 612
Corporation of Madras v. Secretary of State 653
Crown Prosecutor v. Sellamuthu 271

Dasaradharama Reddy v. Rahimtulla Hussani 492
Dasari Ammanna v. Raja Reddi 160
Delhi Bather v. Corporation of Madras 221
Dhas J. S., *In re* 155
District Board, West Tanjore v. Ponnuswami Pallavarayar 231
Dodda Basappa v. Mallamma 458
Doraikannu Ammal v. Ramaswami Mudaliar: 32
D'Souza v. Lobo 584
Duraiswami Pillai v. Venkata Reddy 233
*Durgaprasada Rao v. Sudarsanaswami 513

Ebrahim Sait H. M. v. Mettupalayam Narayani Bank Ltd. 958
Ellappa Chettiar, *In re* 31
*Emperor v. Taduturu Poligadu 12
Eramullan Haji v. Chandroth Narayanan 453
Eswara Krishna v. Susai Reddiar 498
**Eswariah v. Rameswarayya (FB) 483

Ganapathi Bhatta v. A. M. L. D'Souza 907
*Ganganna Dhora, *In re* 744
Gokuldoss Jamnadoss and Co. v. Lakshminarasimhalu Chetti 920
Gopalachari v. Corporation of Madras 723
Gopala Chettiar v. Arasappa Pillai 523
*Gopalan v. Lakshminarasamma 631
Gopalaswami Mudaliar v. Sri Tyagarajaswami Temple, Tiruvarur 719
Gopalaswami Rao v. Ponnuswamy Chetty : 608
Gopu China Jogayya and Seshawatharam Firm v. Satyanarayana 151
Govada Balabharathi Co-operative Credit Society v. Venkatakrishnayya 932
Govinda Chettiar v. Varadappa Chettiar 17
Govinda Nair v. Achutan Nair 678
Govindarajulu Chetty v. Ramaswamy Chetty: 6
Govindaswami Naicker v. Pukhraj Sowcar 903
Govindaswami Naicker v. Srinivasa Rao 73
Gurubasayya v. Siddalingappa 677
**Guruswami Tevar, *In re* (FB) 196
Guruswamy K. N. v. Indo-Carnatic Bank, Ltd. 873

Hanumayamma v. Official Receiver, Guntur: 749
Hariharayyar v. Ahammadunni 491
Hindu Religious Endowments Board, Madras v. Krishnamacharyulu 614

Iswara Subramanya Iyer, *In re* 938

*Jagannadham v. Adilakshmi 545
Jagannatha Ayyangar v. Suppiah Chettiar 797
James C. P. Fernandez v. Ramkrishna Marthoba Rao 21
Jayaram Mudaliar v. Lakshmi Ammal 777
Jhorama v. Latchanna Dora 19
Jones A. V., *In re* 572

Kalandan v. Kattyali 85
*Kaliana Thevan v. Muthuswami Goundan 174
Kallalagar Devasthanam, Madura v. District Collector, Madura 811
Kamanna v. Satti Reddy 919
Kamaya Nayakkar v. Viralakshmi Ammal: 814
Kanakaraju v. Atchutharamanaraju 432
*Kanakasabai Pillai, *In re* 1
Kannabhiran Pillai v. Govindaswami Pillai: 959
Kannappa Mudali v. Varadachariar 38

Kannayya Naidu v. Appala Naidu 954
Kanthasami Reddiar v. Pethusami Reddiar: 887
Karuppanan Ambalam v. Sundara Raja Ayyar 71
Karuppan Chettiar v. Rajangam 172
Kasireddi Appanna, *In re* 144
Kasireddi Siddareddi v. Mandapalle Co-operative Society 452
Kelu Kurup v. Paru Amma 686
Kesavan Nayar v. Velu 909
Kochu Saheb, *In re* 813
*Kondayya Nayudu v. Marianan 766
Kondayyarao v. Naganna 40
Kozhuvammal Ammal v. Paru Amma 589
Krishnamachari v. Chengalraya Naidu 281
Krishnan v. Ramanatha Iyer & Co. 67
Krishnan Chettiar v. Devarayan Chettiar 228
*Krishnan Naidu v. Somi Naidu 544
Krishnaswami Ayyar v. Travancore National Bank Ltd. 437
Krishnaswami Iyer v. Nagalinga Mudaliar: 836
*Krushnacharana Padhi v. Gourochandro Dyano Sumanto 62
Kumaravel Nadar v. Shanmuga Nadar: **(FB) 465
Kunhi Raman v. Kunhi Karnavan 80
Kuniyil Chandu v. Sankaran 56
*Kuppu Govinda Chettiar v. Uttukottai Co-operative Society 831
Kuruba Anjanappa, *In re* 892
Lakshmana Rao, *In re* 134
Lakshminarasamma v. Venkatanarayanarao: 571
Lakshminarasimha Rao v. Garapati Muneyya 825
Latchayya v. Venkatapatiraju 201
Latchmakka, *In re* 294
*Madina Bibi v. Ismail Durga Association 789
M. S. M. Ry. Co. Ltd. v. Ranga Rao 269
Madura, etc. Devasthanam v. Masanam Pillai 422
Madura Kallalagar Devasthanam v. Subbiah Ambalam 455
Mahadevi v. Sankara Menon 504
Mahalakshmi v. Suryakanta Manikyamba 494
Mahalingam Chettiar v. Raghunatha Doraisingam 916
Maherwan Jehangir v. Dhunbhai Kavasha: 785
Mahomed Hussain v. Majiday Mahmood Jamait Managing Committee, Puddupet 167
Mahomed Ibrahim v. Kamal Saheb 207
Mahomed Kadir Sheriff v. Rahimatullah 230
Mahomed Kassim v. Subramanian Chettiar: 444
Mahomed Sahib v. Kunthanmal Sowcar 807
*Mahomed Shadak Koyi v. Venkata Komaraju: 810
Mahomed Tharaganar v. Syed Sahib 418
Manavikraman v. Madras Hindu Religious Endowments Board 246
*Mandan Shetti v. Thimmi Avva 135
Mangacharyulu v. Balarama Krishnamacharyulu 225
Manicka Mudaliar v. Andalammal 573
Manickavasaka Thevar v. Chidambaram Pillai 185
Manikyam Kondayya, *In re* 298
*Manjula Bai T. R. Mrs. v. Janoji Rao 510
Manthiri Goundan v. Arunachalam Goundan: 569
*Meenakshi Ammal v. Murugayya Mooppanar: 463
Mekala Venkatappa, *In re* 755
Meliyaputti Panchayat Board v. Surapu Veeranna 583
Mohideen Pichai Rowther, *In re* 43
Motam Kotayya v. Venkata Punnayya 910
Municipal Council, Adoni v. Babu Naidu 731
*Muni Krishnayya v. Akulamma 697
Munusami Chetti v. Chenchu Naidu 849
Munuswami Mudaliar v. Darwaja Raghupathi 7
Muthu Goundan, *In re* 216
Muthukrishna Raja v. Viswalinga Kadavarayar 893
*Muthuswami Chettiar, *In re* **(FB)** 23
Muthuswami Thevar v. Rajaram Pandian 904
Muthuvenkatapathy Reddy v. Kuppu Reddi **(FB) 427
*Mythili Ammal v. Janaki Ammal 161
Nagappa Chettiar v. Vijaya Raghunatha Doraisingam 532
Nagi Reddi v. Nanjundappa 761
Naidu G. R. v. Venkataswami Naidu 215
Nainamuthu Kannappan, *In re* 138
Nallangal v. Arasappappillaipatti Co-operative Society 779
Nallasivan Pillai v. Ganapathi Mudaliar 633
Namasivaya Mudaliar v. Srinivasa Iyengar: 54
Nambar v. Chandukutty 22
Nana Rao v. Arunachalam Chettiar **(FB) 385
*Nandakishore Ananga Bhima Dev v. Patta Mahadevi 850
Nanjappa Goundan v. Rangaswami Goundan: 410
Narasihma Ayyar v. Krishna Ayyar 722
Narasimhamurti v. Hayat Khan 911
Narasimha Nayanim v. Venkatarama Naidu: 235
Narasimharaju Garu v. Official Receiver, East Godavari, Rajahmundry 737
Narayanachari v. Annamalai Chettiar 61
Narayanan Chettiar v. Chidambaram Chettiar 585
Narayanan Chetti v. Panchanathan Chettiar 89
Narayanan Nambiar v. Kunhathayi Amma: 730
Narayanaswami Chetti v. Venkata Reddi 889
Narayanaswami Naidu v. Rajamanickam Pillai 419
Natesa Ayyar v. Venkalakshmi Ammal 53
Natesa Padayachi, *In re* 649
Natesa Pillai v. Venkatarama Ayyar 206
Nayar Modern Bank Ltd., Palghat v. Travancore National and Quilon Bank Ltd. 149
Nelliappa Pillai v. Sethuramalingam Pillai 918
Nukala Surya Rao v. Bullemma 899
Official Assignee, Madras v. Natesam Pillai 441
Official Receiver of East Godavari v. Chava Govindaraju **(FB) 798
Palanisami Goundar v. Kaliappa Goundar 77
Palaniswami Goundan, *In re* 586
Pandalai K. C., *In re* 760
Pappammal v. Seethammal 754
Paramasivan Pillai v. Thiruvudaya Mudaliar 636
Parandamayya v. Kosaraju Surayya 129
Paravan v. Gopalan Nair 794
Parvathi Amma v. Subramanian Pattar 944
Pattamahadevi v. Annan Naidu 624
Pattammal, *In re* 898
Pattu Achi v. Rajgopala Pillai 923
Pavayi v. Palanivela Goundan **(FB) 470
Periakaruppan Chettiar v. Arunachalam Chettiar **(FB)** 375
Peria Karuppan Chettiar v. Doraiswamy Naicken 461
Perianna Pillai, *In re* 183
Perumal Kudumban, *In re* 562
*Pichai Pillai v. Ramaswamy Ayyangar 681
Pichakkari v. Shivagnana Nachiar 497
Pichu Ayyangar v. Ramanuja Jeer Swamigal 756
Pitchamma v. Venkataramayya 27
Ponnuchami Chetti v. Annakamu Servai 439

Ponnuswamy Pillai, *In re* 945

Poovanalingam Pillai v. Nagaratnam Pillai 943

Public Prosecutor v. Amirtham Servai 18

———— v. Appalanarasayya 268

———— v. Mahommad Abdullah 587

———— v. Narayana Ayyar 173

———— v. Raju Gupta 682

———— v. Ramaswami Nadar 745

Pundarikakshudu v. Kondayya 669

Raghavachariar v. Ponnuswami Mudali 519

Rahmat Bi v. Krishna Doss Lala 641

Rajagopala Rao v. Bhanoji Rao 765

Rajarathna Chettiar v. Mahboob Sahib 106

Ramachandra Deo v. Kamoju Balajee 91

Ramachandrappa v. Narayanappa 339

*Ramachandra Rao v. Parasuramayya (FB) 127

Ramakoteswara Rao v. Suryanarayana 905

Ramakrishna Reddy v. Official Receiver, Bellary 724

Rama Moopan v. Mutha Moopan 705

Ramamurthy v. Nandi Ramulamma 558

*Raman Adiyoty v. Kannan Nambiar 725

Ramanatha Gurukkal v. Arunachalam Chettiar 493

*Ramanathan Chettiar v. Kumarappa Chettiar 650

Ramaseshayya v. Kutumba Rao 793

Ramasubbaraya Sastri v. Appalanarasimharaju 217

Ramasubramanya Pattar v. Karimbil Pati (FB) 124

**Ramaswami Ayyangar v. Rangachariar (FB) 113

Ramaswami Ayyar v. Commissioner, Chittoor Municipality 685

Ramaswami Chettiar, *In re* 58

Ramaswami Reddi v. Alagayammal 421

Ramaswamy Chetty v. Ramachandra Rao : 295

Ramjee Rao v. Municipal Council, Masulipatam 956

Ramu Mudali v. Shobagmul Sowcar 628

Ranganatha Aiyar v. Jayavelu Mudaliar 627

Ranganayaki Ammal v. Rajagopalaswami Naidu 951

Ranganayaki Ammal v. Sampathkumaran 897

Ranganayakulu Naidu Bahadur v. Lakshminarayana 175

Ratnasabapathi Pillai v. Gopala Iyer 876

Rex v. V. Krishnan 329

Roopchand Merlacha v. Sha Motaji Mokanji 791

Rowthmall Neopani v. Nagarmall Madan Gopal 179

Rukmani Ammal v. Subramania Sastrigal 82

Rukminamma v. Venkata Ramadas 949

R. V. and Co. v. Hindu Religious Endowments Board 10

*S., A First Grade Pleader, Coimbatore, *In the matter of* (SB) 370

Sabjumiah Hussain v. Abdul Vahab Sab 821

Sadachi Ammal v. Rajathi Ammal 315

Sambasiva Chettiar v. Secretary of State 703

Sami Naidu v. Katha Goundan 522

Sampathirayudu v. Venkataratnam 878

Sankamma Hengsu v. Anantha Kamath 882

Sankara Menon v. Kuttani 639

Sanyasi Naidu, *In re* 306

Sanyasiraju, *In re* 284

Saraswatamma v. Maki Naidu 881

Sathappa Chettiar v. Chockalingam Chettiar 615

Satyanarayanamurthi v. Manikyala Rao 265

Satyanarayanamurthy v. Krishnamoorthy 884

Secretary of State v. Hussain Saheb 783

Secretary of State v. Malraju Venkata Narasimharao 620

Secretary of State v. Veerayya Vandayar 451

Seetharamachandra Rao v. Satyanarayana Rao 656

*Seetharamamma v. Ramireddi Patta Reddi : 739

Seethayyamma v. Venkataramana 906

Sengamuthu Gounder v. Thayarammal 646

**Seshamma v. Venkata Narasimharao (FB) 356

Sevadappa Gounder v. Narayanaswami Ayyar 564

Sevugan Chettiar v. Raghunatha Doraisingam 273

Shanbagaperumal Naicker, *In re* 279

*Shanmugha Nadar v. Shanmughavel Nadar 145

*Shiva Rao v. Shanmughasundaraswami 140

Sirdhar Vasanta Rao v. Gopal Rao 299

*Sitaramayya v. Pedda Venkanna 15

Sithanna v. Lakshminarasimhulu 540

Sivaprasad Sowcar v. Narasimhamurthi (FB) 187

*Sivasubramaniam Chettiar v. Murugesa Mudaliar 566

Sivaswami Chettiar v. Marudaiya Goundan 16

Sofia Bi Bi v. Vasudeva Chetty 952

*Sogmull Lachiram, Firm, Tenali v. Parandhamayya 716

Somasundaram Chettiar v. Peria Karuppan Chettiar 478

Somasundaram Chettiar v. Sevugan Chettiar 505

Sooryanarayana v. Ramamma 808

Sornammal v. Thangavelu Mudaliar 412

Soundararajan v. Mahomed Ismail 42

Soundararjappa Mudaliar v. Krishna Ayyar 748

South Indian General Assurance and Co. Ltd. v. Registrar of Life Insurance Companies, Madras 623

Sreenivasachariar v. Krishniah Chetty 485

Sreeramulu, *In re* 293

Srinivasachariar v. The Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd. 937

Subba Rao, *In re* 55

*Subba Rao v. Calicut Co-operative Urban Bank Ltd. 635

*Subba Rao v. Kandregula Narsiah 495

Subbayya v. Venkatasubbayya 296

Subbu Pandaram v. Lakshminarayana Chettiar 435

Subburamier v. Venkatachalapathi Ayyar 941

*Subhadrammal v. Kannammal 590

*Subramania Ayyar v. Maya Kone 81

Subramania Gurukkal v. Srinivasa Rao Sahib 617

*Subramaniam Chettiar v. Annamalai Chettiar 525

Subramania Mudali, *In re* 297

Subramanian Chettiar v. Muthuswami Goundan 890

*Subramanian Firm, Trichinopolly v. Chidambaram Servai 527

Subramanyam, *In re* 822

Subramanya Rao v. Pulla Rami Reddi 957

Sundaralingam v. Venkataramanayya 917

*Sundaram v. Venkatappadasu 874

Sundarammal v. Palaniandi Mudali 292

Surayya v. Venkataramanamma 701

Suryanarayanamurthi, *In re* 747

Suryanarayana Rao v. Subrahmanyam 902

Syama Rao v. Hanumantha Rao 925

Tajbi v. Nattar Sheriff 888

Thanammal v. Alamelu Ammal 224

Thimmanna Bhat v. Adyanthaya 908

Thirugnanavalli Ammal v. Venugopala Pillai 29
Thiruvengada Mudaliar v. Rajabadar Mudaliar 823
Thola Udayar Avergal v. Sudai Udayan 8
Thyagarajan Chetty v. Narayana Thevan 450
Travancore National and Quilon Bank Ltd., *In the matter of* 98
Travancore National and Quilon Bank Ltd., *In the matter of* 101
Travancore National and Quilon Bank Ltd., *In the matter of* 139
Travancore National and Quilon Bank Ltd., *In the matter of* 157
Travancore National and Quilon Bank Ltd., *In re* 178
Travancore National and Quilon Bank Ltd., *In the matter of* 184
Travancore National Bank Subsidiary Co. Ltd., *In re* 266
Travancore National Bank Subsidiary Co. Ltd. v. Travancore National and Quilon Bank Ltd. 258
Unnamalai Ammal v. Amba Baghyathammal 763
Vajjula v. Gopalakrishnamma 950
Vanjiappa Goundan v. Annamalai Chettiar 69
Vasantha Rao v. Narayanaswami Ayyar 95
Vasantharao Ammannamma v. Venkata Kodanda Rao 210
*Vasireddi Balachandrasekhara v. Lakshminarasimham 691
Vasudevan Nambudri v. Raman Nambudri 939
Veerabhadra Rao v. Krishnamurthy Sastri 953
Veerabhadrayya v. Seethamma 236
*Veeranna Sha v. Official Receiver, Secunderabad 47
*Veerappa Chettiar v. J. V. Pirrie 436
Veeraraghavaswami v. Kilambi Mangamma 90
*Veera Raju v. Secretary of State 521
Veerasami, *In re* 257
Veerraju v. Rayanim Dora Garu 940
Venkanna v. Ramanna 776
Venkatachalam Chetti v. Venkatrami Reddi 929
Venkatachalam Chettiar, *In re* 227
**Venkata Gopala Narasimha Rama Rao v. Venkataramayya (FB) 768
Venkatappadu v. Ramamurthi 131
Venkataramana v. Varahalu 308
Venkataramana Vilas Co. Ltd. Coimbatore v. Official Receiver, Coimbatore 30
Venkataramasastri v. Venkatasubramania Dikshitar 674
Venkataramayya, *In re* 111
Venkataratnam v. Chennayya 214
Venkataratnam v. Sivaramudu 560
Venkata Rao v. Subba Rao 700
Venkata Rayanim v. China Bapanna 213
Venkatarayudu Garu v. Venkataramana Rao 86
Venkatarayulu Naidu v. Raghunadha Rao 913
Venkata Sastry v. Venkataramanayya 626
Venkatasubbayya v. Satyanarayanamurthy 489
Venkata Suryanarayana v. Tirupatayya 819
Venkatesa Rao v. Trichinopoly District Co-operative Central Bank, Ltd. 928
*Venkayya Pantulu v. Surya Prakasamma 879
Venugopal Pillai v. Thirugnanavalli Ammal 934
Virayya v. Official Receiver, Kistna 611
Virupakshayya v. Subbarayudu 609
Visalakshi Ammal v. Gokuldas Dayal Sait 423
Visalakshi Ammal v. Krishnaveni Ammal 671
Vishnu Nambudiri v. Ramunni Marar 208
Viswanathan Chettiar v. Official Receiver, Coimbatore 222
Viswanathaswami Temple v. Assistant Engineer for Surveys, Electricity Department, Trichinopoly 900
Vizia Rama Murti v. Suryanarayana Murti 507
Vythinatha Padayachi v. Ammalu Ammal 610
Wilfrid Hazell Sell, *In re* 680
Yegneswara Sastri v. Secretary of State 592
Zamindar of Sivaganga v. Periasami Pillai (FB) 379

SUBJECT INDEX

Adverse Possession — Cosharers — Mere non-receipt by one co-owner of share in profits of land in physical possession of another co-owner is not sufficient to establish adverse possession 785*a*

——It depends upon animus 236*b*

——Public temple — Private individual cannot acquire by prescription any private ownership regarding public temple 208*a*

——Temple — Archakas of subordinate temple openly setting up exclusive right to possession and management of temple adverse to right of management of trustees of main temple — Trustees have no right to oust such archakas 208*b*

Appeal — Powers of Appellate Court — Court cannot, in case of co-defendants against whom alternative claim is preferred, give decree against one of them who was not made party to appeal 609*a*

——Suit dismissed — Plaintiff in appeal choosing to implead only one of co-defendants against whom alternative claim was made — Co-defendant impleaded shifting liability on other not impleaded — Court should not remand appeal to be re-heard after impleading other defendant 609*b*

Arbitration — Application to extend time for making award — Court's jurisdiction to extend time is not lost even if in interval between filing of application and passing order for extension award is actually made 926*a*

——Mere writing of award does not amount to making of award 926*b*

——Minor party to — Arbitration is not void but voidable at minor's option 905*a*

Arms Act *(11 of 1878), S. 19 (f)* — Servant of licensee carrying gun to his master's house is not guilty 257

Association — Association maintained by subscriptions from members and donations is not club — Member cannot sue management unless he be damnified by expulsion, punishment or by loss to joint property 902*b*

Banker and Customer — Fiduciary relation—Fact that person had no prior banking transaction with bank or that he gave directions to bank to apply in particular manner moneys standing to his credit does not by itself make relationship between parties fiduciary 441*a*

——Amount credited in anamath or suspense account to await instructions of creditor for its disposal — No pass book or cheque book issued to creditor when amount received by bank — Relation between parties must be deemed to be fiduciary — Creditor is entitled to preferential claim 441*b*

——Person standing surety for customer for money paid to latter by Bank—Bank is not bound to disclose to surety its constituent's indebtedness 437*b*

——Preferential claim — Subscribers of company purchasing chits depositing amount with Bank for payment to company—There is only assignment of money deposited in Bank in favour of company—There is no question of trust in favour of company so as to entitle it to rank as preferential creditor of Bank 258*a*

——Notice to bank that money deposited is trust money—Effect stated 184*a*

——Depositor being trustee and money deposited being trust money — Notice to Bank that money deposited is trust money —Effect stated 178

——Preferential claim—Money deposited with bank for opening overdraft account—Money cannot be said to be deposited for a specific purpose so as to create a trust entitling depositor to preferential claim over other creditors of bank — Relation between depositor and bank is that of debtor and creditor, and vice versa 149

——Person paying certain sum to bank for remitting it by transfer to another place—Sum not credited by bank in his current account nor transferred owing to suspension of payment by bank — Person held entitled to preferential payment regarding such sum 139

——Person paying certain amount in Bank for getting draft in exchange drawn on Bank's branch — On liquidation of Bank person is not entitled to preferential payment in regard to this sum 101*a*

——Cheques given by person to bank for collection only — Proceeds of cheques realized by Bank after it suspended payment —Such person is entitled to preferential payment regarding such proceeds 101*b*

——Relationship between customer and bank is that of creditor and debtor— Mere fact that customer gives direction to banker to apply money to his credit in particular manner would not clothe bank with trust 98

Civil Procedure Code *(5 of 1908), S. 2(12)* — Mesne profits — Interest on, can be awarded as mesne profits 934*c*

Civil P. C.

*——*Ss. 2 (17) (h) and 80*—Word "service" in S. 2 (17) (h)—Meaning—Liquidator appointed by Registrar of Co-operative Societies is not public servant 831*b*

——*S. 10*—Provisions are mandatory 7*a*

——*S. 10* — Expression "matter in issue" refers to entire subject-matter in dispute and not to one of the issues — Rent suit—Amount claimed in both suits not for same period—Section does not apply 7*b*

——*S. 11*—Decision of issue between parties in prior execution petition under different and anterior decree—Attempt to raise similar matter at similar stage of proceedings in subsequent suit between same parties would be barred 59*b*

——*S. 15* — S. 15 does not apply to suit cognizable by Village Munsif under Madras Village Courts Act 495*a*

——*S. 24* — Application to transfer suit from Court of Small Causes to City Civil Court can be entertained 9

——*Ss. 34 (2) and 152* — Decree following judgment and silent with respect to payment of further interest from date of decree to date of payment—Omission even if accidental cannot be rectified 29

——*S. 35*—Order for costs—Second appeal lies where lower Courts apply wrong principles or there is error of law in awarding costs 589*a*

——*S. 35* — Costs are discretionary with trial Court — Discretion can be interfered with in appeal only when it is improperly exercised 589*b*

——*S. 39 and O. 21, Rr. 5, 8*—Transmission for execution to Sub-Court — Transferee Court and not the District Court has jurisdiction to entertain application for execution — Decree has to be sent to the District Court under O. 21, R. 5 only for transmission 214

——*S. 47* — Mortgage suit — Subsequent purchaser impleaded as party—Application for personal decree against mortgagor — Purchaser not made party to this application—Mortgagee proceeding to attach property in execution of personal decree—Claim by purchaser that property attached was his property held came within S. 47 881*a*

——*S. 47 and O. 21, R. 58* — Difference between proceedings under O. 21, R. 58 and those under S. 47 explained 881*b*

——*S. 47* — Decree against karnavan as manager of Malabar tarwad — Executing Court has jurisdiction to determine decree-holder's right to execute decree against other members of tarwad 165*b*

Civil P. C.

——*S. 47 and O. 21, R. 66* — At stage of settling terms of proclamation, parties putting into issue question affecting their relative rights with regard to execution — Matter heard and decided — Parties will not be allowed in course of execution to canvass same matter again 54*a*

*——*S. 48*—Starting point—Amendment of decree—S. 48 is not affected by Art. 182, Limitation Act — Limitation under S. 48 runs from date of original decree and not from date of amendment—Execution after 12 years from date of original decree is barred, amendment or no amendment **(FB)** 127*a*

——*S. 48* — Application for execution not made within 12 years—Court in special circumstances has discretion to allow amendment so as to allow decree-holder to proceed further with execution 19

——*S. 60*—Allowances of Railway Guard can be taken into account in determining salary attachable 766*a*

——*S. 60 (i) and (k)* — Salary upto Rs. 100 and half the remainder and also, independently of it, amount of provident fund is exempted 766*c*

*——*S. 60 (k)* — Recoveries of advances from provident fund cannot be deducted from attachable income 766*b*

——*S. 64*—Private transfer during pendency of attachment in one suit—Attachment in execution of decree in another suit made after transfer but while decree in former suit remained unsatisfied and attachment therein subsisting — Auction-purchaser in sale effected in pursuance of second attachment will not obtain good title — Alienation would not be void as against him (Per *Leach C. J., Pandrang Row and Patanjali Sastri JJ.; Abdur Rahman and Krishnaswami Ayyangar JJ.*, Dissenting.) **(FB) 385*c*

——*S. 64* — It is not necessary that property should have been sold or that assets must have come into executing Court (Per *Abdur Rahman J.*) **(FB)** 385*d*

*——*S. 73*—*A*, *B* and *C* obtaining decrees against son and insolvent father — Court permitting Official Receiver in execution of *A's* decree to sell entire property within certain time and to pay son's share into Court — Official Receiver selling property but paying son's share of sale proceeds into Court after execution petitions by *B* and *C*

Civil P. C.
—*B* and *C* held entitled to rateable distribution 826
*——*S. 73*—Joint Hindu family—Decree against grandfather must be deemed to be passed against son and grandson to the extent of their interest in family property — Decree against grandfather, son and grandson — Another decree against grandfather and son only—Grandfather and son adjudicated insolvents—Both decree-holders are entitled to rateable distribution in grandson's interest under S. 73: *(1937) 1 M L J 180=A I R 1937 Mad 253=167 I C 503, OVERRULED* 525*b*
——*S. 92* — Suit by certain persons on behalf of villagers for declaration that alienations of temple property by pujaris thereof are void and not binding on temple is maintainable apart from S. 92 81*a*
——*S. 95* — Cancellation of attachment prayed for and orders thereon withheld pending adjudication on application for compensation — Applicant under S. 95 cannot be non-suited for want of final order on connected application 77*a*
——*S. 95*—To justify order under S. 95 it is not necessary to prove special damage 77*b*
——*S. 95*—Facts to be proved stated: 77*c*
——*S. 100* — Finding of fact not vitiated by error of law cannot be disturbed 299*a*
——*S. 105*—Suit by plaintiffs for framing scheme — Court overruling defendant's preliminary objection that it had no power to frame scheme — High Court in revision upholding objection and dismissing suit — On order being communicated to it, lower Court passing formal decree dismissing suit — High Court's order is interlocutory and inappropriate within the meaning of S. 115 — Appeal from decree is competent by virtue of S. 105 756*a*
*——*S. 109* — Leave to appeal asked for raising for first time question not raised in trial Court or High Court — Leave cannot be granted 810*b*
——*S. 111A* — Construction — Object of S. 111A is to bring Code of Civil Procedure into line with S. 205, Government of India Act — Provisos to S. 111A make it clear that nothing in the Code shall be read as affecting right given to party to appeal to Federal Court under sub-s. (1) of S. 205 when High Court has passed final judgment, decree or order and has certified that a substantial question of law as to interpretation of Government of India Act is involved 890*b*

Civil P. C.
——*S. 115*—Appellate Court making erroneous decision regarding lower Court's jurisdiction — Question of jurisdiction depending on decision of proper court-fee — Appellate decision is open to revision: 821*c*
——*S. 115*—Court holding that purchasers of parts of hypotheca are not entitled to benefit of Madras Agriculturists' Relief Act—High Court can interfere in revision 808*b*
——*Ss. 144 and 145* — No order for restitution can be made against sureties under S. 144 — But they can be made parties to proceedings—Surety's liability can only be determined under S. 145 (Per *Burn and Stodart JJ.*) 850*a*
*——*S. 144* — Possession of receiver is possession of party ultimately declared successful — Plaintiff succeeding in Court of first instance in suit for possession—Receiver appointed during pendency of appeal by defendant to High Court—Appeal having been allowed defendant got possession from receiver — High Court's decree reversed by Privy Council decree and that of Court of first instance restored—Receiver's possession must be deemed to be plaintiff's possession and he must be deemed to be dispossessed when defendant took over possession from receiver — Plaintiff held entitled to restitution of possession and mesne profits under S. 144 — Fact that he was refused decree for mesne profits by Court of first instance and High Court did not deprive him of his right to profits accruing to his opponent after latter dispossessed him in consequence of High Court's decree (Per *Wadsworth and Stodart JJ.; Burn J.*, contra.) 850*b*
——*S. 144*—Mesne profits—"Order which is properly consequential on such reversal," what is 850*c*
——*S. 144*—Allowances ordered by Court to be paid to parties out of suit property must be deemed to have been paid on condition of their being refunded by party ultimately proving unsuccessful (Per *Burn and Stodart JJ.*) 850*d*
——*S. 144*—Application for mesne profits —Claim to set off not put in trial Court cannot be raised in appeal (Per *Stodart J.*) 850*f*
——*S. 144*—Construction—Words "place the parties in the position which they would have occupied but for such a decree" in S. 144 — Meaning stated (Per *Wadsworth J.*) 850*g*

Civil P. C.

*——*S. 144* — Application by judgment-debtor for stay of execution granted on condition that he furnished security for decretal amount—Judgment-debtor instead of security depositing cash—Court accepting it and ordering decree-holder not to withdraw it except on furnishing security — Decree-holder failing to withdraw — Decree subsequently reversed—Judgment-debtor held entitled to interest on amount of his deposit 15

——*S. 146 and O. 22, Rr. 10 and 11* — Suit by *A* against *B* for recovery of property decreed — Pending suit *A's* son *C* acquiring suit property by final partition decree—Appeal by *B*—Application by *C* to be impleaded as respondent — Neither S. 146 nor O. 22, R. 10 held could apply 876*a*

——*S. 146*—Benamidar releasing right in property claimed by him in suit in favour of real purchaser—Latter can file appeal against dismissal of benamidar's suit — Release deed does not offend against S. 6 (e), T. P. Act 16

——*S. 148* — Compromise decree fixing time within which landlord to deposit value of improvement—Tenant to surrender property on aforesaid deposit — Deposit made after expiry of period fixed by decree but within three years of date of decree — Court cannot extend time under S. 148 — Decree held could not be executed by eviction of tenant 817*a*

——*S. 149*—Court improperly and without sufficient cause granting time for payment of court-fee after presentation of plaint — Plaint takes effect as if presented with full court-fee on date of its first presentation—No question of limitation arises where plaint as originally filed is within time: 934*b*

——*S. 151* — Stay of execution under inherent powers—Court can impose terms 917*b*

——*S. 151*—Remedy under specific provisions of Civil Procedure Code not availed of—Powers under S. 151 cannot be invoked 876*b*

——*Ss. 152 and 115* — Order amending decree without jurisdiction — High Court can in special circumstances entertain revision even when remedy by way of appeal is available 538*a*

——*S. 152*—Scope—Court cannot rectify decree because it was wrong or unfair or parties did not realize their rights—Power to rectify decree is limited to arithmetical mistakes or errors arising from accidental slips or omissions 538*b*

Civil P. C.

——*O. 1, R. 9* — Applicability — Right to sue devolving jointly on two persons—Only one of them bringing action — Death of other person pendente lite before trial — Court cannot refuse decree to plaintiff under O. 1, R. 9 412*b*

——*O. 1, R. 10* — Addition of parties — A person may be added as party where his presence is necessary to enable Court effectually and completely to adjudicate upon and settle all questions involved in suit and not merely those between parties—Person may be impleaded as defendant even if he counter-claims against plaintiff 225

——*O. 1, R. 10 (2)* — Person purchasing right to recover certain amount instituting suit to recover it by adding seller as co-plaintiff—Seller claiming adversely to purchaser—Seller's name as co-plaintiff should be struck off and he should be transposed as defendant 69*a*

——*O. 1, R. 10 (2)*—"Questions involved in the suit"—Scope explained 69*b*

——*O. 2, R. 2*—Suit for possession of property — Past mesne profits need not be claimed — Separate suit for mesne profits is competent 934*a*

——*O. 5, R. 19* — Court should observe mandatory provision in O. 5, R. 19 — Absence of express order required therein does not however mean that summons has not been duly served 213

——*O. 6, R. 18* — Application for adding more defendants allowed—Amendment not embodied in original plaint till date of judgment — After delivery of judgment Judge directing officers of Court to carry out amendment — O. 6, R. 18 held sufficiently complied with 641*b*

——*O. 8, R. 6*—Applicability — O. 8, R. 6 does not apply to matters arising in insolvency or liquidation 266*b*

——*O. 9, R. 13 and O. 23, R. 1* — Vendee suing vendor and impleading person claiming title to sale property by adverse possession and his tenant for possession and alternatively for return of purchase money with damages—Suit against vendor decreed ex parte for latter relief and withdrawn against rest — Decree under O. 9, R. 13 held could be set aside against the vendor but not against rest — Proper remedy for plaintiff was to obtain permission under O. 23, R. 1 to file fresh suit against rest 765

Civil P. C.

——*O. 9, R. 13*—Court cannot order applicant pending trial to deposit costs of suit or furnish security for decree amount 585

——*O. 9, R. 13* — Application to restore petition to set aside sale is not maintainable 569*a*

——*O. 13, R. 2* — Official records of undoubted authenticity — Leave to produce them should be granted even though they are produced late 540*b*

——*O. 20, R. 12* — Interpretation—Application for ascertainment of mesne profits is not necessary — But if made it is not governed by Art. 181, Limitation Act: *71 M L J 388=A I R 1936 Mad 801 = 164 I C 670, OVERRULED* **(FB)** 124*a*

——*O. 20, R. 12 (3) (Madras)*—Direction in R. 12 (3) does not apply where Appellate Court conducts inquiry by itself—Application under R. 12 (3) does not fall within Art. 181, Limitation Act **(FB)** 124*b*

——*O. 20, R. 12 (3) (Madras)*—Procedure —Appellate Court directing Court of first instance to inquire into mesne profits—Court of first instance should fix date for appearance of parties after receipt of record —If decree-holder fails to appear Court should not pass final decree but adjourn matter sine die **(FB)** 124*c*

——*O. 21, Rr. 2 and 18*—Adjustment out of Court may be by means of setting off one decree against another if there is no legal objection to such course — Fact that such adjustment does not come within O. 21, R. 18 would not bar recording of satisfaction 534*a*

——*O. 21, R. 2* — Executing Court cannot make provisional record of satisfaction of decree 534*c*

——*O. 21, R. 2* — Court whether can recognize adjustment which is executory *(Quære)* 534*d*

——*O. 21, R. 16* — Mortgage decree — Transfer can be effected by registered instrument only — Application by person claiming transfer through unregistered instrument is not "in accordance with law" within the meaning of Art. 182 (5), Limitation Act 610*b*

——*O. 21, R. 16*—Decree passed in favour of father devolved on his death on his sons — Sons cannot execute decree without recognition by original Court of devolution on them of decree 89

——*O. 21, Rr. 17 and 57*—Court rejecting application under R. 17—No application in accordance with law must be deemed to have been filed—Rejection does not amount to dismissal under R. 57—Fact that application was numbered as execution petition indicates that rejection was in limine as not complying with legal formalities 615*a*

——*O. 21, R. 17 (2)*—Mere non-mentioning list of properties in original execution application does not deprive decree-holder of benefit of O. 21, R. 17 (2) 893*a*

*——*O. 21, R. 53 (3)*—Attaching decree-holder cannot make adjustment of attached decree and record satisfaction by reason of that adjustment 534*e*

——*O. 21, R. 57*—R. 57 is not exhaustive 763*b*

——*O. 21, R. 57* — Receiver's application under S. 52, Provincial Insolvency Act—Executing Court stopping sale and striking off execution petition—Dismissal is not for decree-holder's default — Attachment does not cease 733*c*

——*O. 21, R. 57* — Applicability — R. 57 deals with case where on petition ultimately dismissed attachment has taken place—R. 57 should be applied with caution in cases where attachment has taken place before judgment or on prior application 615*b*

——*O. 21, R. 57*—Attachment—Termination of—Application for execution in which attachment made not dismissed—Dismissal of interlocutory application by decree-holder or his procuring fresh attachment does not terminate original attachment 172

——*O. 21, R. 58* — Property attached on decree-holder's execution petition—Objection to attachment rejected — Execution petition dismissed finally due to decree-holder's death—Attachment ceases — Defeated objector's claim in fresh execution and attachment of same property by decree-holder's legal representative is not barred by his failure to institute suit contesting dismissal of claim under earlier attachment 763*c*

——*O. 21, R. 58 (2)*—Issue of proclamation of sale cannot be ordered while claim petition is pending 6

——*O. 21, R. 63* — Objection dismissed — Subsequently attachment ceasing within one year—Claimant is not bound to institute suit under R. 63 763*a*

——*O. 21, R. 63*—Objection to attachment under O. 21, R. 58 rejected by executing Court, sale deed in favour of claimant being fictitious — Suit by claimant under O. 21, R. 63 — Onus to prove genuineness of sale deed and valuable consideration is on claimant 444

Civil P. C.

——*O. 21, R. 66 (2) (e)* — Misdescription of items of land to be sold are irregularities likely to affect prices realized 82*b*

——*O. 21, Rr. 69, 90* — Sale held on day on which it has been proclaimed that it shall not take place is invalid 206*b*

*——*O. 21, Rr. 71 and 87* — Application for re-sale can be made at any time within three years—Delay of eleven months therefore cannot justify Court in rejecting decree-holder's application for payment of deficit 566*b*

*——*O. 21, R. 89 and S. 144* — Person bound by decree making deposit under O. 21, R. 89 to set aside sale in execution of that decree — Decree set aside in suit brought for that purpose — Person making payment is entitled to refund 725

——*O. 21, R. 89* — It is not necessary that payment should be in cash—Judgment-debtor assigning to decree-holder mortgage in part satisfaction of decretal amount — Judgment-debtor depositing difference between amount stated in proclamation and value of morgage assigned by him—This is sufficient compliance with O. 21, R. 89 **(FB) 427*b*

——*O. 21, R. 90*—Application to set aside sale cannot be dismissed merely on ground that applicant is adjudicated insolvent: 569*b*

——*O. 21, R. 90*—Application to set aside sale on ground of illegality — That judgment-debtor is materially prejudiced need not be proved 206*a*

——*O. 21, R. 90, Proviso (Madras)* — Application under O. 21, R. 90 admitted—Court cannot order deposit of security after admission — Order for security is discretionary with Court—Decree-holder cannot claim it as of right 624*a*

——*O. 21, R. 90, Proviso (Madras)* — Word 'admission' — The word 'admission' conveys that point of time when an application or suit, as the case may be, is received into Court and accepted for decision and that stage is when notice is given to the opposite side 624*b*

——*O. 21, R. 92*—Period of 30 days expiring on date when Court is closed — Judgment-debtor assigning mortgage to decree-holder by way of part satisfaction of mortgage decree and on reopening day paying balance after giving credit to value of mortgage — Payment is within time **(FB)** 427*a*

——*O. 21, R. 92* — Period of 30 days does not govern doing of something outside Court equivalent to deposit into Court. (Per *Krishnaswami Ayyangar J.)* **(FB)** 427*c*

Civil P. C.

——*O. 21, R. 92*—Court sale—Confirmation — Auction-purchaser making adequate bid — No irregularity or fraud with respect to sale — Court is bound to confirm sale though at late stage some one else is willing to pay more 42

——*O. 22, R. 12* — Construction — Minor plaintiff found to be major when suit filed — Other person cannot file suit on his behalf — Suit must be dismissed — O. 22, R. 12 does not apply 522

——*O. 26, R. 1* — Provisions of O. 26, R. 1 do not apply to execution proceedings: 569*c*

*——*O. 32, R. 7* — Guardian agreeing to refer matter in suit to arbitration can question legality of reference and award in suit and in appeal *(Obiter)* 650*a*

*——*O. 32, R. 7 (1)*—Agreement or compromise by guardian on behalf of minor without Court's leave is voidable against all parties at minor's option 650*b*

——*O. 33, R. 1, Explanation* — Construction—Expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies second part of explanation and not first — Plaintiff unable to pay deficit court-fee — Both parties agreeing that plaintiff had saleable interest in certain items of suit property — Items held could not be ignored in determining whether plaintiff had sufficient means to pay deficit court-fee 754

——*O. 34, Rr. 4 and 5* — Legal right of marshalling cannot be extended by relying on provisions of O. 34, Rr. 4 and 5 in way which cannot be justified by any well established principle 776

——*O. 34, R. 5* — R. 5 recognizes only payment into Court—Preliminary mortgage decree cannot be deemed to be satisfied by private purchase by mortgagee from mortgagor — Mortgagee is still entitled to apply for final decree 461*a*

——*O. 34, R. 14* — Lease by mortgagee back to mortgagor part of mortgage transaction and merely machinery for realizing interest on mortgage — Suit for rent under lease—Under decree in such suit equity of redemption cannot be sold unless suit is framed as suit on mortgage 59*a*

——*O. 40, R. 1*—Application by Collector under O. 40, R. 1 for directing receiver in mortgage suit to pay money due by mortgagor to Government — Order directing receiver to pay falls under O. 40, R. 1 and is appealable 703*a*

Civil P. C.

——*O. 41, R. 6 (2)*—Appeal against decree for sale pending—Sale shall, on application by judgment-debtor, be stayed — Court failing to stay and proceeding to sell—This amounts to illegality 82*a*

——*O. 41, R. 11* — Court cannot admit appeal in part only: *S. A. No. 1141 of 1934, OVERRULED* **(FB) 483

——*O. 41, R. 21*—"Prevented by sufficient cause from appearing" — Appellant served with notice not appearing — Appeal transferred to Sub-Judge — Omission of Sub-Judge to give notice of transfer to appellant is not sufficient cause for absence 53

——*O. 41, R. 22* — Suit by, against dismissed archaka of temple for possession of lands connected with archaka service—Court dismissing suit but making specific declarations not prayed for by plaintiff to safeguard interests of temple — Appeal by plaintiff—Archaka filing no cross-objections against declarations—Declarations must be deemed to be conclusive by reason of O. 41, R. 22 617*a*

——*O. 41, R. 27* — Additional evidence merely for purpose of providing corroboration for oral testimony which had been disbelieved by trial Judge cannot be allowed 911

——*O. 41, Rr. 27 and 29*—Failure of party to examine material witness even though that witness was available is not ordinarily sufficient reason to examine him in appeal 707*a*

——*O. 41, Rr. 27 and 29* — It cannot be said that, in all cases where there is no recorded objection to admission of evidence in appeal, provisions of Rr. 27 and 29 should be ignored 707*b*

——*O. 45, R. 17, Proviso (a)* — Construction — Addition of words to O. 45, R. 3, effected by proviso (a) to O. 45, R. 17 makes it clear that it is unnecessary for Court to consider in petition filed in compliance with O. 45, R. 2, Civil P. C., whether there is substantial question of law involved as to interpretation of Government of India Act, 1935 890*c*

——*O. 47, R. 1*—Specific question involved in issue raised by plaintiff abandoned as result of erroneous view of his pleader — This is no ground for granting review: 203*a*

——*O. 47, R. 1 and S. 115*—Lower Court granting review even though there was no sufficient ground for doing so—High Court can interfere under S. 115 203*b*

——*O. 47, R. 1* — "Any other sufficient reason"—Misapprehension of counsel causing erroneous impression of Judge is a sufficient reason for review 17

——*Sch. 2, Para. 15* — Matter in dispute between parties to suit referred to arbitration — Arbitrator need not examine one party in presence of other parties — It is otherwise with regard to examination of other persons whose testimony might be impugned for some reason — Incarceration of one party preventing examination of one party in presence of other parties—Award cannot be set aside 905*b*

Companies Act *(7 of 1913), S. 153*—Fact that shareholders and creditors of company have approved of scheme of compromise does not mean that Court is bound to accept scheme 621

——*S.179(f)*—Endorsement of promissory notes — Liquidator derives his power to indorse from S. 179 (f) — Power cannot be delegated — Endorsement by liquidator's agent conveys no title to assignee — No question of ratification by liquidator arises 882

——*S. 183 (5)*—S. 183 (5) does not apply where act of Official Liquidator is performed in pursuance of Court's sanction: 179*b*

——*S. 229*—Set-off—Debtor is entitled to claim set-off in respect of amount due to him from company — Fact that another person has stood surety in respect of his debt does not deprive him of that right 266*a*

——*S. 229* — Liability of principal debtor and surety to company joint and several — Surety himself creditor of company in separate dealing — Dealings between company and surety are 'mutual' as contemplated by S. 46, Provincial Insolvency Act —Surety can claim set-off 266*c*

——*S. 282B* — Amount of provident fund lying in deposit in Bank to credit of company not invested in authorized securities provided by S. 282B—Bank with knowledge of breach of trust must be held to have participated in breach of trust 184*b*

Company—Resolution of Board of Directors authorizing director to attend to Court proceedings — He can file petition in insolvency 958*a*

——General Body can sanction payment of gratuity to ex-servant even if by-laws did not provide for its payment — Mere fact that Board of Management is delegated power to frame by-laws does not take away power of General Body to sanction gratuity 928

Company

——Certain shareholders receiving notice that if there was failure to pay by certain date call in respect of allotment money, shares allotted would be forfeited — These shareholders not paying money demanded — Board of directors passing resolution forfeiting share of number of shareholders but names of these shareholders not included—Company held continued to treat these shareholders as shareholders and their names could be included in list of contributories 873

——Court giving Official Liquidator sanction to sell company's property in discharge of its debts — Official Liquidator acting on sanction and entering into contract of sale — Court cannot subsequently revoke its sanction so as to nullify contract of sale 179*a*

——Liquidation — Debt although not presently payable can be set off against money owing to company 157*a*

***Contract** — Public policy — Marriage performed outside British India to evade provisions of Sarda Act is not opposed to public policy — Contribution towards it can be recovered in execution of decree 901*b*

——Specific performance — Contract for sale of land to *A* entered into by brothers who were members of undivided Hindu family—Contract signed by major brothers and by eldest of them as manager of family and guardian of minor brother—*A* entering into possession and not disputing title of vendors — Suit for specific performance held maintainable by brothers including minor who had become major 625

——Undue influence—Proof—When there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete 285*b*

Contract Act *(9 of 1872)*, *S. 19* — Vendor of land failing to disclose that land had been leased to third party and representing to vendee that he could take immediate possession of land—Sale is voidable and does not fall within exception to S. 19 560

——*S. 25* — Plaintiff agreeing to release defendant's brother from liability on payment of certain sum by defendant—Agreement to release from liability if same was enforceable at the time of agreement held was good consideration 678*a*

——*S. 25 (3)* — Words "person to be charged therewith" include person who

Contract Act

agrees to become liable for payment of debt due by another 678*b*

——*S. 25 (3)* — S. 25 (3) contemplates distinct promise to pay — Debtor in letter asking creditor to come and receive 50 paras of paddy "towards what was to be given to" him — Letter held did not disclose express promise to pay remaining paddy 678*c*

——*S. 25 (3)* — Promise to pay part of barred debt does not imply promise to pay whole 678*d*

——*S. 63*—Remission by person on verge of insolvency without consideration is inoperative as against Official Receiver according to S. 53, Provincial Insolvency Act: 737

——*S. 65* — S. 65 does not apply to contracts deliberately entered into by persons knowing such contracts to be invalid: 719*c*

——*S. 68* — Word "reimburse" whether includes payment of interest *(Quære)*: 106*e*

——*S. 72*—Person paying tax under misapprehension as to his liability cannot recover it back either under S. 72 or under equitable principles 956

*——*S. 72* — Payment under mistake of fact is not voluntary — Money paid voluntarily under mistake of fact is recoverable under S. 72 — Payment need not arise out of contractual relation—Payer's ignorance or forgetfulness cannot deprive him of his right—Nor is it necessary that non-rectification of mistaken payment should result in payer incurring liability 660*a*

——*S. 72* — Tax paid to Panchayat Board under mistaken notion that property in respect of which it was payable was within jurisdiction of Board — Payment is under mistake of fact and is recoverable as money had and received for payer's use 660*b*

——*S. 213*—Words "on demand" suggest that demand should be made on agent at his place of business 588*b*

——*S. 220*—Principal and agent—Misconduct—Forfeiture of remuneration is result of misconduct and not of loss arising therefrom — Payment of damages caused by misconduct is in addition to forfeiture of remuneration 299*b*

Conversion — Principal and agent — For relief on ground of conversion title to property and right to present possession must be shown — Agent himself advancing purchase money for goods purchased on account of principal—Principal has neither title to nor right to present possession of goods until he pays price — No question of conversion arises 489

Co-operative Societies Act *(2 of 1912), S. 42 (2) (b) and (6)*—Contribution payable by past member — Determination of, by liquidator—Determination can be questioned in Civil Court 831*e*

*——*S. 43, Rules under, R. 15 (7) (Madras)* — Execution — Award filed in Civil Court under R. 15 (7) (c)—Limitation Act, Art. 182 applies and not Art. 181: *I L R 1937 Mad 495=A I R 1937 Mad 31=167 I C 223, OVERRULED* 635

——*S. 43, Rules under, R. 14 (5) (Madras)* — Land sold for recovery of money due to Co-operative Society — Sale proclamation silent as to encumbrance—Land is not sold free of encumbrances — Principle of caveat emptor applies — No question of estoppel arises 452

Co-operative society — Membership — Resignation by member — Membership ceases immediately letter of resignation reaches Society—Resigning member refusing to receive copy of Society's resolution not accepting his resignation and subsequently attending meeting of Society — Aforesaid conduct cannot restore membership 831*d*

Cosharers—Fraud of—The mere fact that in respect of an alleged disbursement of the amounts collected the co-owner made fraudulent entries cannot be held to be fraud 339*d*

——Property belonging to several tenants-in-common in possession of stranger claiming adversely to them — Suit by one co-tenant for recovery of his share—Other co-tenants impleaded as parties—Partition claimed as ancillary relief—Decree directing partition and awarding possession to other co-tenants of their shares cannot be made 236*c*

——Relation between co-owners of whom one is in possession of common funds is not of creditor and debtor *(Obiter)* 95*c*

Costs—Trial Court's discretion should not be interfered with in absence of sufficient grounds 620*b*

——Discretionary with Court — Mortgage suit—Purchaser of part of mortgaged property undertaking to pay off mortgage money—On default of payment mortgagee suing mortgagor and impleading purchaser —Purchaser held liable for costs 519

Court-fee — Decree for possession subject to payment of certain sum — Plaintiff appealing against order of payment—Appeal should be valued at amount of that sum of money 955

Court-fee

——Refund—Apart from Ss. 13, 14 and 15, Court-fees Act, the Court has got inherent power to refund court-fee 208*c*

——Partition — Suit against father—Son challenging transactions entered into by father as manager—Plaintiff cannot evade court-fee by omitting to ask for relief—Court must look at the real nature of suit and decide reliefs claimed and assess court-fee accordingly **(FB)** 113*c*

——Partition — Minor — Suit against father — Challenging alienations to which minor was not eo nomine a party — Plaint for partition need not contain prayer for declaration or cancellation and hence additional court-fee need not be paid — Fact that alienees and creditors have also been impleaded as parties to suit is immaterial **(FB) 113*e*

——Receiver—Interim — Son challenging transactions by father as manager—Application for appointment of receiver—Separate court-fee not necessary **(FB)** 113*f*

Court-fees Act *(7 of 1870), S. 7 (iv-A) (Madras Amendment)* — Partition suit — Minor suing for partition and cancellation of simple money decrees passed against him in suits in which he was eo nomine impleaded as party — In respect of such decrees court-fee must be paid as prescribed by S. 7 (iv-A) **(FB)** 113*d*

*——*S. 7 (iv) (b) and Sch. 2, Art. 17 (vi)* — Partition suit by member in joint possession of family property—S. 7 (iv) (b) does not apply — Suit falls within Art. 17 (vi) : *21 M L J 21 = 8 I C 512 (F B), OVERRULED* **(FB)** 113*b*

——*S. 7 (iv) (c) (as amended in Madras)* —S. 7 (iv) (c) should not be applied to cases falling under S. 7 (v) *(Obiter)* 273*g*

——*S. 7 (iv) (f)* — Suit for accounts dismissed — Appeal should be valued at full amount of valuation in plaint 878*a*

——*S. 7 (v)* — Applicability — Partition suit — S. 7 (v) applies only where plaintiff is out of possession and not when he is in joint possession **(FB)** 113*a*

——*S. 7 (v) (c)* — Decision by Appellate Court holding land to be overvalued and determining annual income — No revision lies under S. 115, Civil P. C. 821*a*

——*S. 7 (v) (c)*—Under S. 7 (v) (c) Court has no option to consider whether or not net profits for year preceding presentation of plaint are exceptional or unusual : 821*b*

——*S. 12 (2)* — S. 12 (2) applies to all parties to appeal where deficient court-fee

Court-fees Act
is paid whether by appellant or by any other party 674*a*
——*S. 12 (ii)* — Scope — S. 12 (ii) empowers Appellate Court to correct mistake made below 383*b*
—— *Sch. 2, Art. 17-A*—Suit filed in District Munsif's Court transferred to Sub-Court — Appeal from decree of Sub-Court falls under Art. 17-A — Fact that suit was originally filed in District Munsif's Court does not make decree one of that Court : 383*a*
Criminal Procedure Code *(5 of 1898)*, *S. 106*—Offence under S. 510, Penal Code, does not involve breach of peace 755
——*S. 106* — Order under S. 106 made in respect of offence under S. 426, Penal Code, cannot be sustained 55
*——*Ss. 107 and 112* — Code does not require that notice under S. 107 must relate to breach of peace or wrongful act in contemplation at time when information is given to Magistrate **(FB)** 23
——*S. 145* — Party claiming to be in possession of entire village — Magistrate cannot declare him entitled to possession of undivided share of village 904
——*S. 164* — Confession of murder by accused to a Magistrate not investigating the case does not fall under S. 164 138*a*
——*S. 164 (3)*—Magistrate recording confession under S. 26, Evidence Act, asking accused to think over matter and state what really happened as otherwise statement would be used against him — S. 164 (3) is not complied with 562*a*
——*S. 182*—Cheating—Case can be tried at place where complainant was cheated and parted with money 649
——*S. 248* — Withdrawal of complaint as against some of the accused does not involve withdrawal of whole complaint 623
——*S. 288*—Witness, in the Court of Session resiling from his statement before committing Magistrate — His evidence may be treated as substantive evidence under S. 288 but should not be relied upon in the absence of corroboration 136*b*
——*Ss. 342 and 537*—Omission to comply with S. 342 — Conviction cannot be set aside unless omission causes failure of justice within the meaning of S. 537 372*a*
——*S. 342* — Scope — Power of Court to put questions to accused explained : 372*b*
——*S. 342* — Person accused of murder kept in suspense for several months before trial — In examination under S. 342, two printed pages containing precis of evidence against him read out in one breath and accused asked whether he wanted to say anything— This held not giving real opportunity to accused to explain matters against him 1*e*
——*S. 415* — "Any two or more of the punishments" refer to two or more punishments of different kinds 111*a*
——*Ss. 439 and 476* — Order of civil Court under S. 476 — Revision lies under S. 115, Civil P. C., and not under S. 439, Criminal P. C. : *I L R (1939) Mad 439 =A I R 1939 Mad 472=(1939) 1 M L J 480, OVERRULED* **(FB) 465
——*S. 476*—S. 476 held not applicable to departmental enquiry 892
——*S. 488* — Reasonable apprehension of physical ill-treatment is "just ground" for refusal by wife to live with husband—She cannot be deprived of maintenance by reason of that refusal—Second marriage of husband is relevant for considering bona fides of his offer to take back his first wife and to maintain her 292
*——*S. 488 (3)*—Magistrate passing sentence of imprisonment under S. 488 (3)—Accused filing insolvency petition and obtaining protection order—Magistrate cannot cancel sentence—Accused is not person under imprisonment in execution of decree for payment of money within the meaning S. 23, Provincial Insolvency Act 697
——*Ss. 561A & 367*—Disparaging remarks not warranted by evidence against person not before Court should be expunged 134
Criminal Trial—Application by complainant to summon certain order at cost of applicant and necessary to show that defence witnesses were interested in accused held should not be rejected 746
——Confession — Mere fact that accused has given wrong description of way in which he killed deceased is no ground for acquitting him 699
——Criminal breach of trust — Difference between civil and criminal liability should be borne in mind 329*f*
——Duty of prosecution — Prosecution must prove guilt of accused 329*d*
——Evidence—Medical evidence from text book showing time of death by reference to blisters on dead body—Value of, stated: 710*a*
——Evidence— Identification —Value of, explained 710*d*
——Evidence—Marking of irrelevant documents is no ground for ordering retrial : 685
——Evidence—It cannot be said to be reliable against some and unreliable against other accused 43*a*

Criminal Trial

——Evidence entirely circumstantial — Reasonable interpretation favourable to accused possible—It should not be rejected even if unfavourable interpretation is equally or even more reasonable 1*d*

——Joinder of charges—Two distinct offences of theft at two separate houses and also charges under S. 411, Penal Code, tried at one trial—Trial is illegal as joinder is bad 509*b*

——Jury—Verdict of not guilty by jury—Fact that record does not disclose reason for disbelieving prosecution witnesses or Judge disagrees with jury's opinion does not render verdict perverse or unreasonable 509*a*

——Misappropriation—Meaning — Misappropriation is the wrongful setting apart or assigning of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart 329*e*

——Murder — Sentence — Youth itself is not reason for not passing death sentence 710*e*

——Murder—Test whether child was born alive laid down 294

——Murder—Accused stabbing deceased on vital part—Deceased dying as direct result of the injury—Accused is guilty of murder —Fact that expert medical attention would have saved deceased makes no difference 293

*——Murder — Presumption as to guilt—Accused's recent possession of property of murdered person — Cause of death not proved—Presumption does not arise 12*b*

——Murder — Burden to prove that act alleged to be murder was act of person other than deceased is on prosecution even if accused knew whether crime was committed or not 1*a*

——Murder—Alleged murder by husband of his wife — Direct evidence or medical evidence not available—Much reliance cannot be put on conduct of accused 1*b*

*——Murder — There is no presumption that ligature strangulation must be homicidal and not suicidal 1*c*

——Offenders should be put on their trial within reasonable time 329*c*

——Practice — Prosecution sanctioned by Joint Magistrate — Appeal should not be heard by him except with permission of Court to which appeal lies from his Court 945

——Prosecution should not press case when complainant is not witness 329*b*

Criminal Trial

——Revision — Powers of Court — Revisional Court cannot interfere on facts with conviction by lower Court—*(Obiter)* : 111*b*

Criminal Tribes Act *(6 of 1924), S. 23 (1)*—S. 23 (1) relates to time of conviction and not to time of occurrence 298

Custom—Validity of — Custom in Madras entitling one scavenger to absolute right of sending scavengers to various houses is not recognized by law 558

Cutchi Memon—Wills—Provisions of the Mahomedan law with regard to wills apply 153*a*

Debtor and Creditor—Interest—Meaning explained 937*b*

Decree—Compromise decree providing that certain sum with certain rate of interest from date of plaint to date of compromise should be paid within certain time — No provision that after expiry of period amount shall carry interest—Post diem interest held could be claimed by decree-holder 893*d*

Deed — Construction — Form in which parties have deliberately cast their bargain should not be ignored 946*a*

——Construction—Suit by *A* for recovery of share in certain property—Suit dismissed —*A* appealing—*B* agreeing to finance appeal —*A* executing document agreeing that in event of appeal being successful *B* should get half share in suit properties as compensation for his trouble — Deed held did not give *B* present interest in suit properties 918

——Construction—Gift or will — Matters to be taken into consideration in determining whether document is gift or will stated 236*a*

Defamation — Statement that unmarried girl of Brahmin community has not preserved her virgin purity is grossest defamation 879*a*

*——Suit for damages — Fact that there was criminal prosecution and conviction before civil suit is no reason for reducing amount of damages 879*b*

——Loss of reputation in respect of virginity of unmarried girl — Assessment of damages at exact figure is not possible : 879*c*

Divorce Act *(4 of 1869), Ss. 7, 18 and 19* —Application by wife for declaration that marriage with husband was void and for maintenance — Person cannot be said to reside at place where he spends day or two when he has fixed place of residence elsewhere—But where he has no fixed place of residence, place where he actually lives must be taken to be place where he resides : 584

Divorce Act

*——*S. 10*—Decree for judicial separation on ground of cruelty—Subsequent petition for dissolution of marriage on ground of cruelty and adultery — Applicant can rely on decree for proving cruelty and prove adultery only 510

Easement — Artificial stream of water caused by owner of land on higher level flowing from his land to that lying on lower level — Water so flowing not confined in channel belonging to owner of upper land —Owner of lower land can appropriate such water to his own use—Upper owner cannot claim compensation for it 86

Easements Act *(5 of 1882), S. 33, Explanation II*—Owner of house enjoying free light and air through windows in existence for statutory period — Another person blocking them by building wall — Former has right of action even if latter's action has not caused actual damage 952

Emigration Act *(7 of 1922), Ss. 30 (3) and 25 (2) (b)* — Word 'assist' is not confined to financial assistance or entering into agreement to work for hire—Unskilled labourers not permitted to embark in steamer to Penang — Accused offering to send them to Penang by other steamer from different place and seeing them off—Conviction under Ss. 30 (3) and 25 (2) (b) is justified 587

Estoppel — Mortgagor is estopped from denying mortgagee's title 785*c*

——Suit by husband against wife for restitution of conjugal rights — Wife in written statement stating that house in which her husband was living was his mother's house — Statement held did not estop her from setting up her husband as owner of house 161*a*

Evidence — Document legally admissible under Evidence Act and not excluded by statutory prohibition cannot be excluded from evidence on ground of public policy (Per *Wadsworth J., in Order of Reference*) **(FB)** 768*a*

——Burden of proof — Right to sue devolving on plaintiff jointly with other—Plaintiff establishing prima facie his right to sue alone — Burden of rebutting that evidence is on defendant 412*a*

——Evidence of witness rejected as against some accused cannot be accepted against other accused 279

——Court refusing documents produced by party as too late — Party opposing their production cannot ask Court to draw adverse inference from non-production 273*b*

Evidence Act *(1 of 1872), S. 11* — Statement not satisfying conditions laid down in S. 32 cannot be admitted merely because it may probabilize relevant fact 273*f*

——*Ss. 24 and 27*—Confession made under pressure is inadmissible — But statement leading to discovery of weapon though involuntary is admissible 136*a*

*——*Ss. 27 and 26*—Accused charged with murder making statement to police promising them to take to place where his co-accused had buried spear—Accused taking police to that place, searching for spear himself but unable to find it — Spear produced by co-accused — Statement does not fall under S. 27 and is inadmissible 744

——*S. 27*—Duty of police recording statement of accused is to record it as given and to leave it to the Court to decide what evidence is admissible 710*b*

——*S. 27*—It is first statement of accused that leads to discovery of fact if fact is discovered 710*c*

*——S. 27—Confessional statement should be voluntary 12*a*

——*S. 32*—Conviction can be based on uncorroborated dying declaration if found true **(FB) 196

——*S. 32 (3)* — Recital of boundary in document between third parties is admissible when statement is against proprietary interest of person making it and when executant is dead 450*a*

——*Ss. 35 and 74* — Book maintained in Collector's office containing copies of communications sent by Collector to subordinate officers — Registered copy produced from book is admissible 273*c*

*——*S. 65*—Secondary evidence of income-tax returns is inadmissible 161*b*

——*Ss. 74 and 65 (e)* — Profit and loss statement and statement showing details of net income filed in support of return of income furnished under S. 22, Income-tax Act, are public documents—Certified copies of these documents are admissible under S. 65 (e) : *I L R (1940) Mad 329=A I R 1940 Mad 161=1939 M W N 1237, OVERRULED* **(FB) 768*c*

——*S. 76*—S. 76 is only enabling section —It is not exhaustive—Nor does it declare grant of copies illegal in any particular case 308*d*

——*S. 90* — Copy more than 30 years old and produced from proper custody containing statement that it is true copy and also signature of person signing original—Copy is admissible 273*d*

Acc. No 17723
Dated 20.11.90

Evidence Act

——*S. 123*—The accidents register is not a privileged document—It can therefore be sent for, if required 240

——*S. 157*—Recital of boundary in mortgage deed is admissible under S. 157 when executant of document is himself witness 450*b*

Execution — Final order on execution application dismissing it on ground that security was not furnished for amount already drawn by decree-holder—Application cannot be said to be dismissed for non-prosecution 893*c*

——Admission by karta in execution application that previous next friend of minor decree-holders had received decretal amount would not entitle judgment-debtor to have satisfaction entered regarding minors' shares 893*f*

——Decree binding — Decree on its face showing that Court passing it had no jurisdiction to pass it—Executing Court can go into question whether that decree is nullity 628*a*

——Application necessitated by Court's striking off previous application is not fresh application for execution but merely one for revival 566*c*

——Executing Court cannot record satisfaction of decree over which it has no jurisdiction 534*b*

——Limitation — Amendment — Application returned for amendment has no judicial existence—When it is re-presented after being time-barred, without any prayer to excuse delay, it cannot be deemed to be pending application and any order passed upon it cannot save limitation for fresh application 215*a*

Execution sale — No bidders on date of auction — Decree-holder can in same proceedings ask Court to put property for sale at later date 566*a*

Explosives Act *(4 of 1884), S. 4*—"Explosive" in S. 4 includes electric sparklets : 284

General Clauses Act *(10 of 1897), S. 3 (21)* — Word "Government" does not include District Board 916*b*

Government of India Act *(1935) 25 & 26 Geo. V, Ch. 42) S. 205 (1)*—Revision petition dismissed by single Judge of High Court — Order of dismissal certifying that case involved question of law as to interpretation of Government of India Act—Appeal to Federal Court from order of dismissal is competent—S. 111-A, Civil P. C., is no bar 890*d*

Government of India Act

——*S. 205 (1)* — Construction — Effect of S. 205 (1) is that where High Court has certified that judgment, decree or final order passed by it involves substantial question of law as to the interpretation of the Act, dissatisfied party has right of appeal to Federal Court—If case invloves Rs. 10,000 or more Federal Court is empowered to hear and decide all questions arising in appeal 890*a*

——*S. 224 (2)*—Order of Village Headman under S. 10 of Regn. 11 of 1816 cannot be questioned by High Court 183

——*S. 270 (1)* — Offence committed by Deputy Inspector of Schools held done in execution of his duty as servant of Crown and consent of Governor held necessary for his prosecution 813

Government of India (Constitution of Orissa) Order *(1936), S. 20* — Notification No. F-210 of 1936, Judicial, dated 1st April 1936 — Execution petition pending on 1st April 1936 in Berhampore Court — It has jurisdiction to entertain petitions under Ss. 19 and 20, Madras Agriculturists' Relief Act 131

Government Securities Act *(10 of 1920), S. 5*—S. 5 is enacted to protect Government — Question of assignor's beneficial ownership in war bonds and Government promissory notes deposited by assignee as security is not affected by S. 5 878*b*

Grant — Service grant — Inam lands attached to office of karnam and enfranchised in favour of holder of office of karnam—Alienee from karnam gets good title 540*a*

——Construction — Terms not clear — Ancient enjoyment is good evidence of title 273*e*

Hindu law—Adoption—Widow— Burden is on widow to prove improper motive on part of sapinda in refusing consent to adoption 950*a*

——Adoption — Widow — In absence of direct authority from husband, consent of sapindas is necessary — Nearest sapindas improperly refusing consent — Consent of next nearest sapinda is necessary — There is no residuary power to adopt when her husband's sapindas are all dead 950*b*

——Adoption — On death of adopted son adoptive mother making adoption to her deceased husband—Estate vested in her as heir to first adopted son is divested 923

——Adoption—Illatom adoption—It is not open in second appeal to attack the findings of fact on the essential questions of the authorization by the prospective father-in-

Hindu law

law to his wife to complete the affiliation after his death, and of the subsequent marriage and the status recognized in favour of the adoptee as an illatom son-in-law: 761*a*

——Adoption — Illatom adoption — Incidents to be determined by evidence in each case—Illatom adoption is creature of agreement—But detailed contract embodying all incidents is not necessary— Plaintiff taken in family for regular adoption—Son being born subsequently to adoptor, plaintiff continuing to live in family on proposal of illatom adoption — On death-bed adopter authorizing his wife to complete aforesaid adoption by marrying his daughter to plaintiff—Marriage carried out—Adoption held valid and was carried out on basis of agreement 761*b*

——Adoption—Presumption that adoption all along recognized by members and acted upon without question must have been duly authorized cannot be applied where there was no occasion for anybody to dispute adoption 739*c*

——Adoption — Adoption by widow of member of divided family with consent of nearest sagotra sapindas of her husband is valid even if she has not consulted daughter's son : *49 Mad 652=A I R 1926 Mad 881 =95 I C 651, OVERRULED* **(FB) 356*a*

——Adoption—Person by will authorizing that both of his wives shall separately make adoption—Construction stated 5

*——Alienation — Coparceners — Coparceners alive at date of alienation of family property alone can challenge it—After-born coparcener cannot challenge it *(Obiter)* 691*b*

*——Alienation — Coparcener — Father entitled to half share on date of mortgage — Mortgagee can execute decree against father's half share—After-born son acquires no right in property alienated by father 691*c*

——Apostate from Hinduism can revert to it 513*b*

——Construction of upper storey on ancestral house by member with his separate money is made with aid of family properties 626

*——Conversion of Hindu Christian to Hinduism—No particular form of expiatory ceremony is necessary for valid conversion in absence of custom to that effect in convert's caste—Acceptance by his community as Hindu is enough 513*a*

——Debts — Father — Separate property —There is no difference between nature of obligation of sons and other heirs inheriting aforesaid property — But ancestor's debts are not charge on estate inherited 837*d*

Hindu law

——Debts—Father — Son becoming insolvent after father's death — Father's debt is not charge on property in hands of son—Father's creditor cannot claim priority over son's creditors in insolvency proceedings—Insolvency Act does not recognize priority in favour of father's creditor 837*e*

*——Debts — Father — Father lawfully receiving money but subsequently misappropriating it—Liability is civil for which son would be liable under pious obligation rule 828

——Debts—Manager — Necessity — Purchase of new lands for family and litigation are not prima facie family necessities: 547*b*

——Family settlement—Doctrine of bona fide settlement of disputes cannot be invoked to confer absolute estate on daughter or widow 739*b*

——Guardian—Powers of natural guardian stated 106*a*

——Guardian—Paternal grandmother of minor is not his lawful guardian even if she happens to be his nearest living relation — Endorsement of payment made by her cannot bind minor under S. 21, Limitation Act: *53 M L J 677 = A I R 1928 Mad 42=106 I C 863, OVERRULED* **(FB) 33*b*

* —— Inheritance — Brother's son's daughter is entitled to inherit 545

——Joint family—Business—Personal liability of junior coparcener participating in conduct of business is question of fact depending upon nature and extent of participation—Personal liability does not extend to antecedent transactions — Principle of ratification does not apply—Rule of estoppel cannot give rise to partnership quod general public—Personal liability of junior coparceners cannot be based on that ground 580

——Joint family — Insolvency — Father joint with his son becoming insolvent — Judgment-creditor of father attaching son's interest in family estate before Official Assignee or Receiver realising same—Official Assignee or Receiver loses power to sell son's share 525*a*

——Joint family business — Debts contracted by some members in actual control of business for benefit of business — Other members not partaking in direction of business are not personally liable for such debts 241*a*

Hindu law

——Joint family business — Act of insolvency by manager of family business cannot be imputed to other coparceners 241*b*

——Limited estate — Gift to female is not presumed to be limited gift 210*a*

——Limited estate—Vested remainder — It is not possible to have vested remainder after conferring limited estate analogous to that of woman's estate under Hindu law 210c

——Maintenance — Duty of maintaining wife is on husband which can be enforced by suit *(Obiter)* 749*b*

——Maintenance—Suit for — Creation of charge while decreeing suit is discretionary matter 749*c*

——Maintenance—Suit by wife for maintenance mentioning certain items of properties on which she claimed charge—Fact that Court declares charge on one item would not justify conclusion that property did not form subject-matter of suit 749*g*

*—— Maintenance — Coparcener—Major and minor coparceners can sue for maintenance without asking for partition: *(1939) 1 M L J 683 = A I R 1939 Mad 513 = 185 I C 26, REVERSED* 664*a*

*—— Maintenance — Daughter in joint family can sue manager for maintenance: *(1939) 1 M L J 683=A I R 1939 Mad 513=185 I C 26, REVERSED* 664*b*

*——Maintenance— Concubine — Concubine is entitled to maintenance even though she be childless 511*a*

——Manager — Managing member litigating in respect of joint family property — Presumption is that he represents his family 636*a*

——Manager—Right in joint property litigated by managing member — Subsequent litigation by junior coparceners not getting impleaded in manager's suit cannot be permitted 636*b*

*——Marriage—Validity — Marriage cannot be declared void merely on ground that bride was not virgin at the time of marriage 135

——Partition—Mere fact that after division in status old manager enters into business transactions and junior members do not object will not justify inference that they adopt new business or become partners with erstwhile manager 339*a*

——Partition—Jewels proved to have been purchased with family funds — Onus to prove that by reason of gifts as stridhanam they have ceased to be family property is on those who deny their divisibility 339*b*

Hindu law

——Partition — Manager collecting outstandings due to family cannot be said, till accounts are taken, to be debtor to other members and is not liable to pay interest on amount collected by him 339*c*

——Partition — Division of status —Coparcener is not entitled to take moneys for maintenance and other personal expense from common purse 339*e*

——Partition — Coparcener after division of status carrying on business and suffering losses—He is not entitled to remuneration from common account 339*f*

——Partition—After division of status old manager continuing business—His position explained 339*g*

——Partition—Alienation is not recognized as a mode of severance of a joint family—Suit to set aside alienation and recovery of plaintiff's share in property alienated cannot be construed as suit for partition in the absence of clear indication to hold the share in severalty in the plaint or other evidence showing such intention 217

——Stridhan—Inheritance to anwadhyeka stridhanam property — Widowed daughter is to be preferred to daughter's daughter 494

*——Succession — Illegitimate daughters are not entitled to succeed to stridhanam of their mother's mother 463

*——Suit on promissory note executed by father—Sons joined as defendants but subsequently dismissed from suit — Decree passed against father alone — Interest of sons in family property held liable in execution 544

——Widow—Maintenance — Even in case of impartible estate widow of undivided coparcener is prima face entitled to maintenance: (Per *Burn and Stodart JJ.)*:850*e*

*——Widow — Widowed penniless daughter—Widow is bound to maintain her out of husband's estate **(FB)** 804

——Widow — Maintenance — Suit for, against manager of joint family — Onus is on manager to prove binding nature of debts sought to be taken into account for reducing family income — Manager's *ipse dixit* is not sufficient — He must adduce prima facie reliable evidence 547*a*

——Widow — Maintenance — Suit for—Costs—Amount claimed not out of all proportion to amount found due — She ought not to be mulcted in costs 547*c*

*——Widow — Maintenance — Widow's right of maintenance is absolute — Her

Hindu law
separate property or income therefrom should not be taken into account in assessing amount of maintenance to be awarded 547*d*

—— Widow — Maintenance — Decree against undivided members made charge on family property — Decree cannot be defeated by any subsequent partition between members 458*a*

——Widow — Maintenance decree against undivided members—Subsequent partition —No suit lies by member for declaration that he is not liable for maintenance by reason of partition to which widow was consenting party — Question falls within S. 47, Civil P. C. 458*b*

——Will—Absolute estate—Widow—Gift in favour of, by husband — Will conferring powers of gift, mortgage.and sale on widow —Widow held took absolute estate — Mere inclusion of words for maintenance in will held did not restrict extent of interest 479*a*

——Will—Construction — Will by Hindu regarding self-acquired properties directing that properties shall go to his widow for life and after her death they shall pass to his daughter and thereafter to his grandsons through daughter — Daughter held took daughter's estate and not absolute estate 210*b*

Husband and wife — Husband found not to be entitled to decree for restitution of conjugal rights — Wife should be given decree for separate maintenance 906

——Restitution of conjugal rights — Suit for — Relief is discretionary with Court— Husband few years after his first marriage with immature girl contracting second marriage and living with second wife— First wife neglected for 20 years after her marriage and 13 years after she attained puberty—Husband rejecting last offer made by first wife to join him and in order to overcome her opposition to claim put forward by him under will which was also in favour of his first wife instituting suit for restitution of conjugal rights — Husband held not entitled to relief claimed 777

Impartible estate — Acquisition of properties by holder out of income of zamindari would be separate property of zamindar unless he intended to incorporate it with zamindari 814

Income-tax — Mutual Benefit Society— Co-operative Bank carrying on business with non-members is not mutual benefit society **(SB)** 612*b*

Income-tax Act *(11 of 1922)*, *S. 3* — Assessee joint with father until father's death —Assessee and his step-mother the only surviving members constitute joint family within the meaning of S. 3, Hindu Women's Rights to Property Act — Assessee can be taxed only as representative of Hindu undivided family **(SB)** 942

——*S. 3*—"Individual" — Meaning of—It includes co-operative society—Co-operative Bank, some share-holders of which, are persons while majority consists of co-operative societies is " association of individuals " within the meaning of S. 3 **(SB)** 612*a*

——*S. 4* — Madras and Southern Mahratta Railway Co., in accordance with contract of 1882 paying into Bank of England certain amount as its share of capital and Secretary of State undertaking to pay in London out of revenue of India interest on this amount — Guaranteed interest received by company in London in year of account held liable to assessment **(SB) 598

——*S. 4 (2)* — Assessee, a resident of British India, owning immovable property in Saigon in Indo.China—Assessee keeping account with bank at Saigon and having right to overdraw to certain limit—Assessee paying his net income in his account with bank and reducing amount of over-draft— In year of account, assessee withdrawing certain sum less than net income and remitting it to British India—Remittance held remittance of profit within meaning of S. 4 (2) **(SB) 593*a*

——*S. 4 (2)*—In order to attract provisions of S. 4 (2) it is not necessary that assessee should receive profits in India in exact form in which they were made **(SB)** 593*b*

——*S. 4 (2)*—Available profits more than sufficient to cover remittance—Remittance is presumed to be out of profits **(SB)** 593*c*

*——*S. 4 (2)*—Assessee, a resident of British India, carrying on business in partnership in Saigon (Indo-China)—Profits made in Saigon remitted to Mysore for purchase of Bonds—Bonds so purchased sent to Madras Branch of Imperial Bank of India for safe custody—Assessee obtaining overdraft on security of these bonds—Bonds held conversion of profits into capital and not remittance of profits **(SB)** 433

——*S. 4 (2)*—Remittance held remittance of profits **(SB)** 416

——*S. 10*—Assessee company contracting with mill to mill cotton for it for certain period at reduced rate—As consideration mill exchanging its 20,000 shares with

Income-tax Act
company's 1000 shares—Transaction is of capital nature to the extent of value of 1000 shares—Difference in values of shares is profit in hands of company—Fact that gain is not in money but shares is immaterial **(SB)** 602*b*

——*S. 10 (2) (vi)*—Original cost of asset is question of fact — Contract for purchase of assets — Price mentioned therein is not conclusive proof of original cost—Income-tax authorities can go behind contract where price seems fictitious and ascertain true value **(SB)** 602*a*

*——*S. 10 (2) (vi)* — Company carrying on hotel business leasing one of its hotels with furniture and equipment—Articles of Association entitling company to lease whole or part of its undertaking — Company is entitled to depreciation allowance in respect of hotel building leased under S. 10 (2) (vi) **(SB)** 366

*——*S. 54* — Effect of S. 54 explained — S. 54 does not prohibit party from putting in evidence certified copy of income-tax return if that return is public document: **(FB)**768*b*

——*Ss. 54 and 26-A* — One of partners obtaining certified copy of order of assessment containing statements by other partner — Court is not precluded from admitting same in evidence when statements are otherwise relevant 308*c*

——*S. 54*—Word 'disclosure' — Meaning of—Statement by one partner on behalf of partnership — Grant of copies of that statement to other partners is not illegal 308*e*

Insolvency — Compromise decree passed in Ceylon against agents of Official Assignee in British India whereby creditor was to share pro rata insolvent's assets in Ceylon and was entitled to proceed for balance against assets out of Ceylon—Creditor held entitled to prove balance of debt in insolvency proceedings in British India against aforesaid insolvents but could not claim priority over other creditors 837*c*

——Provable debts—Interest ceases from date of adjudication — Official Assignee cannot consent to payment of interest after adjudication 837*f*

——Insolvency Court can look into consideration for judgment-debt when suit has not been fought on merit—Same cannot be said where there has been real contest or where decree-holders claim to be mortgagees or charge-holders 749*d*

——Insolvency Court cannot question form in which decree is passed 749*e*

Insolvency
——Official Receiver — Position of, with regard to ordinary Civil Courts — Receiver is suitor only and must follow proper form and procedure 733*a*

——Sale in — Setting aside — Civil Court cannot set aside sale merely on ground of inadequacy of price 611

——Decree against father and son and property belonging to them attached—Subsequent insolvency of father — Execution can be allowed to continue as against interest of son in property attached 222

* ——Adjudication by foreign Court — Effect — Adjudication of judgment-debtor by foreign Court—Decree-holders attaching moveable property of judgment-debtor in British India — Attachments before and after adjudication—Decree-holder attaching before adjudication remains entitled to benefit of attachment but decree-holder attaching after adjudication is entitled to nothing under his attachment 47

——Son accepting in insolvency proceedings contention that he was personally liable for his father's debts and that he committed acts of insolvency — Son thereupon adjudicated insolvent — Order when not appealed against cannot be challenged in revision 30

Interest Act *(32 of 1839), S. 1, proviso* —Person advancing money to minor for his necessaries is entitled to interest 106*f*

Interpretation of Statutes—Section primarily intended to apply to suits—Principle of construction in applying it to appeals stated 674*b*

——Same rules apply to all statutes—Taxing statute cannot be construed differently 653*b*

——Court cannot ignore statutory definition (Per *Krishnaswami Ayyangar J. in Order of Reference)* **(FB)** 385*a*

——Later and earlier statute — Construction — Rule of, explained *(Per Krishnaswami Ayyangar J. in Order of Reference)* **(FB)** 385*b*

——Language clear—Effect must be given to it even if anomaly arises *(Per Krishnaswami Ayyangar J.)* **(FB)** 127*b*

——Language of statute in its grammatical meaning leading to absurdity and injustice —Construction modifying meaning of words and sentence may be put upon it 62*b*

——Marginal note — Not to be referred when words in Section are free from ambiguity 8*b*

****Land Acquisition Act** *(1 of 1894), Ss. 3 (d) and 30* — Appeal lies from deci-

Land Acquisition Act
sion of Subordinate Judge appointed under S. 3 (d) to decide dispute referred by Collector under S. 30 : *59 Mad 554 = A I R 1936 Mad 514 = 165 I C 405, OVERRULED* **(FB)** 474

Landlord and Tenant — Estoppel continues after termination of tenancy unless possession is given up — S. 43, Presidency Small Cause Courts Act, does not modify aforesaid rule — S. 46 of aforesaid Act has no application 700

——Duty to contribute to expenses for performance of festival in temple is not ordinary incident of relation of landlord and tenant—It cannot be taken into consideration in settling fair rate of rent 175

——Lessor leasing land for laying out flower garden — Lessee and his assignee building permanent structures on land — —Lessor is entitled for mandatory injunction requiring demolition of buildings 32

——Mulgeni tenancy—Suit for rent—Persons in possession as mulgeni tenants held could claim apportionment of rent 21*a*

Lease—Patta is document of title and has great value as between Government and pattadar 783*a*

——Government has right to trees standing on unoccupied sites and has right to issue tree patta for them 783*b*

***Legal Practitioners' Act** *(18 of 1879), S. 13*—Professional misconduct—Proceedings against practitioner cannot be allowed to be dropped as result of agreement between complainant and practitioner **(SB)** 370*a*

*——*S. 13* — High Court cannot give approval ex post facto to enquiry conducted by tribunal not appointed for that purpose **(SB)** 370*b*

——*S. 13* — Tribunal conducting enquiry not validly constituted — Acquiescence in proceedings would not make it lawful **(SB)** 370*c*

*——*S. 13* — District Judge directed by High Court to hold enquiry in charge of professional misconduct cannot delegate it **(SB)** 370*d*

***Letters Patent (Madras),** *Cl. 12*—Posting of offer or despatch by telegram of offer from particular place cannot be regarded as part of cause of action—Similarly notice of rejection must be taken to have been given in place where letter is received 49

License—License is purely matter personal between licensor and licensee—It is deemed to have elapsed with death of licensor: 102*a*

Life Assurance Companies Act *(6 of 1912), S. 34*—Company as well as persons falling under one or more of specified categories in S. 34 can be punished — Person can be convicted in different capacities separately 760

Limitation — Expiry of — Debt does not cease — Nor does relation of creditor and debtor 908*b*

——Certification — There is no limitation for decree-holder to certify and if he has certified at one stage, the judgment-debtor is entitled to request executing Court to record satisfaction to that extent 893*e*

——Onus—Objection that suit is barred—Onus is on plaintiff to prove that suit is within time 639*a*

——Principle of laches or delay is based on equitable doctrine—It does not apply to questions of legal rights 281*f*

Limitation Act *(9 of 1908), S. 4*—Applicability — Pronote—On last day of limitation for suit Court closed for summer recess — On reopening day payee assigning pronote—Assignee filing suit on same day — Suit held not barred 908*a*

*——*S. 4*—District Munsif's Court closed during vacation — Person having right to sue in that Court is entitled to benefit of S. 4 — Fact that Village Munsif's Court under Madras Village Courts Act has concurrent jurisdiction and is open during vacation does not deprive plaintiff of benefit of S. 4 495*b*

——*S. 7* — Eldest member of joint Hindu family is presumed to be manager of family unless presumption is rebutted—In Madras he can give valid discharge without concurrence of other members 530

——*S. 14*—For want of pecuniary jurisdiction Court returning plaint filed within time for presentation to proper Court—Plaintiff representing it to same Court after amendment by striking out part of claim—Plaint becoming time-barred on date of representation—Suit held must be deemed to have been instituted on date of representation when Court had jurisdiction to entertain it and was therefore barred: *49 M L W 25 = A I R 1939 Mad 397, REVERSED*: 689

——*Ss. 19 and 20*—Mortgagor losing all interest in mortgaged property—He cannot by acknowledgment under S. 19 or payment of interest or principal under S. 20 bind person on whom his interest has devolved : *24 M L J 66 = 17 I C 619; 55 Mad 758 = A I R 1932 Mad 516 = 138 I C 632 and A I R 1935 Mad 899 = 161 I C 924, OVERRULED* **(FB) 470

Limitation Act

——*S. 20*—Undivided Hindu family—Pronote executed by son — Endorsement of payment on pronote by father — Father cannot be presumed to have authority within meaning of S. 20 to make payment on behalf of son in absence of proof of specific authority 954

*——*S. 20*—Debtor sending money to his friend for payment to creditor — Friend sending same to creditor through messenger with letter to the effect that amount was sent by debtor for payment to him—Payment amounts to acknowledgment within meaning of S. 20 691*a*

——*Ss. 20 and 21* — Acknowledgment by de facto guardian does not prevent debt being time-barred **(FB)** 33*a*

——*S. 20 (2)*—Payment—S. 20 (2) applies where mortgagee is in possession and receives rents and profits as mortgagee and not as purchaser from mortgagor though his title may not prevail against third person 461*b*

——*S. 21*—Lawful guardian—Who is lawful guardian stated—Lawful guardian is de jure guardian in contrast to de facto guardain (Per *Krishnaswami Ayyangar J.)* **(FB)** 33*d*

——*S. 22*—Redemption suit against member of unincorporated association in his personal capacity as mortgagee — Amendment seeking to sue member as representing association held could not be allowed as large number of fresh parties were being added — Fact that amendment was not opposed did not deprive association of its right to plead limitation 639*c*

——*S. 22*—Applicability—Right to sue on mortgage devolving on two sisters — Only one suing — Other dying pending suit — S. 22 does not apply 412*c*

——*Arts. 61 and 120* — Suit to recover money advanced to minor for his necessaries is governed by Art. 61 and not by Art. 120 106*g*

——*Arts. 64 and 85* — Defendant opening his account in plaintiffs' shop by writing his own name at top of account and also writing subsequent entries therein—About a year after opening of account defendant striking balance in his own handwriting—Account held did not fall under Art. 64 in absence of authentication by defendant and inasmuch as there were credit entries showing counterclaim by defendant and shifting balance at times against plaintiff case fell under Art. 85 887

Limitation Act

——*Art. 134 (before amendment of 1929)* —Art. 134 did not apply to transfer under which possession was not taken by transferee 920*b*

*——*Art. 134-A*—Representative suit on behalf of general body of worshippers of village—Word "plaintiff" in such case refers only to plaintiffs eo nomine on record: 81*b*

*——*Art. 141*—Person without title to property in possession of it after death of widow — Possession not permissive — Character of possession is not changed by his becoming entitled to share in property along with reversioner—Suit by reversioner brought more than twelve years after widow's death is barred under Art. 141 102*b*

——*Art. 142*—Suit for ejectment by person out of possession—He cannot succeed unless he, in addition to title, proves that he has been in possession within 12 years of suit—Burden is not on defendant to prove adverse possession : *21 M L W 398 =A I R 1925 Mad 834=87 I C 386 and 25 M L W 127 = A I R 1927 Mad 287 = 99 I C 312, OVERRULED* **(FB) 798*a*

*——*Art. 142*—Suit by purchaser at court-auction in execution of mortgage decree for ejectment of person in possession of property is covered by Art. 142 **(FB)** 798*b*

——*Art. 182*—Application for restitution is application for execution 281*a*

——*Art. 182* — Word "appeal" includes revision 281*b*

——*Art. 182*—Application for restitution of costs of objection by judgment-debtor — Time runs from date of appellate order in consequence of which restitution is sought —Fact that revision by judgment-debtor against order allowing decree holder's application for amendment of decree is pending is of no avail 281*c*

——*Art. 182* — Application for execution returned for amendment cannot save limitation if not re-presented within reasonable time even if no time is fixed by Court: 281*d*

——*Art. 182 (5)* — Mere claiming more money than due does not render application one not in accordance with law 893*b*

——*Art. 182 (5)*—Application need not be successful in order to be "in accordance with law 610*a*

——*Art. 182 (5)*—Petition for restitution returned, without any orders being passed, on ground that execution had been stayed by order which was in force — Petition though not physically in Court must be treated as pending—Subsequent application

Limitation Act
though time-barred must be treated as reminder to Court to take up prior application for decision 281*e*
——*Art. 182, cl. (5)*—Execution application without correct number of suit is not one in accordance with law 215*b*

Lunacy—Old man suffering from senile dementia on certain date—Presumption is in favour of its continuance—Onus to uphold transactions subsequent to this date will be on persons who say that they were not vitiated on ground of his incapacity: 73

Madras Abkari Act *(1 of 1886), Rules under, General Sales Notification, R. 27*—*B*, after bidding for shop at auction but before issue of licence entering into partnership with *A*—*A* and *B* thereby agreeing to become joint owners sharing profit and loss —Partnership is illegal being opposed to Rule 27 705

Madras Agency Tracts Interest and Land Transfers Act *(1 of 1917), S. 5*—S. 5 does not abrogate powers of civil Courts to try suits relating to property within jurisdiction —Civil Court has jurisdiction to try suit on mortgage of property within its jurisdiction though party is member of hill tribe 160

Madras Agriculturists Relief Act *(4 of 1938)* — Liability declared in appellate Court's decree for first time — No written application raising plea for relief under Act before appellate Court — Proper procedure stated 959*b*
——*S. 3*—Phrase "quit rent, jodi, kattubadi, poruppu or the like" in S. 3 refers only to payment in nature of quit rent on inam and does not include charges for police, for roads, for water and similar dues levied by state or local body 915
——*S. 3 (ii), (a)*—Simple mortgagee of agricultural land is 'agriculturist' 941
——*S. 3 (ii) proviso B*—Assessment for four consecutive half years is not necessary 919*a*
——*S. 3 (ii), proviso B*—It is not necessary that assessment must have been valid 919*b*
——*Ss. 3 (3) and 20*—'Debt' includes liability to make restitution — Debt covers case of person liable whether personally or on account of possession of property 95*a*
——*Ss. 3 (iii) and 20*—Suit by first mortgagee—Puisne mortgagee asked to free his own security—He is not debtor 61
——*S. 4 (c)*—Arrears of rent due by lessee of properties of religious endowment under management of District Board under S. 63, Madras Local Boards Act, is sum due to

Madras Agriculturists Relief Act
local authority and comes under S. 4 (c), Madras Agriculturists Relief Act 231
——*S. 4 (d)*—"House property" includes compound or yard attached to building site 54*b*
——*S. 4 (e)*—Society formed under Societies Registration Act is corporation—Debts due to it cannot be scaled down 949
——*S. 4 (h)* — Debt due to two women jointly or as co-owners — Interest of each woman in debt and assets of each woman apart from debt must be considered in order to determine whether each woman is entitled to claim exemption under S. 4 (h) 885
——*S. 4 (h)* — Words "other property" refer to property other than debts due to woman from agriculturists 421
——*Ss. 7 and 8*—Plaintiff's claim dismissed in lower Courts but allowed in appeal to High Court — Application by judgment-debtor under Ss. 7 and 8 after judgment but before decree was drawn up—Application held competent 478
——*S. 8*—Debt incurred before 1st October 1932 but ripened into decree after commencement of Act cannot be scaled down in accordance with S. 8 910
——*Ss. 8 and 9*— Liability to pay principal originating in contract or tort — Compensation for withholding payment is interest and can be scaled down under Act 794*a*
——*Ss. 8 and 9*—Debt incurred before 1st October 1932 ripened into decree after that date—Scaling down is governed by S. 8 and not by S. 9 793
——*S. 8* — Principal and interest due — Payment by debtor without specification—Creditor after appropriating payment towards total amount due towards interest and principal claiming balance — He must be deemed to have appropriated payment first towards interest and then towards principal 485*a*
——*Ss. 8 and 9* — Application under S. 8 for scaling down debt—Compromise decree — Payment towards amout due under decree—Decree-holder can appropriate it first towards interest and costs and then towards principal — New debt cannot be said to be incurred on date of compromise decree 419
——*S. 8*—Debt incurred under promissory note should not be regarded as different from other debts 52*a*
——*S. 8, Explanation*—Renewing debt or including it in fresh document must be by

Madras Agriculturists Relief Act

the same debtor —*B* taking over debt due by *A* and executing document — Explanation does not apply 58

——*S. 9* — Promissory note executed in 1924 by *A* in favour of *B*—Promissory note endorsed in 1933 by *B* in favour of *C*—Application by *B* for scaling down — Debt held incurred after 1st October 1932 and must be scaled down under S. 9 943

——*Ss. 9, 12 and 19*—Mortgage executed in 1920 in discharge of earlier promissory notes—Payments made towards mortgage in 1923 and 1924 and appropriated—Decree on mortgage in 1936—Decree how should be scaled down stated 940

——*Ss. 9 and 3*—Subsequent debt merely renewal of prior debt—Suit on subsequent debt—For applicability of S. 9, both debts must be shown to be "debt" within the meaning of S. 3 836

——*S. 9*—It is wrong to say that interest calculated at 5 per cent. should be added to principal and from that sum should be deducted amount actually paid 807*a*

——*S. 9*—Word "incurred" includes liabilities arising under decree—Decree passed after 1st October 1937 may be governed by S. 9 *(Obiter)* 485*b*

——*S. 9, proviso and S. 8*—Scaling down debt under S. 9 or S. 8—S. 9, proviso can be applied more than once until debt is traced back to original principal amount 796

——*S. 10 (2)*—Mortgage debt being price payable by mortgagor for land purchased from mortgagee — Debt cannot be scaled down 420

——*S. 10 (2) (i)* — Usufructuary mortgage — Lease back to mortgagor as part of same transaction at annual payment of certain amount of paddy — Mortgage containing no stipulation for payment of interest as profits were to be enjoyed in lieu of interest—Suit on mortgage bond—Application for scaling down decree — Mortgage held fell within exception in S. 10 (2) (i) and could not be regarded as simple mortgage 946*b*

——*S. 10 (2) (iii)* — Word "liability" is not limited to liability incurred only by borrower who is guilty of no act of default 937*a*

——*Ss. 11 and 19*—Compromise providing that certain gross sum should be payable in full satisfaction of suit claim and costs without allocating any part of that sum specifically to costs of suit—Ss. 11 and 19 cannot be invoked by creditor 925

Madras Agriculturists Relief Act

——*S. 12*—Plaintiff is entitled to interest only from date of decree 807*b*

——*S. 14*—Family debt—If debt is family debt it must be regarded as family debt with regard to every member 797*a*

——*S. 14*—S. 14 cannot be interpreted so as to say that when there is one or more non-agriculturist members family property has to be split up into individual shares 797*b*

——*S. 15*—Possessory mortgage—Surplus reserved as payable to mortgagor after appropriating part of usufruct in lieu of interest does not fall within the mischief of Section 15 939

——*S. 15 and R. 6 (1)* — Suit by major inamdar against minor inamdar for recovery of water charges — S. 15 or R. 6 (1) does not apply 422

——*S. 15 (3)*—S. 15 (3) not self-contained —Whole of S. 15 controlled by proviso to S. 15 (1) — Payment by tenant could be credited under S. 15 (3) towards rent due for fasli 1347 only where conditions of proviso to S. 15 (1) were fulfilled 235

——*S. 19* — Decree passed after Act came into force cannot be scaled down 959*a*

——*S. 19* — "Judgment-debtor" does not include his assignee 907

——*S. 19* — Application by one member of agriculturist family for scaling down joint family debt — Debt of whole family should be scaled down and not merely of applicant — Scaling down of mortgage debt should be in respect of not only agricultural land included in mortgage but also of other property comprised therein—Act refers to character of debtor and not to character of property comprised 435

——*S. 19* — "Debt" as defined in Act includes decree debt 432

——*S. 19* — Rules providing for appeals from orders under S. 19 have no retrospective effect 418*a*

——*S. 19* — Order under S. 19 dismissing application of judgment-debtor — Appeal does not lie even if execution petition is pending 418*b*

——*Ss. 19 and 28 (1) (2) (c), Rules under, R. 8*—R. 8 is not retrospective: 417

——*S. 20* — Sale in execution of money decree confirmed — Execution does not terminate until delivery of property to purchaser — S. 20 can be applied to stay delivery proceedings 825

——*S. 20* — Decree passed against father in respect of family liability must be deemed decree against son also 95*b*

Madras Agriculturists Relief Act

——*S. 21* — Object of S. 21 explained — Mortgagor adjudicated insolvent—Dividend declared before commencement of Act — Purchasers of parts of hypotheca who are agriculturists are entitled to benefit of Act 808*a*

——*S. 21* — Exclusion enacted in S. 21 is limited only to insolvent and debts payable by him — Even if same debt is payable by his son, son cannot be excluded by S. 21: 95*d*

——*S. 23* — Subsequent alienee of part of hypotheca is entitled to apply under S. 23 944

Madras City Municipal Act *(4 of 1919), Ss. 357 (1) and 218*—Notice under S. 218 specifying neither particulars of work to be carried out nor fixing time limit—Conviction under S. 357 (1) cannot be sustained 723

Madras City Police Act *(3 of 1888), S. 75* — Conviction under S. 75 is no bar to prosecution under Ss. 323 and 352, Penal Code 224

Madras City Tenants' Protection Act *(3 of 1922), S. 5*—Compensation—Lowest value of land within seven years before date of decree should be considered 641c

——*S. 11*—Notice under S. 11 is condition precedent to filing suit—Notice to all joint tenants and their assignees is essential — Defect cannot be cured by their being added as defendants subsequently 641*a*

Madras Co-operative Societies Act *(6 of 1932), Rules under, R. 15 (7)*—Award by Registrar transferred to civil Court for execution — Civil Court has jurisdiction to recognize assignment under O. 21, R. 16, Civil P. C. 38

——*S. 48* — Liquidator appointed — Suit against society — Leave of Registrar not obtained—Suit must be dismissed 831*c*

——*S. 51*—Registrar or arbitrator in passing award acts as Court — Proceeding under Act is suit — Award under Act is decree within the meaning of S. 51 (1), Provincial Insolvency Act—Decree-holder under award under Act is on no higher footing than ordinary decree-holder 932*a*

—— *S. 51, Rules under, R. 15* — Award under R. 15 filed in civil Court for enforcement may be executed on application of assignee of award 849

Madras Court of Wards Act *(1 of 1902), S. 49*—Suit by managers of temple—Notice under S. 49 giving name and address of temple sufficiently complies with S. 49 even if names and addresses of managers are not given 532

Madras Court of Wards Act

——*Ss. 57 and 58* — Ss. 57 and 58 do not authorize Court of Wards to function as trustee in absence of notification—On death of old jagirdar Court continuing to administer trust properties of temple of which ward was hereditary trustee and dismissing archaka of temple—Court must be deemed to be de facto trustee under S. 9 (13), Madras Hindu Religious Endowments Act, and entitled to dismiss archaka—Dismissal cannot be questioned in civil Court by reason of Madras Hindu Religious Endowments Act, Ss. 73 and 43 617*b*

Madras Debt Conciliation Act *(11 of 1936), Ss. 2 (f) and 25*—Mortgage decree falls within purview of Act 889*b*

——*Ss. 4, 14 and 17*—Debtor having only one creditor applying under S. 4—Creditor not agreeing to settlement of his debts — Application under S. 4 must be dismissed 295*a*

——*S. 4 (1)*—The Debt Conciliation Board has no power to scale down the debt of a person on the ground of his being an agriculturist under the provisions of Madras Agriculturists Relief Act 295*b*

—— *Ss. 7 and 25* — Word 'dismissed' in S. 25 includes rejection under S. 7—Application rejected under S. 7 becomes application under S. 4 when re-presented and provisions of S. 25 will come into force — Stay will operate until application is dismissed 791

——*S. 25* — In staying proceedings under S. 25 Court cannot impose any condition 917*a*

——*S. 25*—Sale of hypotheca in execution of mortgage decree — Application by judgment-debtor under O. 21, R. 90, Civil P. C., is proceeding in respect of debt within purview of S. 25 899

——*S. 25*—S. 25 applies even to execution proceedings 889*a*

—— *S. 25* — Judgment-debtor cannot obtain stay under S. 25 of any individual suit more than once 31

Madras District Municipalities Act *(5 of 1920), S. 61*—Interpretation—Drain alongside public street means drain for purpose of draining street — Drain on private property for purpose of draining it and which has nothing to do with drainage of street does not vest in Municipal Council under S. 61 (1) 423

——*S. 93 (1)* — Licensed arrack distillery owner at *A* maintaining depot for sale of arrack at *B* through agent — Agent at *B* contracting on behalf of principal and sell-

Madras District Municipalities Act
ing arrack at B—Principal must be deemed to be carrying on business at B within meaning of S. 93 (1): *(1938) 2 M L J 1035 = A I R 1939 Mad 177 = 181 I C 911, REVERSED* 731

Madras Elementary Education Act *(8 of 1920), Ss. 36 and 34 (2)* — Education tax under Act is levied by District Board and not by Government 916*a*

Madras Estates Land Act *(1 of 1908), S. 3 (11)* — Water in landholder's tank augmented by water from Government source — Tenant of single crop wet land using water from tank for second crop without permission — Government water when it gets into landholder's tank becomes his property — Landholder is entitled to levy extra charge for extra water for second crop—Fact that tenant pays cess to Government under Madras Irrigation Cess Act makes no difference 455

—— *Ss. 3 (2) (d), 77 and 181* — Landholder permanently alienating kudiwaram right in home-farm land within village admitted to be "estate" — Land continued to go by name of kam-battam—Land becomes "ryoti" land in spite of it and even in absence of express intention under S. 181 — Suit for rent in respect of such land falls under S. 77 and is cognizable only by Revenue Court 40

—— *S. 24* — Tenant is not bound to pay enhanced rent even if patta has been accepted and muchilika exchanged: **(FB)** 379*d*

——*S. 40 (1)* — Ryot paying rent in cash varying with the crop can apply for order under S. 40 8*a*

——*S. 45*—Ryot encroaching on unoccupied land adjacent to his holding and in possession of it for more than twelve years without paying rent— This does not debar land-holder from claiming rent on such encroachments as soon as he detects them: 91

——*Ss. 50 to 58, Chap. 4*—Patta is strong prima facie evidence of title 523*a*

——*S. 112* — Sale bad for want of proper service of notice—Any person interested in land affected by sale can challenge it in civil Court — Right is not restricted to registered pattadar 439

——*S. 117* — Collector has no jurisdiction to act under S. 117 — Sale in pursuance of orders passed by Collector under S. 117 is illegal — Substantial injury need not be proved for setting aside sale 185

—— *S. 125* — Mortgagee of mortgage executed before Act paid off by mortgagee holding mortgage executed subsequent to

Madras Estates Land Act
Act — Latter mortgage cannot be regarded as "encumbrance created before passing of Act" 571

——*S. 187 (1) (e)* — Permanent arrangement between landholder and tenant for commutation of grain rent into money rent is not rendered unlawful by S. 187 (1) (e) **(FB)** 379*e*

——*S. 189 (as amended by Act of 1936)*— Suit filed by inamdar in civil Court for ejectment of tenants—During its pendency Amending Act of 1936 coming into force—Civil Court should only dismiss suit and cannot order refund of court-fees 451

Madras Gaming Act *(3 of 1930), S. 9* — Servants in gaming house not gambling— They cannot be convicted under S. 9 227

Madras Hereditary Village Offices Act *(3 of 1895), Ss. 13 (1) and 21* — Suit by plaintiff for declaration that defendant's appointment as karnam was illegal and registry of his name as holder of that hereditary office falls under S. 13 (1)—Jurisdiction of Civil Courts is barred under S. 21 —Fact that defendant is stranger to plaintiff's family is immaterial 748

Madras High Court (Original Side) Rules —Questions within province of Judge should not be referred to Official Referee unless parties have agreed to submit their disputes to arbitration — Consent given by party subsequently withdrawn — Report of Official Referee should be ignored 573

Madras Hindu Religious Endowments Act *(2 of 1927)*—Scheme of Act stated — Court has no residuary power to frame scheme where Board has refused to do so 756*e*

——*Ss. 18 and 62* — Suit for modification of scheme—Hindu Religious Endowments Board's general power of supervision over trustees and appointing staff made subject to final control by District Judge—Restriction conflicts with Act which gives unrestricted powers of supervision to Board in aforesaid matters and must be removed: 614

——*Ss. 34 and 76*—S. 76 must be regarded as exception to S. 34 — Board has no power to cancel lease under S. 34 — Court only can do it 10

——*Ss. 43, 53 and 54* — Jurisdiction of Civil Court is barred by Ss. 43, 53 and 54 — Archaka of temple dismissed by trustee has no right of suit 493*b*

——*S. 43*—Person appointed actually performing functions of paricharaka office — He is office-holder attached to temple and can be dismissed only by trustee — Power

Madras Hindu Religious Endowments Act of his dismissal given to archaka by decree cannot have any force 28

——*S. 44-B (2) (a) and (2) (d) (i)* — Collector dismissing application for resumption of temple inam — Appeal lies under S. 44-B (2) (d) (i) from order of dismissal to District Collector who has power to grant appropriate relief by confirming or cancelling it 811

——*S. 62*—Board cannot be compelled to hold inquiry — Its decision holding inquiry as unnecessary is final 756*b*

——*S. 63*—Board refusing to frame scheme —Court has no power to frame one—S. 63 contemplates only orders settling, modifying or cancelling scheme—Words "institute a suit in the Court to modify or set aside such order" refer to aforesaid orders: 756*c*

——*S. 65*—Court can settle scheme where one is framed by Board—S. 65 empowers Court to modify or cancel scheme after it is framed by Board 756*d*

——*Chap. 6-A, Ss. 65-A to 65-E (as amended by Act 12 of 1935)* — Scope — Notification proceedings under Chap. 6-A are confined to cases where Board was not party to suit in which schemes were framed by Civil Courts and to cases where no scheme has been framed by Civil Court — Procedure under S. 65 cannot be started unless there is gross mismanagement by trustee and unless scheme framed by Court is given fair trial 246*a*

——*Chap. 6-A, Ss 65-A to 65-E (as amended by Act 12 of 1935)* — Question of appointment of manager decided by High Court in favour of trustee — Board cannot flout decision by procedure under Chap. 6-A in absence of allegation that appointment did not work well 246*c*

——*S. 65-B (as amended by Act 12 of 1935)*—Applicability — S. 65-B may well be taken to apply to cases where schemes were settled by Civil Courts in suits to which the Board was not a party 246*b*

Madras Irrigation Cess Act *(7 of 1865)* — Interpretation — Act should be strictly construed (Per *Patanjali Sastri J.*) 521*b*

——*S. 1 (b)*—Irrigation from private reservoir fed from authorized source is not from source different from or in addition to that authorized within meaning of proviso 2 to Sec. 1 (b) — Such irrigation cannot be penalised—Fact that water stored in private reservoir causes detriment to others is immaterial 521*a*

Madras Land Revenue Assessment Act *(1 of 1876), S. 4* — Suit for contribution for peishkush paid after portion of estate has passed into other hands — Jurisdiction of Civil Court is not barred 497*a*

Madras Local Boards Act *(14 of 1920), S. 89*—Suit for recovery of cess under S. 89 — Suit falls under Sec. 77, Madras Estates Land Act—Limitation for suit is governed by Sch. A, Art. 8, Madras Estates Land Act—Limitation Act does not apply: 819*a*

——*S. 89*—S. 89 does not bar suit against under-tenure holder for cess as rent: 819*b*

——*S. 159* — View that question of establishing Board's title to alleged encroachment is purely of civil nature is erroneous 583

——*S. 164*—Failure to comply with requisition under Sec. 164 (2) — It is wrong to hold that Local Board should establish its title and possession of land in Civil Court 608

——*S. 227 (a) and S. 208 (2) and (3)*—Offence under S. 208 (2) and (3) by person in his capacity as member or president of Panchyat Board — Previous sanction of Local Government is necessary before Court can take cognizance of offence 297

Madras Motor Vehicles Taxation Act *(3 of 1931), S. 2 (iii)*—"Motor vehicles" includes steam roller 653*a*

Madras Prevention of Adulteration Act *(3 of 1918), S. 5 (1) (b)* — Adulterated ghee stored for preparing eatables for sale — Ghee is not stored or offered for sale within meaning of S. 5 (1) (b) 938

——*S. 5 (1) (b) and S. 20 (2), R. 28* — Ignorance of nature or quality of article is no defence — Service of ghee to customers with meals by hotel-keeper amounts to sale 173

——*S. 5 (1) (d)* — Butter offered for sale in sealed tins containing extra moisture admixed in process of manufacture — Conviction under S. 5 (1) (d) is bad 221

Madras Prohibition Act *(10 of 1937), S. 4 (1) (a)*—Ignorance of introduction of prohibition is no excuse 816

Madras Revenue Recovery Act *(2 of 1864), S. 58* — Suit for declaration that area of land was wrongly estimated and that therefore revenue authorities arrived at wrong assessment is barred 592

Madras Survey and Boundaries Act *(4 of 1897), Ss. 11, 12*—Order of survey officer under S. 11 or of appellate authority under S. 12 does not break continuity of adverse possession held by unsuccessful party:

Madras Survey and Boundaries Act *56 Mad 366=AIR 1933 Mad 279=141 I C 307 and 40 M L W 536=AIR 1934 Mad 685=152 I C 462, OVERRULED* **(FB)** 187*c*

——*S. 12*—No boundary dispute—Survey officer entering in register one claimant as owner of holding — Other claimant can institute suit to establish his title as true owner **(FB)** 187*b*

——*(8 of 1923), Ss. 13, 14* — Suit for modification of demarcation made by Survey Officer—Burden is on plaintiff to show that demarcation was wrong 273*a*

——*S. 14* — In suits under S. 14, Government is neither necessary nor proper party 620*a*

Madras Village Courts Act *(1 of 1889), S. 73* — Village Court satisfying by consideration of admitted circumstances that promissory note was executed by defendant — Mere lack of direct evidence of execution of pronote is not material irregularity justifying interference in revision: 909

Mahomedan Law — Dower — Divorce by husband before consummation — Wife receives only half her specified dower even though prompt 888

——Guardian—Guardian carrying on business cannot impose liability on minor member of family 285*a*

——Guardian—De facto—He cannot bind minor to a covenant to transfer his property even in part 106*b*

——Minors are not liable to pay interest on sums advanced to them 106*d*

——Wakf — Mutwalli — Right of, can be acquired by prescription — Even society can be mutwalli 167*b*

——Will — Writing or particular form of verbal declaration is not necessary as long as intention is ascertainable — Letter and telegram held could be admitted to probate 153*b*

Malabar Compensation for Tenants' Improvements Act *(1 of 1900), Ss. 3, 5 and 19* — Kanom deed executed before 1886 providing that jenmi should pay compensation for improvements at the rate specified therein—Kanomdar creating sub-kanom—Sub-tenants of sub-kanomdar not aware of contract between jenmi and kanomdar can claim compensation under Act and not according to rate specified in kanom deed 453

——*S. 6* — Applicability — Compensation for improvements fixed by decree deposited — Tenant claiming re-valuation — Immediate eviction is not barred 817*b*

Malabar Law — Family property—New acquisition by manager — Presumption—Nature of, explained 80

——Joint property — Thiyyas of Calicut Taluk — Incident of impartibility must be proved by party setting it 67

——Tarwad — Karnavan—Debt incurred by karnavan for family benefit — Decree againt karnavan can be executed against family property of tarwad 165*a*

——Tarwad — Property devolving on heir can be mortgaged by him as his own — Mortgage unless proved to be mala fide will prevail against ancestor's creditor's right to recover his debt 22

Malabar Tenancy Act *(24 of 1930), S. 20*—S. 20 prohibits any suit for eviction of kanomdar, except on grounds specified therein, irrespective of any contract entered into between parties before passing of Act 56

——*S. 20 (3)*—Jenmi or his assignee can sue to evict tenant even if melcherthdar has that right and has failed to exercise it 577*a*

Malicious Prosecution—Suit for damages for malicious prosecution — What plaintiff should prove stated 683

Master and servant—Madras and Southern Maharatta Ry. Co. — Rules regulating dismissal of servants, Rr. 5 and 7 — Dismissal based on conviction is not wrongful — Departmental enquiry not necessary — Company cannot be compelled to re-employ servant though conviction set aside at later date 269

Mesne profits—*A* holding land under *B*—*B* granting patta of same land to *C*—*C* dispossessing *A* — *B* not shown to have taken part in dispossessing *A*—*B* held not liable to *A* for mesne profits 913*a*

***Minor**—Decree — Setting aside — Gross negligence of guardian ad litem can be basis 810*a*

—— Document impugned on ground of executant's minority—Onus to prove minority on date of execution is on executant 285*d*

——Unconscionable bargain set aside — Court of equity cannot award against minor interest at the rate of 75 per cent. per annum 106*c*

——Guardian— Appointment — Desirability—When relevant stated (Per *Mockett J.*) **(FB)** 33*c*

Mortgage—Mortgage of moveable property is valid— Mortgage of immovable property and also of produce realized therefrom every year—Mortgage of produce operates

Mortgage
as mortgage of moveable property — Mortgagee gets title to crop the moment it comes into existence 929*a*

——Mortgage of produce of land — Land subsequently leased — Standing crop on land claimed by mortgagee before its removal—Mortgagee's title must prevail over lessee with notice of mortgage 929*b*

—— Mortgage of moveable property — Mortgagee cannot claim possession— He can enforce his mortgage only by suing for sale of property mortgaged or by appointment of receiver to secure possession thereof in order to realize his security 929*c*

——Executory contract can amount to discharge of mortgage — But mere recital in plaint in mortgage suit that plaintiff had entered into contract with mortgagors that they should sell their property to mortgagee is not admission that mortgage is discharged 884*a*

——Receiver appointed in suit on simple mortgage — Mortgagee has no charge on rents and profits of mortgaged property — He cannot have preferential claim against Crown 703*b*

——Prior and subsequent mortgagees— Suit by prior mortgagee without impleading subsequent mortgagee—Prior mortgagee himself purchasing mortgaged property at sale in execution of his decree — Suit by subsequent mortgagee against mortgagor and prior mortgagee for enforcing his mortgage — Prior mortgagee can set up his mortgage in defence though right to enforce it may be time barred 646

——Limitation—Presumption — Mortgage proved to have been executed in certain month — There is no presumption that it was executed on any particular day of that month — There must be positive proof of actual starting point when suit is challenged as barred 639*b*

——Usufructuary mortgage-deed providing for payment of peshkush to Government by mortgagee — Suit by mortgagor for redemption and preliminary decree passed— Mortgagee throughout failing to pay peshkush, mortgagor suing mortgagee to recover amount of peshkush which mortgagor was compelled to pay—Subsequent final decree in redemption suit — Mortgagor held entitled to rely on mortgage deed in his suit for recovery of amount of peshkush and entitled to recover by way of damages what he was compelled to pay during six years preceding suit 233

Negotiable Instruments Act *(26 of 1881), S. 78* — Discharge can be given only by payee or holder of promissory note—There is no such thing as benami promissory note for this purpose 90

*——*S. 87* — What is material alteration stated—Alteration in dates of execution of promissory note and of endorsement of payment is material alteration irrespective of fact whether alteration is to prejudice of promisor or not 62*a*

*——*S. 87*—Alteration referred to in S.87 is alteration by party to instrument and not by stranger 62*c*

*——*S. 87* — Promissory note altered materially by stranger though may be void under S. 87 does not become inadmissible in evidence — Promisee or his representative can bring action based on original consideration 62*d*

——*S. 98* — Payee of promissory note endorsing it after it became barred and with fabricated endorsement of payment — It is not necessary to give notice of dishonour to him 85*b*

*——*Ss. 120 and 121*—Words "suit thereon" denote proceeding by promisee or payee to recover money due on negotiable instrument—They do not apply to proceeding initiated by promisor for relief under S. 19, Madras Agriculturists' Relief Act 52*b*

Oaths Act *(10 of 1873), S. 11* — S. 11 relates to proceedings in which evidence was given and not to all possible proceedings — Evidence on special oath given in proceeding under O. 21, R. 100, Civil P. C., is not conclusive proof in suit under O. 21, R. 103, Civil P. C. 627

Parties—Transposition—Suit by minor for share of his family assets in partnership after dissolution against partners and his brothers one of whom was manager of family and partner in firm— Suit virtually conducted by defendant brothers on behalf of minor plaintiff — Defendant brothers held could be transposed as plaintiffs 308*b*

Partition — Decree directing party to pay certain amount towards his share of marriage expenses — Absence of notice of marriage held could be taken into consideration in admitting or rejecting items of expenditure 901*a*

Partnership — Dissolution — Minor — Manager of joint Hindu family who was member of partnership on dissolution entering into arrangement prejudicial to his family—Minor is entitled to sue not merely

Partnership
manager but persons in possession of his share of assets 308*a*

Partnership Act *(9 of 1932), S. 13 (c)*—Suit for accounts—Interest on capital contributed by partner cannot be allowed after dissolution — Interest on capital is payable only out of profits in absence of contract to the contrary 505

——*S. 69* — It is doubtful whether Court has no jurisdiction to pass decree in favour of unregistered partnership—Even assuming that it has no jurisdiction to pass such decree, executing Court is not entitled to go into elaborate enquiry as to its legality 628*b*

——*S. 69*—Suit instituted after 1st October 1933 by unregistered firm in respect of debt arising before commencement of Act —S. 69 does not apply 628*c*

Penal Code *(45 of 1860), Ss. 147 and 148*—Conviction — Accused claiming to be owner of land and preventing harvest of crop on it by deceased—Deceased actually on land before such prevention — Court failing to determine possession of land and ownership to crop — Accused cannot be convicted for rioting 43*d*

——*Ss. 147 and 352*—Accused arrested by police officers in good faith under colour of their office assaulting them — He is guilty under S. 352—Persons attempting to rescue him by use of criminal force are guilty under S. 147 18

——*Ss. 148, 149 and 427*—Site belonging to villagers generally and set apart for public purpose—Villagers demolishing walls built on site by complainant are not guilty of any offence 747

——*S. 171 (g)*—Publication by one of contestants to election that other is leper knowing it to be untrue is not offence under Section 171 (g) 230

——*S. 193*—Complaint by Court is necessary for prosecution under S. 193—S. 193 cannot be evaded by filing complaint of defamation 677

——*S. 201* — False information to screen offender need not be given to police or Magistrate—Whether information is volunteered or given in reply to enquiry is immaterial 898

——*S. 206* — Property transferred by accused judgment-debtor immediately after giving undertaking to Court not to transfer same—Intention to cause injury to creditor is clear — The case falls within S. 206—Fact that decree-holder can by other proceedings defeat transfer is immaterial 271

Penal Code
——*S. 283* — Accused by building stone wall across cart track lying in his patta land claiming right to close it— He cannot be convicted under S. 283 216

——*Ss. 299 and 300*—Attack with dangerous weapons by several persons on one — Instantaneous death—Inability to find person inflicting fatal injury—Culpable homicide, at least, is made out 43*b*

——*S. 300* — Accused chopping at arm or leg with sword and thereby severing arteries —Injured man dying as result—Offence is murder 745

——*Ss. 300 and 324*—Evidence as to attack and persons attacking doubtful and unsatisfactory —Offence of murder reduced to one of hurt — Conviction even for hurt is not justified 43*c*

——*S. 300, Exception 5*—Culpable homicide — Accused on affectionate terms with deceased — Latter suffering death at the hands of accused with her own consent — Crime held fell under S. 300, Exception 5 138*b*

——*S. 302* — Sentence — Lesser sentence held sufficient 562*b*

——*Ss. 325 and 302* — Several accused found guilty of rioting — One of them beat deceased on head with stick—Other accused causing injuries to deceased on head by throwing stone at him—Latter accused held could at best be convicted under S. 325 and not S. 302 586

——*S. 405* — Criminal breach of trust—Essentials necessary to constitute offence stated 329*a*

——*S. 405*—Agent having no claim against principal merely retaining principal's money without doing anything else with it—He is not guilty of criminal breach of trust: 329*g*

——*S. 405* — Person having reasonable claim against another for more than sum of money belonging to other in his hands — His user of this sum for his own purpose would not amount to criminal breach of trust 329*h*

——*S. 405* — Mere payment by debtor to creditor is not entrustment 329*i*

——*S. 405*—S. 405 applies to partners: 265

——*Ss. 420 and 120 B* — Conspiracy to cheat — Grant of false transfer certificate by clerk of Tea Licensing Committee — Grantee enabled to transfer export quota rights in excess of quota to the credit of his estate—Both clerk and owner of estate held guilty under S. 420 read with S. 120-B 155

Penal Code

——*S. 430* — Accused closing sluice after same had been opened by Amin of Estate for irrigating land not entitled to water from tank—In absence of proof that opening of sluice was according to custom its closure by accused with object of protecting their own land from suffering from want of water cannot be termed "mischief" — Dispute is of civil nature 306

——*S. 430*—Preventing complainant from opening sluice which had been closed some days before 144

——*S. 486* — Parcel of beedies consigned by *A* to *B* — Forwarding note bearing *A's* signature—Counterfeit trade-mark detected at place of delivery — *A* held could not be convicted under S. 486 822

——*S. 499* — Certain passages in book found to be defamatory — Order for destruction of all copies of entire book is illegal—Only pages containing objectionable passages should be destroyed 953

*——*S. 504* — Discussion between bill-collector and complainant — Bill-collector shouting "Shameless fellow, I will shoe you" — No offence under S. 504 is committed 681

Pleading — Appeal — Plea not raised in written statement cannot be entertained in High Court 884*b*

——Amendment — Arguments in appeal before High Court heard—Application for amending cause title of plaint held could not be allowed 831*a*

Practice—Adjournment—Party's physical presence made impossible by reason of illness—He should be granted adjournment 569*d*

——Remand—General rule stated — It is undesirable to remand case in order to enable both parties to adduce evidence which might and ought to have been put before trial Court — Remand held justified 511*b*

——Subsequent events — When should be considered, illustrated 412*d*

——Relief—Plaint asking for a much wider relief—It does not deprive plaintiffs of the right to the more limited relief, namely the amount admittedly due 308*f*

——Relief—Suit based on title — Plaintiff can claim relief on strength of anterior possession alternatively as independent ground of claim — Such relief can be granted even if not specifically asked for in plaint if other party is not prejudiced thereby : 71

Precedents — Decision of one Division Bench is binding on subsequent Division Bench — If it disagrees proper course is to refer matter to Full Bench **(FB)** 356*b*

Presidency Towns Insolvency Act *(3 of 1909), S. 9 (e)*—Even if there had already been act of insolvency as result of previous attachment there can be second act of insolvency of same nature 958*b*

——*S. 46* — Word "subject" in S. 46 — Meaning—Debt which insolvent is liable to pay out of property in his hands is provable in insolvency — Insolvent liable to pay debt out of joint family property in his hand or separate property inherited by him from father—Liability is debt provable in insolvency—Personal liability of insolvent is not necessary condition for debt to be proved under S. 46 837*b*

——*S. 106 (1) Proviso* — Proviso has no bearing on appealability of orders passed 572

Principal and agent — On insolvency of Hindu sons, deceased father's assets in British India vesting in Official Assignee—Official Assignee through agent taking out letters of administration in respect of deceased's Ceylon assets—Supreme Court of Ceylon passing consent decree to which agent was party — Decree held binding on Official Assignee 837*a*

——Power of attorney — Authority to adjust matter does not include power to refer to arbitration 650*c*

——Suit by principal for accounts against agent residing elsewhere—Cause of action cannot be said to arise at place where principal resides 588*a*

——Agent cannot call upon principal for account 504*b*

——Suit for accounts by principal—Agent cannot claim credit for time-barred items unless right to account subsists on date of suit 299*c*

——Benami transaction — Agent using principal's name for benami transaction of his own — Onus is on agent to prove that money was his own and not of principal and that transaction was truly benami 299*d*

Principal and Surety — Composition between debtor and creditor — Liability of surety contracting to remain liable after discharge of principal is not extinguished 437*a*

Promissory note—Party to pronote promising to execute note but going away without doing so — No evidence that he

Promissory note
authorized any one to affix his mark — He is not liable on pronote 874*a*

*——Promissory note purporting to be joint promissory note of *A* and *B* in renewal of previous joint promissory note—*A* alone executing it and *B* failing to execute it—No evidence whether *A* executed only on faith that *B* would also execute — Note is binding on *A* 874*b*

——Promissory note payable on demand becomes payable immediately demand is made 631*a*

*——Promissory note payable on demand —Amount paid by maker before demand but note left with payee—Payee endorsing it to third person without latter's knowledge of fact of payment — Endorsee can sue maker on promissory note : *64 M L J 241 =A I R 1933 Mad 300 = 141 I C 136, OVERRULED* 631*b*

*——Promissory note executed by member of joint Hindu family endorsed by promissee—Endorsement not so worded as to transfer original debt—Remedy of indorsee is only against executant and not other members of his family 174

——Liability of endorser arises only on date of endorsement 85*a*

——Promissory note endorsed to another person for collection of principal and interest —Endorsee is agent for collecting money and cannot negotiate it to another person unless so authorized by principal 27

Provident fund — Proceeding to recover provident fund after depositor's death — Parties need not obtain succession certificate 590*b*

***Provident Fund Rules,** *R. 17, Note 1* — Hindu wife obtaining decree for separate maintenance from husband is not judicially separated from husband 590*a*

Provident Insurance Societies Act *(5 of 1912), S. 22*—Bank preparing false revenue account and balance sheet to conceal deficit from shareholders—Managing director and auditor signing same with knowledge of real facts are guilty under S. 22 though actuated by best intention 682

Provincial Insolvency Act *(5 of 1920), S. 4* — Interpretation — Official Receiver party to proceedings in Civil Court as representative of estate — Decision against receiver — Adverse decision cannot be reopened by application under S. 4 — Proper remedy is by way of appeal 733*b*

——*Ss. 4 and 53* — Mortgagor becoming insolvent after execution of mortgage — Suit by mortgagee—Application by Official

Provincial Insolvency Act
Receiver under Ss. 4 and 53 to same Court rejected and mortgagee's suit decreed — Appeal by Official Receiver against order of dismissal only—Appeal held was barred by res judicata as decree had become final—S. 53 has no application 564*a*

——*S. 4* — Jurisdiction of Civil Court is not barred 564*b*

——*S. 28 (2)* — Application by undischarged insolvent to Debt Conciliation Board without leave of Insolvency Court—Board has no jurisdiction to entertain application 492

——*Ss. 34 (2) and 28 (2)* — Claim for marriage expenses, arrears of maintenance, lump sum on account of residence, for clothing and for future maintenance against Hindu insolvent is debt provable in insolvency — Suit against insolvent without Court's leave is barred under S. 28 (2): 951

——*S. 35*—Adjudication order can be set aside any time when it is shown that adjudication ought not to have been made — Fact that debtor does not object to order of adjudication is no ground for refusing to set it aside **(FB)** 375*a*

——*S. 35* — Annulment of adjudication—Adjudication of debtor as insolvent cannot be annulled under S. 35 on ground that debt mentioned by petitioning creditor in his application is bogus unless it can be shown that debtor did not owe any other debts or was not really insolvent at the time of adjudication 151

——*S. 37* — Court cannot modify its own vesting order passed under S. 37—Its power is confined only to giving directions for carrying out intention of that order 724

——*S. 37*—Annulment does not necessarily entitle debtor to be placed in possession of property in hands of receiver — Directions are discretionary with Court depending on circumstances of each case **(FB)** 375*b*

——*S. 37* — Adjudication — Subsequent showing that no act of insolvency committed — Adjudication must be annulled **(FB)** 375*c*

——*S. 37* — Judgment-debtor adjudicated insolvent pending attachment of his property —Order of dismissal of pending execution would not automatically raise attachment —Attachment is ineffective so long as it is in hands of receiver — When adjudication is annulled property vests in judgment-debtor subject to attachment 129

——*S. 51 (1) and (3)* — S. 51 (3) applies to sales in execution in general and is not restricted to sales in execution of decree —

Provincial Insolvency Act
Both S. 51 (1) and S. 51 (3) refer to same classes of cases 932*b*

——*Ss. 53 and 54*—Suit by wife for maintenance — Few days afterwards husband filing application for insolvency — Court creating charge on certain property in favour of wife—Husband adjudicated insolvent — Application by Official Receiver for declaration that charge was not binding on him — Suit by wife few days before presentation of application for insolvency and relation between parties held did not suggest collusion between parties — Charge held took effect on date of suit 749*a*

——*S. 53*—S. 53 applies even to transfers in invitum 749*f*

——*Ss. 53 and 54*—Fraudulent preference —Transfer made under threat of legal proceedings—Dominant motive not to prefer mortgagee to other creditors — Mortgage cannot be challenged under Ss. 53 and 54 228

——*S. 66 (2)*—Allowance under S. 66 (2) is discretionary with Court — Application by insolvent claiming expenses for his daughter's marriage does not strictly fall under S. 66 (2) — But it may be brought within category of 'allowance for the support of himself and his family' — Proper course is to apply for increase of allowance for period during which marriage is contemplated—But it cannot be claimed as of right 675

*——*S. 78 (2)*—Proof of debt means that kind of proof only which entitles creditor to have his name entered in Schedule and none other 716*a*

——*S. 78 (2)*—S. 78 (2) incorporates principle of S. 14, Limitation Act 716*b*

Provincial Small Cause Courts Act *(9 of 1887), S. 23 and Sch. 2, Art. 7* — Suits for rents of small cause nature—Plaintiff's co-sharers added as defendants — Suits involving question of title as shares of co-sharers came up for determination — Suits held ceased to be of small cause nature — Suits fall under Sch. 2, Art. 7 507

——*Art. 31*—Merely because suit involves taking of accounts, it does not become suit for account — Suit by agent for indemnity against principal held not suit for account 504*a*

——*Art. 41*—Applicability — Art. 41 does not apply to suit for contribution for peishkush under S. 4, Madras Land Revenue Assessment Act, after portion of estate has passed into hands of other party 497*b*

Railways Act *(9 of 1890), Ss. 122 and 132* — Complaint by railway authorities under S. 132 is not necessary for conviction under S. 122 268

Registration Act *(16 of 1908), S. 17* — Equitable mortgage—Collateral letter signed at time of deposit of title deeds and delivered to mortgagee by way of security for loan held required registration: *48 M L W 119=A I R 1938 Mad 547, REVERSED* 671

——*S. 17*—Patta for one year only—Statement in it binding tenant if he remains in occupation for longer period will not make registration necessary **(FB)** 379*c*

——*Ss. 17 (1) (b) and 17 (2) (b)*—Compromise during pendency of suit — Document embodying terms of agreement relating to other matters as well as suit property—Parties agreeing to file compromise in Court and obtain decree in terms thereof—Document held fell within S. 17 (2) (b) and not S. 17 (1) (b) 897

*——*S. 17 (1) (e)*—Final mortgage decree is immovable property—Assignment of such decree is compulsorily registrable 140*a*

Religious endowment — Dedication complete—Subsequent misapplication of income by donor would not affect its validity: 920*a*

——Founder prescribing line of devolution regarding trusteeship — He has no right to alter it unless he had reserved such power 633

Religious Endowments Act *(20 of 1863), S. 4*—Temporary appointment of trustee is not invalid 823*b*

——*Ss. 6 and 14*—Trustee can be dismissed only on good and sufficient grounds — Mere disobedience by trustee of Committee's order directing his co-trustee to take joint charge is not sufficient reason for his dismissal 823*a*

Res judicata — Issue made subject of final order — That order cannot be ignored by succeeding Judge 957

——Suit by *A* for redemption dismissed — Subsequent suit by *A* for redemption against parties to previous suit by impleading additional parties held res judicata so far as parties to previous suit were concerned: 201

——Applicability to survey officer's decision under Madras Survey and Boundaries Act stated (Per *Krishnaswami Ayyangar and Somayya JJ., in Order of Reference)* **(FB)** 187*a*

Right of suit — Right can only be taken away by statute 493*a*

Riparian rights—Proprietors of estate on partition stipulating to keep watercourses

Riparian rights
joint and agreeing not to interfere with supply channels—Either party can restrain other from erecting bund interfering with watercourse without showing damage: 656

Second appeal—Claim involving point of law can be investigated 577*b*

***Set-off** — Amount payable by *A* in his individual account — Amount payable to *A* and *B* in their joint account—Amounts can be set-off if on evidence it can be shown that *A* is solely entitled to the amount standing in name of *A* and *B* 436

Societies Registration Act *(21 of 1860), Preamble and S. 20*—Charitable purposes —Meaning—Society whose paramount object is charitable is not rendered any the less charitable by the fact that some of its purposes are not strictly charitable but religious—Society for improvement of Islamic education and rendering pecuniary help to musaffars held to be society for charitable purposes and fact that one of its purposes was management of affairs of mosque cannot change its character 167*a*

Society — Acts of management within powers of society—Disputes between members and persons responsible for management — Disputes should be decided by machinery provided by rules of society and not by civil Court — Civil Court has jurisdiction only when act complained of is ultra vires the society 902*a*

***Specific Relief Act** *(1 of 1877), S. 18 (d)*—Vendor's suit for specific performance dismissed for want of good title—Whether purchaser is entitled to costs depends upon his conduct in such suit 739*e*

——*S. 18 (d)*—Same considerations govern grant of specific performance to vendor and of directing refund of deposit to purchaser 739*f*

——*S. 18 (d)*—Interest on deposit—Prima facie the purchasers are entitled to interest if there is nothing in their conduct to disentitle them to the same 739*g*

Stamp Act *(2 of 1899), Art. 35* — Undertaking by tenant to accept patta if drawn up in accordance with terms mentioned in statement signed by him does not require stamping or registration **(FB)** 379*a*

——*Art. 35* — Agreement to pay rent in money instead of in grain requires stamping and registration **(FB)** 379*b*

Succession Act *(39 of 1925), Ss. 102 and 103*—Testator providing that certain items of properties shall remain as tarwad properties and then providing that properties omitted from will shall go to certain persons

Succession Act
— Attempt to create property on analogy of tarwad held invalid and items held fell into residue 785*b*

——*Ss. 241 and 228* — Construction — Person possessed of property in India dying in England and appointing executor in England by will—English executor obtaining probate in England and applying in India for letters of administration through agent—Agent is entitled to letters of administration on application with copy of will annexed under S. 241 — Security need not be furnished as S. 228 does not apply to such case 680

Surety—Surety for proper administration of tarwad affairs by karnavan cannot release himself of his own free will 730

Telegraphs Act *(13 of 1885), S. 18*—Sec. 18 does not contemplate direct action of cutting down trees by Telegraph Authority itself — S. 18 applies only to cutting down of trees after line has been erected 900

Tort—Tort cannot be presumed 913*b*

——Negligence—Articles liable to spontaneous combustion stored in house — It is duty of occupant to keep efficient watchmen on guard and to have reasonable fire equipment ready at hand 722

Trade Mark — Passing off actions — Real question for determination stated 145*a*

*——Passing off—Trader's name acquiring secondary significance in locality—Another trader of similar name using his name in combination with other words which taken as a whole not representing truth and also doing other things thereby deliberately intending to pass his goods as those of former — He should be restrained from doing so by means of injunction — Form of injunction stated 145*b*

——Passing off—Trader's name acquiring secondary signification—Mere dissimilarity in get up of goods of another trader using similar name affords no protection 145*c*

***Transfer of Property Act** *(4 of 1882), S. 3, Expl. 1* — Immovable property — Fixtures — Machinery installed by tenant for cinema, in premises leased for his own profit and not as permanent improvement to premises — Machinery is moveable property within the meaning of S. 3 527

——*S. 36* — Principle of S. 36 whether applies to case of assignee of lessee *(Quære)* 21*b*

——*S. 41*—Whether transferee has taken reasonable care to ascertain that transferor had power to transfer is question of fact 523*b*

Transfer of Property Act

——*S. 44*—Mortgagee is not entitled to sue for partition where partition is not necessary to give effect to mortgage 491

*——*S. 53* — Judgment-debtor's property attached in execution of decree—Objection by wife claiming property attached as belonging to her by virtue of sale deed allowed — Suit by decree-holder for cancellation of sale deed on ground that it was executed with intent to defeat and delay creditors—Suit falls under S. 53 and must fail for want of Court's permission under O. 1, R. 8, Civil P. C. — O. 21, R. 63 is not incompatible with S. 53, T. P. Act 789*a*

——*S. 53*—Suit under S. 53—Objection by defendant that suit was incompetent for want of Court's permission under O. 1, R. 8, Civil P. C., put in issue and disallowed — In appeal, amendment of plaint turning suit into representative one held too late: 789*b*

——*S. 60*—*A* and *B* distinct owners of properties *X* and *Y* mortgaging same to *C*—*C* subsequently purchasing property *Y* free from mortgage in consideration of other liability of *B* to *C* — S. 60, last clause has no application and *C* is entitled to recover entire debt from property *X*—*A's* right of contribution is not affected 498*c*

——*S. 60, last clause* — Words "share of mortgagor" in S. 60, last clause—Meaning —Manner of acquisition of equity of redemption is immaterial 498*a*

——*S. 60, last clause* — Applicability explained 498*b*

——*S. 65-A* — Mortgage before S. 65-A—S. 65-A would not apply even if lease is after it 669*a*

——*S. 65-A*—Lease by mortgagor for unusual term to defeat creditors is void — Lessee will have no right to redeem 669*b*

——*S. 67-A*—Mortgage deed providing for payment of sum due in certain instalments with default clause that in default of two consecutive instalments mortgagee could claim whole — Mortgagee electing to sue only on two instalments in arrears and obtaining decree without affecting his rights under balance of mortgage — Objection in execution that sale should not be subject to remaining balance rejected — Order held appealable and principle of S. 67-A could not apply 296

——*S. 69*—Suit for injunction restraining mortgagee from selling mortgaged property and for scaling down mortgage debt under Madras Agriculturists Relief Act — Mortgaged property improperly sold—Purchaser cannot be impleaded on ground of fraud—Cause of action against him is entirely different—Rule of lis pendens is inapplicable 903

——*Ss. 76 and 77*—Usufructuary mortgage providing that rents payable by mortgagor to jenmi should be paid by mortgagee and out of receipts from mortgaged property and balance should be taken in lieu of interest on principal money—Rents not paid by mortgagee to jenmi — Mortgagor in redemption suit can claim adjustment of unpaid rents against mortgage amount—Claim of mortgagor for back rents cannot be treated as claim to set off 686

——*S. 100*—S. 100 does not apply to auction sale 701*a*

——*S. 100, Proviso* — Simple mortgagee cannot be said to have property in his hands 701*b*

——*Ss. 100 and 59*—Charge on immovable property can be created only by registered deed attested by at least two witnesses 140*b*

——*S. 108 (g)* — Sub-lease of property subject to maintenance charge — Sub-lease containing covenant for quiet enjoyment—Sub-lessor failing to pay amount of maintenance — Sub-lessee is entitled to pay the same and recover it from sub-lessor 410*b*

——*S. 108 (j)* — Sub-lease for residue of term does not operate as assignment: 410*a*

——*S. 117 and Ch. 5* — Ch. 5 applies to agricultural leases in absence of any special usage or custom 410*c*

——*S. 119, before amendment of 1929* — Exchange deed — Transferee from one of parties to exchange cannot raise plea of bona fide purchase for value under S. 119 — Transferee can get no better title than that of transferor 426*a*

——*S. 119, as amended by Act of 1929* — Applicability—Date of contract is governing factor and not date of dispossession: 426*b*

——*S. 130* — Agreement between debtor and creditor that debts would be payable from particular fund with third person — Agreement amounts to assignment — Assignee is bound to refund surplus to assignor 258*b*

——*S. 130*—Assignment of part of debt—An assignment of a part of a debt is valid 258*c*

——*S. 130* — Where a debt is assigned, interest will go with it 258*d*

——*S. 130* — Fixed deposit receipt—Endorsement on back—Effect stated 157*b*

Trustee—Temple — De facto trustee can sue to recover temple lands 617*c*

Trust—Trustee of temple notwithstanding scheme prohibiting borrowing, borrowing money—Creditor lending it with knowledge of prohibition cannot be compensated for what he has advanced even if money is applied for purposes of temple 719*a*

——Principle that creditor advancing money to trust for purposes of trust cannot be defeated by contention that duties could have been performed on less elaborate scale does not apply where trustee is acting contrary to trust 719*b*

Trusts Act *(2 of 1882), Ss. 88, 90 and 94* — Husband applying for issue of pattah and depositing money for survey stones and growing trees but dying before grant of pattah — His widow making fresh application and pattah issued in her favour—Land covered by pattah attached by creditor of her husband — Ss. 88, 90 and 94 held inapplicable 779*a*

——*Ss. 88 and 90*—Ss. 88 and 90 are not exhaustive only in sense that if person cannot be brought under these Sections he must be found to fall under S. 94 779*b*

*——*S. 89* — One party standing in fiduciary relation to another exercising undue influence over latter—Third person deriving benefit of such exercise with knowledge of such relation cannot retain benefit so received 285*c*

Vendor and purchaser — Sale proving abortive — Claim for purchase money is claim for money had and received—Liability to refund arises when money is received by vendor 794*b*

——Vendor's title—Mere fact of knowledge on purchaser's part of earlier transactions of vendor will not disentitle purchaser to insist upon proof of vendor's title 739*a*

——Vendor's title depending on proof of disputed fact — Vendor not proving that fact cannot be held to have made out good title 739*d*

Will—Absolute estate—Gift over is invalid — New course of devolution cannot be created by gift 479*b*

——Construction — Intention of testator should be effectuated and not frustrated 479*c*

——Absolute estate and life estate with power of appointment—Distinction—Life estate with power of appointment may be conferred by will or inter vivos 479*d*

——Construction—Each will must be construed by itself—Value of decisions stated —Court must ascertain expressed intention of testator from words used in will 479*e*

——Proof of—Execution of will under suspicious circumstances — Propounders must prove not merely that testator signed will but also that he knew and approved of contents of will — Existence of very material differences between two wills executed within short interval is suspicious circumstance — Burden lying on party substantially benefited by change is proportionately heavier and he must make frank and full disclosure of all material circumstances 315*a*

——Proof of — Registration during testator's lifetime — Testamentary capacity — Facts of execution and testamentary capacity are distinct — Significance of registration and effect of sub-registrar's evidence must be appraised with due regard to physical and mental condition of testator at time of execution — Mere fact that testator could say that it was his will or could answer simple questions is not enough to show that he had sound disposing mind 315*b*

——Proof of — Registration is not proof of testamentary capacity 315*c*

——Proof of—Suspicion—Fact that only one out of six attestors was examined and writer of will was not called intensifies suspicion 315*d*

Workmen's Compensation Act *(8 of 1923)*—Accident — Right of compensation — Accident must be proved to arise out of and in course of employment **207**

COMPARATIVE TABLES

Comparative Table of cases reported in Other Journals in 1940 which were already reported in All India Reporter in previous years.

A. I. R. 1939 Madras = Other Journals

AIR	Other Journals	
293	189 I C	320
295	186 I C	302
378	186 I C	449
393	189 I C	17
402	186 I C	279
432	186 I C	255
433	189 I C	386
436	189 I C	390
438	189 I C	335
441	189 I C	348
446	189 I C	325
450	187 I C	735
472	189 I C	25
	41 Cr L J	705
499	186 I C	606
525	188 I C	815
531	189 I C	98
538	189 I C	364
543	188 I C	878
547	188 I C	691
564	188 1 C	571
570	186 I C	343
584	188 I C	852
590	189 I C	158
595	188 I C	826
618	186 I C	379
614	189 I C	123
645	189 I C	170
648	189 I C	280
670	188 I C	857
671	189 I C	31
678	189 I C	200
682	188 I C	889
684	189 I C	54
686	188 I C	843
688	187 I C	338
697	188 I C	892
699	189 I C	294
711	189 I C	228
722	189 I C	316
724	189 I C	204
740	188 I C	187
742	187 I C	731
744	186 I C	460
745	188 I C	283
751	189 I C	66
757	189 I C	190
776	189 I C	289
780	1940-1 M L J	747
	51 M L W	743
781	188 I C	696
783	188 I C	801
	41 Cr L J	677
788	186 I C	444
789	188 I C	895
792	186 I C	348
797	186 I C	470
798	187 I C	602
799	186 I C	599
800	186 I C	634
802	188 I C	534
803	189 I C	309
811	189 I C	406
817	187 I C	467
818	188 I C	710
824	188 I C	751
830	1940 M W N	632
	189 I C	215
840	188 I C	311
	41 Cr L J	573
841	189 I C	411
846	186 I C	327
847	188 I C	41
848	188 I C	183
853	189 I C	429
858	188 I C	48
860	188 I C	727
862	189 I C	495
867	187 I C	816
876	187 I C	426
877	188 I C	13
881	189 I C	476
884	188 I C	831
886	186 I C	437
887	186 I C	249
892	187 I C	591
894	189 I C	301
897	ILR 1940 M	394
	189 I C	484
905	41 Cr L J	203
907	189 I C	167
909	ILR 1940 M	233
	189 I C	303
911	ILR 1940 M	322
	189 I C	259
914	41 Cr L J	186
915	186 I C	297
916	41 Cr L J	275
917SB	41 Cr L J	185
920	ILR 1940 M	300
	189 I C	96
922	ILR 1940 M	211
	1940-1 M L J	655
	189 I C	505
928	187 I C	861
929	189 I C	245
932	186 I C	316
933	188 I C	416
934	188 I C	822
937	189 I C	241
940	ILR 1940 M	204
	186 I C	440
942	186 I C	424
944	189 I C	305
946	189 I C	50
949	189 I C	435
957	187 I C	780
963	189 I C	490
967	188 I C	200
971	188 I C	881
974	186 I C	455
976	41 Cr L J	181

A. I. R. 1940 Madras = Other Journals

AIR	Other Journals	
1	1939 M W N	883
	50 M L W	452
	1939 M Cr C	246
	186 I C	704
	41 Cr L J	369
5	50 M L W	594
	1939 M W N	1170
	1939-2 M L J	805
	187 I C	745
6	1939 M W N	776
	50 M L W	338
	1939-2 M L J	505
7	1939-2 M L J	290
	1939 M W N	793
	50 M L W	834
8	50 M L W	809
	1939 M W N	838
	1939-2 M L J	437
	ILR 1939 M	977
	186 I C	850
9	50 M L W	634
	1939 M W N	1082
	1939-2 M L J	841
	ILR 1940 M	251
	188 I C	680
10	1939 M W N	1042
	50 M L W	651
	1940-1 M L J	28
	186 I C	868
	ILR 1940 M	388
12	1939 M W N	873
	50 M L W	435
	1939 M Cr C	238
	185 I C	829
	41 Cr L J	242
15	50 M L W	432
	1939-2 M L J	509
	1939 M W N	961
	187 I C	30
16	50 M L W	429
	1939 M W N	962
	1939-2 M L J	759
	186 I C	632
17	50 M L W	568
	1939 M W N	1080
	1939-2 M L J	809
	188 I C	263
18	1939 M W N	1004
	1939 M Cr C	259
	50 M L W	763
	1939-2 M L J	776
	186 I C	108
	41 Cr L J	250
19	1939 M W N	988
	187 I C	834
21	50 M L W	608
	1939 M W N	1022
22	1939 M W N	1041
	50 M L W	655
	186 I C	323
23	50 M L W	802
FB	1939 M W N	1209
	1940-1 M L J	11
	1939 M Cr C	304
	185 I C	824
	41 Cr L J	238
	ILR 1940 M	335
27	50 M L W	606
	1939 M W N	1017
	186 I C	714
28	1939-2 M L J	661
	1939 M W N	1083
29	50 M L W	719
	1939-2 M L J	751
	1939 M W N	1165
	186 I C	468
30	50 M L W	581
	1939 M W N	1094
	1939-2 M L J	728
	186 I C	125
	ILR 1940 M	191
31	50 M L W	720
	1939-2 M L J	727
	1939 M W N	1169
32	50 M L W	705
	1939-2 M L J	773
	1939 M W N	1163
	186 I C	90
33	50 M L W	896
FB	1939-2 M L J	884
33	1940 M W N	9
FB	186 I C	749
	ILR 1940 M	358
38	50 M L W	507
	1939 M W N	986
	1939-2 M L J	596
	188 I C	204
40	50 M L W	602
	1939 M W N	1090
	1939-2 M L J	778
	188 I C	318
42	50 M L W	699
	1939 M W N	1115
	186 I C	118
43	1939 M Cr C	16
	1939 M W N	879
	50 M L W	557
	186 I C	525
	41 Cr L J	337
47	50 M L W	701
	1939-2 M L J	859
	1940 M W N	195
	190 I C	172
49	50 M L W	597
	1939 M W N	1171
	ILR 1940 M	195
	1940-1 M L J	676
	190 I C	154
52	50 M L W	587
	1939 M W N	1044

AIR	Other Journals
52	1939-2 M L J 658
	186 I C 458
53	1939 M W N 947
	1939-2 M L J 568
	50 M L W 515
	189 I C 704
54	50 M L W 578
	1939 M W N 1148
	1939-2 M L J 782
	189 I C 732
55	1939 M Cr C 9
	1939 M W N 1012
	1939-2 M L J 750
	50 M L W 511
	185 I C 753
	41 Cr L J 235
56	50 M L W 695
	1939 M W N 1240
58	1939 M W N 990
	50 M L W 523
	1939-2 M L J 609
	186 I C 722
59	50 M L W 677
	1939 M W N 1145
	1940-1 M L J 143
	187 I C 852
61	50 M L W 150
	1939-2 M L J 225
	1939 M W N 736
62	1940 M W N 24
	1939-2 M L J 686
	50 M L W 746
	189 I C 795
67	1939 M W N 1087
	1939-2 M L J 718
	50 M L W 511
	189 I C 727
69	1939 M W N 948
	1939-2 M L J 551
	50 M L W 494
	188 I C 379
71	50 M L W 611
	1939-2 M L J 645
	1939 M W N 1179
	190 I C 161
73	1939 M W N 1023
	50 M L W 668
77	50 M L W 640
	1939 M W N 1084
	1940-1 M L J 782
	189 I C 887
80	50 M L W 676
	1939 M W N 1136
	1939-2 M L J 757
	185 I C 755
81	50 M L W 658
	1939 M W N 1137
	1939-2 M L J 920
	189 I C 749
82	1939 M W N 1154
	50 M L W 645
	1940-1 M L J 460
	ILR 1940 M 420
	190 I C 19
85	50 M L W 649
	1939-2 M L J 760
	1939 M W N 1139
86	1939 M W N 1018
	50 M L W 662
89	50 M L W 605
	1939 M W N 1046
	1939-2 M L J 758
	ILR 1940 Mad 79
	187 I C 352
90	1939-2 M L J 812
	1939 M W N 1207
	50 M L W 917
	189 I C 685
91	50 M L W 721
	ILR 1940 M 245
	1940-1 M L J 673
	1940 M W N 433
	190 I C 42
95	50 M L W 636
	1939 M W N 1077
	1939-2 M L J 745
98	1939 M W N 1063
	50 M L W 939
101	51 M L W 111
	1939 M W N 1071
	186 I C 773
102	50 M L W 571
	1939 M W N 1225
	187 I C 376
106	1939 M W N 798
	50 M L W 823
	ILR 1940 M 27
	190 I C 101
111	50 M L W 614
	1939 M W N 1039
	1939 M Cr C 285
	1939-2 M L J 878
	ILR 1939 M 1035
	187 I C 103
	41 Cr L J 403
113	1940-1 M L J 32
FB	51 M L W 11
	1940 M W N 126
	186 I C 494
	ILR 1940 M 259
124	50 M L W 933
FB	1940-1 M L J 54
	1940 M W N 118
	186 I C 474
	ILR 1940 M 372
127	51 M L W 173
FB	1940-1 M L J 235
	1940 M W N 181
	187 I C 176
	ILR 1940 M 349
129	1939 M W N 1111
	1939-2 M L J 786
	50 M L W 716
131	50 M L W 851
	1939-2 M L J 853
	1940 M W N 64
	186 I C 862
134	1939 M W N 1131
	50 M L W 782
	1940 M Cr C 1
	186 I C 472
	41 Cr L J 317
135	50 M L W 837
	1939 M W N 1198
	1939-2 M L J 882
	186 I C 832
136	1939 M W N 1134
	50 M L W 742
	1939 M Cr C 282
	186 I C 484
	41 Cr L J 323
	1940-2 M L J 35
138	1939 M W N 1132
	50 M L W 784
	1939 M Cr C 276
	186 I C 479
	41 Cr L J 322
	ILR 1940 M 428
	1940-2 M L J 89
139	1939 M W N 1072
	51 M L W 107
	189 I C 801
140	50 M L W 844
	187 I C 243
	1940 M W N 313
	ILR 1940 M 306
	1940-1 M L J 922
144	1939 MW N 1224
	1939 M Cr C 303
	188 I C 195
	41 Cr L J 558
145	50 M L W 872
	1940-1 M L J 749
	1940 M W N 648
	1940 M Cr C 159
	190 I C 24
149	1939 M W N 1174
	188 I C 583
151	1939-2 M L J 753
	50 M L W 821
	1939 M W N 1203
153	50 M L W 754
	1939 M W N 1160
	1940-1 M L J 273
	187 I C 414
155	1939 M W N 1125
	1939 M Cr C 279
	187 I C 33
	41 Cr L J 388
157	1939 M W N 1096
	50 M L W 759
	187 I C 531
160	1939 M W N 1195
	50 M L W 893
	1940-1 M L J 177
	188 I C 171
161	50 M L W 815
	1939 M W N 1237
	1939 I T R 657
	ILR 1940 M 329
	189 I C 722
165	1939 M W N 1229
167	50 M L W 734
	1940 M W N 31
	ILR 1940 M 671
	1940-2 M L J 436
	189 I C 860
172	1939 M W N 1157
	1939-2 M L J 916
173	1939 M W N 1128
	50 M L W 790
	1939 M Cr C 288
	186 I C 785
	41 Cr L J 377
174	50 M L W 797
	1939 M W N 1243
	189 I C 775
175	1939 M W N 1140
178	1939 M W N 1066
	50 M L W 944
	189 I C 824
179	50 M L W 879
	1940-1 M L J 107
	1940 M W N 584
	190 I C 67
183	50 M L W 799
	1939 M W N 1223
	1939 M Cr C 311
	187 I C 92
	41 Cr L J 402
184	1939 M W N 1068
185	50 M L W 886
	1940-1 M L J 20
	1940 M W N 62
	189 I C 829
187	1940-1 M L J 79
FB	51 M L W 73
	1940 M W N 41
	187 I C 321
	ILR 1940 M 501
196	51 M L W 65
FB	1940-1 M L J 124
	1940 M W N 81
	ILR 1940 M 158
	1940 M Cr C 25
	187 I C 280
	41 Cr L J 437
201	50 M L W 809
	1939-2 M L J 836
	1940 M W N 197
203	50 M L W 903
206	50 M L W 867
	1940 M W N 294
	1940-1 M L J 568
	188 I C 472
207	50 M L W 796
	1939 M W N 1205
	1939-2 M L J 851
	188 I C 145
208	1939 M W N 1143
	1939-2 M L J 867
210	50 M L W 729
	1939 M W N 1181
	1940-1 M L J 188
	ILR 1940 M 223
	190 I C 190
213	1939 M W N 1197
	1939-2 M L J 926
	50 M L W 938
	189 I C 695
214	50 M L W 764
	1939 M W N 1244
	187 I C 758
215	50 M L W 793
	1939 M W N 1206
	1939-2 M L J 864
	189 I C 822
216	50 M L W 593
	1939 M W N 1259
	1940 M Cr C 17
	186 I C 896
	41 Cr L J 391
217	50 M L W 824
	1940 M W N 453
	ILR 1940 M 405
	188 I C 700
	1940-2 M L J 1021
221	1939 M W N 1224
	1939 M Cr C 310
	1940 1 M L J 169
	51 M L W 203
	188 I C 150
	41 Cr L J 552
222	1939-2 M L J 708
	50 M L W 839
	1940 M W N 349
	189 I C 88
224	50 M L W 80

AIR	Other Journals
224	1939-2 M L J 814
	1939 M Cr C 303
	1940 M W N 172
	187 I C 82
	41 Cr L J 401
225	50 M L W 777
	1939-2 M L J 872
	1939 M W N 1233
227	1939 M W N 888
	50 M L W 458
	1939 M Cr C 251
	189 I C 811
	41 Cr L J 813
228	50 M L W 771
	1939 M W N 1245
	1940-1 M L J 786
	188 I C 208
230	1939 M W N 610
	1939 M Cr C 194
	188 I C 327
	41 Cr L J 577
231	50 M L W 503
	1939 M W N 972
	1939-2 M L J 818
	ILR 1940 M 239
	188 I C 640
233	50 M L W 889
235	1939-2 M L J 791
	50 M L W 800
	1939 M W N 1208
236	1939 M W N 1073
240	1939 M W N 1128
	50 M L W 796
	1939 M Cr C 271
	189 I C 816
	41 Cr L J 817
241	50 M L W 857
	1940 M W N 642
246	1939 M W N 1098
257	1939 M W N 1260
	1940 M Cr C 10
	187 I C 120
	41 Cr L J 400
258	1939 M W N 1054
265	1939 M W N 1252
	1940 M Cr C 14
	187 I C 126
	41 Cr L J 898
266	1939 M W N 1231
268	1939 M W N 876
	1939 M Cr C 242
	187 I C 118
	41 Cr L J 393
269	50 M L W 833
	1939-2 M L J 911
	1940 M W N 74
	190 I C 164
271	1939 M W N 1248
	1940 M Cr C 7
	187 I C 122
	41 Cr L J 897
	1940-1 M L J 761
	51 M L W 744
273	1939 M W N 841
279	1939 M W N 1251
	1940 M Cr C 11
	186 I C 601
	41 Cr L J 842
281	49 M L W 768
	1939 M W N 624
	1939-2 M L J 469
	189 I C 185
284	1939 M W N 1250
	1940 M Cr C 14
	189 I C 779
285	1939 M W N 976
292	1939 M W N 1255
	1940-1 M L J 171
	1940 M Cr C 9
	51 M L W 204
	188 I C 32
	41 Cr L J 532
293	1939 M W N 1129
	50 M L W 787
	1939 M Cr C 274
	187 I C 632
	41 Cr L J 491
294	1939 M W N 1130
	50 M L W 791
	1939 M Cr C 272
	188 I C 332
	41 Cr L J 579
295	1939-2 M L J 789
	50 M L W 813
	1939 M W N 1196
	ILR 1940 M 188
	188 I C 617
296	50 M L W 775
	1939-2 M L J 924
	1939 M W N 1239
297	1939 M Cr C 53
	1940 M W N 353
	51 M L W 532
	187 I C 643
	41 Cr L J 496
298	1939 M Cr C 49
	1940 M W N 242
	51 M L W 484
	1940-1 M L J 775
	190 I C 313
	41 Cr L J 898
299	1939 M W N 1046
	188 I C 626
306	1939 M Cr C 50
	190 I C 515
	41 Cr L J 930
308	50 M L W 681
	1939 M W N 1028
	1939 I T R 560
315	1939 M W N 651
329	1939 M W N 1213
	1939 M Cr C 289
	190 I C 123
	41 Cr L J 824
339	1939 M W N 927
356	1940-1 M L J 400
FB	51 M L W 408
	1940 M W N 393
	188 I C 250
	ILR 1940 M 454
366	51 M L W 222
SB	1940-1 M L J 319
	1940 M W N 273
	ILR 1940 M 178
	1940-8 I T R 41
	188 I C 177
370	51 M L W 197
SB	1940-1 M L J 259
	1940 M W N 161
	1940 M Cr C 49
	187 I C 144
	41 Cr L J 419
	ILR 1940 M 433
372	1940 M W N 93
372	51 M L W 206
	1940 M Cr C 33
	ILR 1940 M 514
	1940-2 M L J 39
	190 I C 206
	41 Cr L J 858
375	1940-1 M L J 228
FB	51 M L W 231
	1940 M W N 157
	ILR 1940 M 441
	189 I C 573
379	1940-1 M L J 391
FB	51 M L W 366
	1940 M W N 333
	188 I C 136
	ILR 1940 M 487
383	51 M L W 228
	1940 M W N 268
	ILR 1940 M 646
	1940-2 M L J 425
385	51 M L W 270
FB	1940 M W N 207
	1940-1 M L J 482
	188 I C 81
	ILR 1940 M 526
410	1940-1 M L J 200
	51 M L W 258
	1940 M W N 266
412	1940-1 M L J 240
	1940 M W N 429
	190 I C 657
416	51 M L W 362
SB	1940 M W N 277
	1940-1 M L J 543
	1940-8 I T R 20
	188 I C 395
417	1940-1 M L J 317
	1940 M W N 301
	51 M L W 447
418	1940-1 M L J 422
	1940 M W N 290
	51 M L W 756
419	1940-1 M L J 225
	51 M L W 237
	1940 M W N 265
420	1940-1 M L J 367
	51 M L W 346
	1940 M W N 289
421	1940 M W N 309
	1940-1 M L J 534
	51 M L W 444
	192 I C 386
	ILR 1940 M 688
422	1940-1 M L J 369
	51 M L W 322
	1940 M W N 300
423	51 M L W 30
	1940-1 M L J 155
	1940 M Cr C 21
	1940 M W N 140
	190 I C 694
426	1940-1 M L J 248
	1940 M W N 290
	191 I C 23
427	1940 M W N 379
FB	51 M L W 527
	1940-1 M L J 629
	188 I C 557
	ILR 1940 M 699
432	51 M L W 452
	1940 M W N 338
	192 I C 400
	1940-1 M L J 600
433	51 M L W 487
SB	1940-1 M L J 639
	1940-8 I T R 150
	1940 M W N 501
	188 I C 321
	ILR 1940 M 618
435	1940-1 M L J 300
	51 M L W 269
	1940 M W N 283
	192 I C 62
436	1940-1 M L J 115
	51 M L W 680
	1940 M W N 608
	190 I C 711
437	1940-1 M L J 424
	51 M L W 333
	1940 M W N 322
	ILR 1940 M 757
439	1940-1 M L J 148
	51 M L W 194
	1940 M W N 595
	190 I C 803
441	51 M L W 144
	1940-1 M L J 254
	1940 M W N 598
	ILR 1940 M 845
444	51 M L W 34
	1940 M W N 557
	190 I C 740
450	1940 M W N 80
	51 M L W 509
451	51 M L W 105
	1940 M W N 68
	186 I C 770
452	1940-1 M L J 121
	51 M L W 99
	186 I C 848
	1940 M W N 487
453	51 M L W 101
	1940-1 M L J 165
	1940 M W N 564
	190 I C 737
455	51 M L W 81
	1940-1 M L J 160
	1940 M W N 498
	ILR 1940 M 745
	191 I C 34
458	51 M L W 262
	1940-1 M L J 204
	1940 M W N 603
461	1940-1 M L J 134
	51 M L W 191
	1940 M W N 602
463	1940-1 M L J 288
	1940 M W N 155
	51 M L W 336
	ILR 1940 M 739
	191 I C 60
465	51 M L W 542
FB	1940-1 M L J 719
	1940 M W N 472
	1940 M Cr C 112
	189 I C 630
	ILR 1940 M 762
	41 Cr L J 769
470	1940-1 M L J 766
FB	51 M L W 592
	1940 M W N 448
	188 I C 603
	ILR 1940 M 872
474	51 M L W 553
FB	1940-1 M L J 732
	1940 M W N 438

AIR	Other Journals
474	188 I C 447
FB	ILR 1940 M 791
478	1940 M W N 412
	51 M L W 606
479	1940-1 M L J 212
	1940 M W N 269
	191 I C 17
483	1940-1 M L J 857
FB	51 M L W 694
	1940 M W N 514
	189 I C 253
	ILR 1940 M 785
485	1940 M W N 329
	1940-1 M L J 860
	52 M L W 295
489	1940 M W N 187
	1940-1 M L J 465
	51 M L W 644
491	1940 M W N 59
	51 M L W 511
	191 I C 57
492	51 M L W 187
	1940-1 M L J 270
	1940 M W N 187
	ILR 1940 M 856
493	51 M L W 185
	1940 M W N 148
	1940-1 M L J 352
	ILR 1940 M 825
	190 I C 753
494	1940-1 M L J 119
	1940 M W N 51
	51 M L W 127
	191 I C 63
495	1940-1 M L J 220
	51 M L W 179
	1940 M W N 152
	ILR 1940 M 684
497	1940 M W N 54
	1940-1 M L J 175
	51 M L W 514
498	51 M L W 239
	1940 M W N 200
	190 I C 858
	1940-2 M L J 1003
504	1940-1 M L J 173
	51 M L W 171
	ILR 1940 M 296
	1940 M W N 597
	191 I C 598
505	1940 M W N 29
	51 M L W 108
	190 I C 748
507	1940 M W N 60
	191 I C 496
509	1940 M W N 239
	51 M L W 321
	1940-1 M L J 428
	1940 M Cr C 79
	188 I C 381
	41 Cr L J 581
510	51 M L W 142
	1940-1 M L J 210
	ILR 1940 M 319
	1940 M W N 601
	191 I C 430
511	1940-1 M L J 60
	51 M L W 113
	1940 M W N 109
	191 I C 383
513	51 M L W 159
	1940-1 M L J 800

AIR	Other Journals
513	1940 M W N 588
	ILR 1940 M 653
	190 I C 868
519	1940-1 M L J 388
	51 M L W 318
	1940 M W N 504
	191 I C 805
521	1940-1 M L J 152
	51 M L W 201
	1940 M W N 607
	190 I C 729
522	51 M L W 267
	1940-1 M L J 337
	1940 M W N 500
523	1940 M W N 190
	51 M L W 851
	1940-1 M L J 791
	191 I C 428
525	51 M L W 357
	1940 M W N 286
	1940-1 M L J 553
527	1940 M W N 38
	51 M L W 155
	190 I C 825
530	1940-1 M L J 195
	51 M L W 648
	1940 M W N 582
	ILR 1940 M 752
	191 I C 369
532	51 M L W 354
	1940 M W N 292
	1940-1 M L J 442
	ILR 1940 M 858
534	51 M L W 148
	1940-1 M L J 292
	1940 M W N 505
	190 I C 715
538	1940-1 M L J 310
	51 M L W 252
	1940 M W N 184
	191 I C 76
540	1940-1 M L J 302
	51 M L W 339
544	1940-1 M L J 363
	51 M L W 315
	1940 M W N 327
	ILR 1940 M 815
545	51 M L W 348
	1940-1 M L J 433
	1940 M W N 302
	ILR 1940 M 734
547	51 M L W 391
	1940-1 M L J 608
558	1940 M W N 342
	51 M L W 662
560	1940-1 M L J 314
	51 M L W 249
	1940 M W N 142
	191 I C 25
562	1940 M W N 358
	51 M L W 535
	1940 M Cr C 90
	191 I C 37
	42 Cr L J 64
564	51 M L W 429
	1940 M W N 365
	1940-1 M L J 647
566	1940-1 M L J 537
	1940 M W N 345
	51 M L W 739
569	1940-1 M L J 711
	51 M L W 600

AIR	Other Journals
569	1940 M W N 462
571	1940 M W N 339
	51 M L W 517
	1940-1 M L J 664
572	1940-1 M L J 533
	51 M L W 433
	1940 M W N 527
573	1940-1 M L J 356
	1940 M W N 323
	51 M L W 687
	ILR 1940 M 636
577	51 M L W 569
	1940 M W N 484
580	1940-1 M L J 469
	51 M L W 374
	1940 M W N 653
	ILR 1940 M 1012
583	1940-1 M L J 599
	1940 M W N 390
	51 M L W 526
	1940 M Cr C 94
584	51 M L W 523
	1940-1 M L J 651
	1940 M W N 427
585	1940-1 M L J 710
	51 M L W 574
	1940 M W N 483
	191 I C 880
586	51 M L W 590
	1940 M W N 538
	1940 M Cr C 139
	190 I C 490
	41 Cr L J 923
587	1940-1 M L J 816
	51 M L W 679
	1940 M W N 480
	1940 M Cr C 121
	190 I C 720
	42 Cr L J 26
588	1940 M W N 254
	1940-1 M L J 558
	51 M L W 747
589	51 M L W 538
	1940-1 M L J 764
	1940 M W N 445
590	51 M L W 575
	1940-1 M L J 715
	1940 M W N 490
592	51 M L W 540
	1940-1 M L J 704
	1940 M W N 442
	192 I C 14
593	1940-8 I T R 249
SB	1940-2 M L J 217
	52 M L W 108
	ILR 1940 M 715
	1940 M W N 1027
598	1940-8 I T R 280
SB	1940-2 M L J 110
	52 M L W 208
	1940 M W N 778
	ILR 1940 M 889
602	1940-8 I T R 307
SB	1940-2 M L J 95
	52 M L W 78
	1940 M W N 852
	ILR 1940 M 985
608	1940-1 M L J 598
	51 M L W 492
	1940 M W N 388
	1940 M Cr C 95
	191 I C 55

AIR	Other Journals
608	42 Cr L J 79
609	1940 M W N 422
	51 M L W 615
	191 I C 891
610	51 M L W 427
	1940-1 M L J 595
	1940 M W N 361
	191 I C 795
611	1940 M W N 304
	1940-1 M L J 574
612	1940-8 I T R 269
SB	1940-2 M L J 160
	1940 M W N 715
	ILR 1940 M 627
	52 M L W 332
	190 I C 388
614	1940-1 M L J 709
	51 M L W 560
	1940 M W N 497
	191 I C 47
615	1940 M W N 69
617	1940 M W N 71
620	1940-1 M L J 690
	1940 M W N 418
	51 M L W 604
621	1940 M W N 252
	51 M L W 639
623	1940 M W N 104
	1940 M Cr C 32
	51 M L W 515
	187 I C 220
	41 Cr L J 454
624	1940 M W N 121
	51 M L W 256
	1940-1 M L J 350
	191 I C 29
625	1940-1 M L J 251
	1940 M W N 183
	51 M L W 384
	ILR 1940 M 852
626	1940 M W N 288
	51 M L W 446
627	1940 M W N 318
	51 M L W 449
	1940-1 M L J 685
628	1940-1 M L J 329
	1940 M W N 297
	51 M L W 683
631	51 M L W 69
	1940 M W N 52
	ILR 1940 M 382
	191 I C 40
633	1940 M W N 235
	51 M L W 381
635	51 M L W 189
	1940-1 M L J 268
	1940 M W N 147
	ILR 1940 M 649
	191 I C 226
636	51 M L W 386
	1940 M W N 144
639	1940 M W N 446
641	1940 M W N 413
	51 M L W 655
646	1940 M W N 256
	1940-1 M L J 740
649	1940 M W N 391
	51 M L W 552
	1940-1 M L J 760
	1940 M Cr C 109
650	1940 M W N 191
653	1940-1 M L J 576

AIR	Other Journals
653	51 M L W 475
	1940 M Cr C 98
	1940 M W N 665
656	1940 M W N 311
	1940-1 M L J 699
660	51 M L W 437
	1940-1 M L J 582
	1940 M W N 423
664	51 M L W 324
	1940 M W N 244
	1940-2 M L J 358
	ILR 1940 M 830
669	1940 M W N 250
	51 M L W 481
	1940-1 M L J 601
671	1940 M W N 122
	51 M L W 213
	1940-1 M L J 561
674	1940-1 M L J 478
	51 M L W 434
	1940 M W N 348
675	1940-1 M L J 334
	51 M L W 363
	1940 M W N 284
677	51 M L W 491
	1940 M W N 392
	1940-1 M L J 689
	1940 M Cr C 106
	190 I C 358
	41 Cr L J 906
678	51 M L W 520
	1940-1 M L J 682
	1940 M W N 443
680	1940-1 M L J 264
	51 M L W 219
	1940 M W N 150
	ILR 1940 M 820
	192 I C 381
681	1940 M W N 890
	51 M L W 516
	1940-1 M L J 655
	1940 M Cr C 107
	190 I C 630
	42 Cr L J 48
682	1940 M W N 385
	1940 M Cr C 102
	190 I C 628
	41 Cr L J 956
683	1940 M W N 305
	1940-1 M L J 668
	51 M L W 635
685	1940 M W N 386
	51 M L W 542
	1940 M Cr C 108
	190 I C 317
	41 Cr L J 897
686	1940 M W N 55
	1940-1 M L J 693
	51 M L W 617
689	1940-1 M L J 590
	51 M L W 471
	1940 M W N 662
691	1940-1 M L J 820
	51 M L W 622
	1940 M W N 927
	ILR 1940 M 913
697	1940 M W N 237
	1940 M Cr C 83
	1940-1 M L J 868
	51 M L W 718
	ILR 1940 M 692
	189 I C 692
	41 Cr L J 785
699	51 M L W 562
	1940 M W N 543
	1940 M Cr C 122
	190 I C 415
	41 Cr L J 909
700	1940 M W N 308
	1940-1 M L J 605
701	1940 M W N 341
	1940-1 M L J 831
	192 I C 47
703	1940-1 M L J 429
	1940 M W N 320
	51 M L W 749
705	1940 M W N 516
707	1940 M W N 511
710	1940 M W N 86
	1940 M Cr C 54
	ILR 1940 M 254
	52 M L W 981
716	51 M L W 697
	1940 M W N 566
	1940-2 M L J 17
719	1940-1 M L J 547
	51 M L W 708
	1940 M W N 669
722	1940-2 M L J 11
	1940 M W N 698
	52 M L W 189
723	1940 M W N 531
	1940 M Cr C 126
	1940-2 M L J 88
	52 M L W 68
	190 I C 734
	42 Cr L J 61
724	1940-1 M L J 932
	51 M L W 612
	1940 M W N 420
725	1940-1 M L J 340
	1940 M W N 657
	52 M L W 226
730	1940-1 M L J 939
	1940 M W N 556
	52 M L W 119
	191 I C 896
731	1940 M W N 111
	51 M L W 181
	1940-1 M L J 437
733	1940 M W N 519
737	1940 M W N 495
739	1940 M W N 14
744	51 M L W 564
	1940-1 M L J 758
	1940 M Cr C 111
	1940 M W N 542
	190 I C 396
	41 Cr L J 917
745	1940 M W N 479
	1940 M Cr C 130
	1940-2 M L J 92
	52 M L W 224
	190 I C 360
	41 Cr L J 900
746	1940 M W N 387
	1940 M Cr C 97
747	1939 M W N 1254
	1940 M Cr C 15
	1940-1 M L J 571
	41 Cr L J 807
	189 I C 827
748	1940-1 M L J 912
	1940 M W N 528
749	1940 M W N 259
754	1940-1 M L J 813
	51 M L W 633
	1940 M W N 489
755	1940 M Cr C 125
	1940 M W N 531
	52 M L W 66
	191 I C 240
	42 Cr L J 16
756	1940-1 M L J 882
	51 M L W 727
	1940 M W N 575
	ILR 1940 M 901
760	1940 M W N 384
	51 M L W 534
	1940 M Cr C 105
	190 I C 896
	42 Cr L J 39
761	1940 M W N 509
	1940-2 M L J 30
763	1940 M W N 459
765	1940-1 M L J 811
	51 M L W 631
	1940 M W N 488
766	1940-1 M L J 936
	1940 M W N 555
	52 M L W 69
	191 I C 462
768	52 M L W 159
FB	1940 M W N 787
	1940-2 M L J 257
	1940-8 I T R 450
	ILR 1940 M 969
776	1940 M W N 551
	1940-2 M L J 27
	52 M L W 120
	191 I C 719
777	1940-1 M L J 877
	1940 M W N 525
	51 M L W 758
779	1940 M W N 76
783	1940 M W N 573
	1940-2 M L J 13
	52 M L W 205
	191 I C 631
785	1940-1 M L J 913
	1940 M W N 569
	52 M L W 71
789	51 M L W 608
	1940-1 M L J 872
	1940 M W N 481
	ILR 1940 M 808
791	1940-2 M L J 283
	1940 M W N 837
	52 M L W 303
793	52 M L W 173
	1940 M W N 770
	1940-2 M L J 235
	ILR 1940 M 943
794	1940-2 M L J 273
	52 M L W 289
	1940 M W N 884
	ILR 1940 M 864
796	1940-2 M L J 232
	52 M L W 204
	192 I C 378
	1940 M W N 800
797	1940-2 M L J 187
	1940 M W N 754
	52 M L W 249
798	1940-2 M L J 190
FB	52 M L W 149
	1940 M W N 747
	ILR 1940 M 953
804	52 M L W 179
FB	1940 M W N 842
	1940-2 M L J 298
807	1940-2 M L J 185
	1940 M W N 753
	52 M L W 245
808	1940-2 M L J 291
	1940 M W N 831
	52 M L W 301
810	1940 M W N 717
	1940-2 M L J 433
	52 M L W 463
811	1940-1 M L J 891
	51 M L W 735
	1940 M W N 579
813	1940 M W N 534
	1940 M Cr C 123
	42 Cr L J 99
	191 I C 51
814	1940 M W N 105
816	1940 M W N 529
	1940 M Cr C 135
	52 M L W 64
	190 I C 526
	41 Cr L J 938
817	1940 M W N 720
	1940-2 M L J 311
	52 M L W 336
819	1940 M W N 493
	52 M L W 553
821	1940-2 M L J 176
	52 M L W 146
	1940 M W N 817
822	1940 M W N 535
	1940 M Cr C 133
	190 I C 647
	42 Cr L J 28
823	1940-2 M L J 5
	1940 M W N 695
	52 M L W 185
	191 I C 410
825	1940 M W N 760
	1940-2 M L J 234
	52 M L W 244
	191 I C 359
826	1940-2 M L J 23
	1940 M W N 699
	52 M L W 191
828	1940-2 M L J 179
	52 M L W 141
	1940 M W N 774
	191 I C 755
831	52 M L W 131
	1940-2 M L J 241
	1940 M W N 782
	ILR 1940 M 929
836	1940-2 M L J 174
	52 M L W 140
	1940 M W N 722
837	52 M L W 89
	1940-2 M L J 621
	1940 M W N 1205
849	1940 M W N 721
	1940-2 M L J 216
	52 M L W 335
850	1940-2 M L J 47
	1940 M W N 723
	52 M L W 214
873	1940 M W N 553
874	1940-2 M L J 384
	52 M L W 360
	1940 M W N 886
876	1940-2 M L J 349

A. I. R. 1940 Madras = Other Journals *(Concld.)*

AIR	Other Journals	
876	52 M L W	357
	1940 M W N	876
878	1940-2 M L J	278
	52 M L W	247
	1940 M W N	841
879	1940-2 M L J	328
	52 M L W	282
	1940 M W N	892
	191 I C	600
881	1940 M W N	826
	1940-2 M L J	305
882	1940-2 M L J	309
	52 M L W	342
	1940 M W N	796
	192 I C	103
884	1940-2 M L J	346
	52 M L W	351
	1940 M W N	896
885	52 M L W	292
	1940 M W N	912
	1940-2 M L J	342
887	1940-2 M L J	334
	1940 M W N	882
	192 I C	350
888	1940 2 M L J	345
	52 M L W	369
	1940 M W N	864
	191 I C	728
889	1940-2 M L J	324
	52 M L W	381
	1940 M W N	888
	192 I C	315
890	1940-2 M L J	170
	52 M L W	240
	1940 M W N	849
	1940-3 F L J H C	134
892	1940 M W N	805
	52 M L W	345
	1940 M Cr C	278
	191 I C	761
893	1940 M W N	547
897	1940 M W N	797
	1940-2 M L J	319
	52 M L W	339
898	1940 M W N	803
	1940-2 M L J	315
	52 M L W	349
	1940 M Cr C	166
	190 I C	573
	41 Cr L J	950
899	1940-2 M L J	333
	52 M L W	367
	1940 M W N	862
	191 I C	733
900	1940-2 M L J	254
	1940 M W N	799
	52 M L W	328
	1940 M Cr C	176
901	1940 M W N	832
	1940-2 M L J	353
	52 M L W	371
902	1940 M W N	771
	1940-2 M L J	330
	52 M L W	308
903	1940 M W N	772
	1940-2 M L J	281
	52 M L W	324
904	1940 M W N	801
	1940-2 M L J	355
	52 M L W	346
	1940 M Cr C	184
	191 I C	53
	42 Cr L J	67
905	1940 M W N	808
	1940-2 M L J	356
	52 M L W	373
906	1940-2 M L J	276
	1940 M W N	846
	52 M L W	330
	191 I C	738
907	1940 M W N	828
	1940-2 M L J	317
	191 I C	744
908	52 M L W	221
	1940-2 M L J	251
	1940 M W N	777
909	1940-2 M L J	238
	52 M L W	306
	1940 M W N	881
	191 I C	557
910	52 M L W	176
	1940 2 M L J	202
	1940 M W N	809
	ILR 1940 M	1023
911	1940 2 M L J	287
	52 M L W	326
	192 I C	355
	1940 M W N	863
913	1940 M W N	758
	52 M L W	254
	1940-2 M L J	611
915	1940-2 M L J	461
	1940 M W N	946
	192 I C	336
	52 M L W	494
916	1940 M W N	718
	1940-2 M L J	422
917	1940 2 M L J	322
	52 M L W	366
	192 I C	409
	1940 M W N	860
918	1940 M W N	829
	1940 2 M L J	337
919	1940-2 M L J	467
	52 M L W	420
	1940 M W N	997
920	1940 M W N	907
	1940-2 M L J	409
923	1940 M W N	847
925	1940-2 M L J	476
	52 M L W	403
	1940 M W N	945
926	1940-2 M L J	481
	1940 M W N	988
	52 M L W	537
928	52 M L W	417
	1940-2 M L J	488
	1940 M W N	1004
929	1940-2 M L J	456
	52 M L W	465
	1940 M W N	978
932	1940-2 M L J	388
	1940 M W N	933
	52 M L W	454
934	1940 M W N	901
	1940-2 M L J	427
	52 M L W	533
937	1940-2 M L J	478
	52 M L W	432
	1940 M W N	993
938	1940 M W N	804
	1940 M Cr C	178
	190 I C	624
	42 Cr L J	31
939	1940-2 M L J	712
	52 M L W	639
	1940 M W N	1126
940	1940-2 M L J	758
	52 M L W	674
	1940 M W N	1138
941	1940-2 M L J	516
	52 M L W	480
	1940 M W N	1006
	192 I C	100
942	1940 2 M L J	834
SB	1940-8 I T R	545
	1940 M W N	1221
	52 M L W	805
943	1940-2 M L J	575
	52 M L W	518
943	1940M W N	1037
	191 I C	846
944	1940-2 M L J	749
	52 M L W	680
	1940 M W N	1148
	192 I C	107
945	1940 M W N	805
	52 M L W	345
	1940 M Cr C	183
	190 I C	640
	42 Cr L J	55
946	1940-2 M L J	760
	52 M L W	688
	1940 M W N	1144
949	1940-2 M L J	554
	52 M L W	549
	1940 M W N	1015
	191 I C	816
950	51 M L W	566
	1940-1 M L J	779
	1940 M W N	470
951	1940-2 M L J	239
	52 M L W	307
	1940 M W N	883
	191 I C	670
952	1940-2 M L J	381
	52 M L W	383
	1940 M W N	914
	191 I C	832
953	1940 M W N	532
	52 M L W	118
	1940 M Cr C	137
	191 I C	84
	42 Cr L J	119
954	1940-2 M L J	369
	1940 M W N	893
	52 M L W	399
	191 I C	853
955	1940 M W N	904
	1940-2 M L J	406
	52 M L W	397
956	1940-2 M L J	469
	52 M L W	437
	1940 M W N	956
957	1940-2 M L J	499
	52 M L W	462
	1940 M W N	994
958	1940-2 M L J	495
	52 M L W	474
	1940 M W N	990
	191 I C	687
959	1940-2 M L J	473
	52 M L W	413
	1940 M W N	947

Other Journals = All India Reporter

I. L. R. 1940 Madras = All India Reporter

ILR	A I R		
1	1939	PC	244
17	„	M	772
23	„	„	792
27	1940	„	106
40	1939	„	886
45	„	„	817
50	„	„	877
60	„	„	841
73	„	„	894
79	1940	„	89
81	1939	„	906
84	„	„	917
87	1939	M	963
98	„	„	849
109	„	„	862
123	„	„	867
149	„	„	929
158	1940	„	196
172	„	PC	17
178	„	M	866
188	„	„	295
191	„	„	30
195	„	„	49
204	1939	„	940
211	1939	M	922
223	1940	„	210
233	1939	„	909
239	1940	„	231
245	„	„	91
251	„	„	9
254	„	„	710
259	„	„	113
296	„	„	504
300	1939	„	920
306	1940	„	140
319	„	„	510
322	1939	M	911
329	1940	„	161
335	„	„	23
349	„	„	127
358	„	„	33
372	„	„	124
382	„	„	631
388	„	„	10
394	1939	„	897
405	1940	„	217
420	„	„	82
428	„	„	138
433	1940	M	370
441	„	„	375
454	„	„	356
487	„	„	379
501	„	„	187
514	„	„	372
526	„	„	385
599	„	PC	105
618	„	M	433
627	“	„	612
636	„	„	573

I. L. R. 1940 Madras = All India Reporter *(Concld.)*

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
646	1940	M	383	734	1940	M	545	815	1940	M	544	864	1940	M	794	947	1941	M	56
649	,,	,,	635	739	,,	,,	463	820	,,	,,	680	869	1941	,,	61	953	1940	,,	798
653	,,	,,	513	745	,,	,,	455	825	,,	,,	493	872	1940	,,	470	969	,,	,,	768
671	,,	,,	167	752	,,	,,	530	830	,,	,,	664	889	,,	,,	598	985	,,	,,	602
684	,,	,,	495	757	,,	,,	437	845	,,	,,	441	901	,,	,,	756	1008	1941	,,	182
688	,,	,,	421	762	,,	,,	465	852	,,	,,	625	913	,,	,,	691	1012	1940	,,	580
692	,,	,,	697	785	,,	,,	483	856	,,	,,	492	929	,,	,,	831	1023	,,	,,	910
699	,,	,,	427	791	,,	,,	474	858	,,	,,	532	943	,,	,,	793	1028	1941	,,	316
715	,,	,,	593	808	,,	,,	789												

(1940) 1 Madras Law Journal = All India Reporter

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1940	PC	7	200	1940	M	410	367	1940	M	420	598	1940	M	608	749	1940	M	145
11	,,	M	23	204	,,	,,	458	369	,,	,,	422	599	,,	,,	583	758	,,	,,	744
20	,,	,,	185	210	,,	,,	510	371	,,	PC	24	600	,,	,,	432	760	,,	,,	649
24	,,	PC	17	212	,,	,,	479	388	,,	M	519	601	,,	,,	669	761	,,	,,	271
28	,,	M	10	220	,,	,,	495	391	,,	,,	379	605	,,	,,	700	764	,,	,,	589
32	,,	,,	113	225	,,	,,	419	400	,,	,,	356	608	,,	,,	547	766	,,	,,	470
54	,,	,,	124	228	,,	,,	375	422	,,	,,	418	629	,,	,,	427	775	,,	,,	298
60	,,	,,	511	235	,,	,,	127	424	,,	,,	437	639	,,	,,	433	779	,,	,,	950
64	,,	PC	16	240	,,	,,	412	428	,,	,,	509	647	,,	,,	564	782	,,	,,	77
68	,,	,,	60	248	,,	,,	426	429	,,	,,	703	651	,,	,,	584	786	,,	,,	228
75	,,	,,	1	251	,,	,,	625	433	,,	,,	545	655a	,,	,,	681	791	,,	,,	523
79	,,	M	187	254	,,	,,	441	437	,,	,,	731	655b	1939	,,	922	795	,,	PC	30
97	,,	PC	11	259	,,	,,	370	442	,,	,,	532					800	,,	M	513
107	,,	M	179	264	,,	,,	680	446	,,	PC	38	664	1940	,,	571	811	,,	,,	765
115	,,	,,	436	268	,,	,,	635	460	,,	M	82	668	,,	,,	683	813	,,	,,	754
119	,,	,,	494	270	,,	,,	492	465	,,	,,	489	673	,,	,,	91	816	,,	,,	587
121	,,	,,	452	273	,,	,,	153	469	,,	,,	580	676	,,	,,	49	820	,,	,,	691
124	,,	,,	196	278	,,	PC	19	478b	,,	,,	674	682	,,	,,	678	831	,,	,,	701
134	,,	,,	461	288	,,	M	463	482	,,	,,	385	685	,,	,,	627	834	,,	PC	45
137	,,	PC	36	292	,,	,,	534	533	,,	,,	572	689	,,	,,	677	857	,,	M	483
143	,,	M	59	300	,,	,,	435	534	,,	,,	421	690	,,	,,	620	860	,,	,,	485
148	,,	,,	439	302	,,	,,	540	537	,,	,,	566	693	,,	,,	686	868	,,	,,	697
152	,,	,,	521	310	,,	,,	538	543	,,	,,	416	699	,,	,,	656	872	,,	,,	789
155	,,	,,	423	314	,,	,,	560	547	,,	,,	719	704	,,	,,	592	877	,,	,,	777
160	,,	,,	455	317	,,	,,	417	553	,,	,,	525	706	,,	PC	54	882	,,	,,	756
165	,,	,,	453	319	,,	,,	366	558	,,	,,	588	708	1941	M	365	891	,,	,,	811
169	,,	,,	221	329	,,	,,	628	561	,,	,,	671	709	1940	,,	614	895	,,	PC	63
171	,,	,,	292	334	,,	,,	675	568	,,	,,	206	710	,,	,,	585	912	,,	M	748
173	,,	,,	504	337	,,	,,	522	571	,,	,,	747	711	,,	,,	569	913	,,	,,	785
175	,,	,,	497	340	,,	,,	725	574	,,	,,	611	715	,,	,,	590	922	,,	,,	140
177	,,	,,	160	350	,,	,,	624	576	,,	,,	653	719	,,	,,	465	932	,,	,,	724
180	,,	PC	33	352	,,	,,	493	582	,,	,,	660	732	,,	,,	474	935	1941	,,	312
188	,,	M	210	356	,,	,,	578	590	,,	,,	689	740	,,	,,	646	936	1940	,,	766
195	,,	,,	530	363	,,	,,	544	595	,,	,,	610	747	1939	,,	780	939	,,	,,	730

(1940) 1 Madras Law Journal (Sup.) = All India Reporter

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1940	FC	10	14	1940	FC	20	21	1940	FC	19	23	1940	FC	7	28	1940	FC	25

(1940) 2 Madras Law Journal = All India Reporter

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1941	M	24	140	1940	PC	105	238	1940	M	909	309	1940	M	882	346	1940	M	884
5	1940	,,	823	151	,,	,,	86	239	,,	,,	951	311	,,	,,	817	349	,,	,,	876
11	,,	,,	722	160	,,	M	612	241	,,	,,	831	315	,,	,,	898	353	,,	,,	901
13	,,	,,	783	170	,,	,,	890	251	,,	,,	908	317	,,	,,	907	355	,,	,,	904
17	,,	,,	716	174	,,	,,	836	254	,,	,,	900	319	,,	,,	897	356	,,	,,	905
23	,,	,,	826	176	,,	,,	821	257	,,	,,	768					358	,,	,,	664
27	,,	,,	776	179	,,	,,	828	273	,,	,,	794	322	,,	,,	917	369	,,	,,	954
30	,,	,,	761	185	,,	,,	807	276	,,	,,	906	324	,,	,,	889				
35	,,	,,	136	187	,,	,,	797	278	,,	,,	878	326	1941	,,	110	371	1941	,,	40
39	,,	,,	372	190	,,	,,	798	281	,,	,,	903	328	1940	,,	879	374	,,	,,	17
47	,,	,,	850	202	,,	,,	910	283	,,	,,	791	330	,,	,,	902	376	,,	,,	245
88	,,	,,	723	205	,,	PC	82	287	,,	,,	911	333	,,	,,	899	379	,,	,,	100
89	,,	,,	138	216	,,	M	849	290	1941	,,	21	334	,,	,,	887	381	1940	,,	952
92	,,	,,	745	217	,,	,,	593	291	1940	,,	808	337	,,	,,	918	384	,,	,,	874
95	,,	,,	602	232	,,	,,	796	293	1941	,,	56	340	1941	,,	37	388	,,	,,	932
110	,,	,,	598	234	,,	,,	825	298	1940	,,	804	342	1940	,,	885	393	1941	,,	123
126	,,	PC	75	235	,,	,,	798	305	,,	,,	881	345	,,	,,	888	398	,,	,,	46

(1940) 2 Madras Law Journal = All India Reporter *(Concld.)*

MLJ	A I R			MLJ	A I R			MLJ	A I R			MLJ	A I R			MLJ	A I R		
402	1941	M	77	501	1941	M	127	615	1941	M	79	769	1940	PC	70	887	1941	M	158
406	1940	,,	955	502	,,	,,	30	621	1940	,,	837	780	1941	M	272	891	,,	,,	147
409	,,	,,	920	503	,,	,,	276	645	1941	,,	227	782	,,	,,	207	895	,,	,,	120
416	1941	,,	76	505	1940	PC	134	648	,,	,,	107	786	,,	,,	202	897	,,	,,	185
417	,,	,,	74	510	1941	M	39	651	,,	,,	59	788	,,	,,	196	903	1940	PC	116
418	,,	,,	61	513	,,	,,	113	654	,,	,,	67	791	,,	,,	182	918	1941	M	364
420	,,	,,	45	516	1940	,,	941	655	,,	,,	91	793	,,	,,	31	920	,,	,,	128
422	1940	,,	916	517	1941	,,	58	664	,,	,,	321	803	,,	,,	188	923	,,	,,	350
425	,,	,,	383	520	,,	,,	129	668	,,	,,	97	811	1940	PC	176	927	,,	,,	231
427	,,	,,	934	547	,,	,,	226	672	,,	,,	285	817	1941	M	289	934	,,	,,	305
433	,,	,,	810	551	,,	,,	27	677	1940	PC	173	819	,,	,,	99	935	,,	,,	201
436	,,	,,	167	553	,,	,,	74	685	1941	M	62	820	,,	,,	303	937	,,	,,	353
446	1941	,,	42	554	1940	,,	949	688	,,	,,	270	825	,,	,,	116	940	,,	,,	362
451	,,	,,	44	555	1941	,,	99	694	,,	,,	64	827	,,	,,	119	943	,,	,,	205
452	1940	PC	114	556	,,	,,	26	697	,,	,,	18	830	,,	,,	363	946	,,	,,	313
456	,,	M	929	559	,,	,,	48	700	,,	,,	103	831	,,	,,	151	952	1940	PC	167
461	,,	,,	915	562	,,	,,	51	707	,,	,,	52	834	1940	,,	942	963	1941	M	154
466	1941	,,	100	564	,,	,,	38	709	,,	,,	73	837	1941	,,	60	972	,,	,,	28
467	1940	,,	919	566	,,	,,	256	711	,,	,,	244	838	,,	,,	118	977	,,	,,	114
468a	1941	,,	73	570	,,	,,	49	712	1940	,,	939	841	,,	,,	152	979	,,	,,	183
469	1940	,,	956	572	,,	,,	55	715	1941	,,	101	844	,,	,,	125	984	,,	,,	36
473	,,	,,	959	575	1940	,,	943	721	,,	,,	354	846	,,	,,	274	990	,,	,,	81
476	,,	,,	925	577	,,	PC	124	726	,,	,,	6	851	1940	PC	183	1003	1940	,,	498
478	,,	,,	937	584	1941	M	72	747	,,	,,	23	858	1941	M	287	1016	1941	,,	181
481	,,	,,	926	587	,,	,,	111	748	,,	,,	250	860	,,	,,	262	1018	,,	,,	280
484	1941	,,	66	590	,,	,,	22	749	1940	,,	944	867	,,	,,	115	1021	1940	,,	217
488	1940	,,	928	594	,,	,,	53	753	1941	,,	198	870	,,	,,	288	1031	1941	,,	63
492	1941	,,	50	597	,,	,,	19	756	,,	,,	87	872	,,	,,	204	1032	,,	,,	259
494	,,	,,	96	603	,,	,,	186	758	1940	,,	940	874	,,	,,	193	1038	,,	,,	208
495	1940	,,	958	606	,,	,,	84	760	,,	,,	946	877	,,	,,	315	1055	,,	,,	277
498	1941	,,	112	611	1940	,,	913	767	1941	,,	258	881	,,	,,	126	1063	,,	,,	323
499	1940	,,	957									883	,,	,,	200				

51 Madras Law Weekly = All India Reporter

MLW	A I R			MLW	A I R			MLW	A I R			MLW	A I R			MLW	A I R		
1	1940	PC	1	185	1940	M	493	348	1940	M	545	511	1940	M	491	617	1940	M	686
4	,,	,,	7	187	,,	,,	492	351	,,	,,	523	514	,,	,,	497	622	,,	,,	691
11	,,	M	113	189	,,	,,	635	354	,,	,,	532	515	,,	,,	623	631	,,	,,	765
30	,,	,,	423	191	,,	,,	461	357	,,	,,	525	516	,,	,,	681	633	,,	,,	754
34	,,	,,	444	194	,,	,,	439	362	,,	,,	416	517	,,	,,	571	635	,,	,,	683
44	,,	PC	30	197	,,	,,	370	363	,,	,,	675	520	,,	,,	678	639	,,	,,	621
49	,,	,,	24	201	,,	,,	521	366	,,	,,	379	523	,,	,,	584	644b	,,	,,	489
61	,,	,,	36	203	,,	,,	221	374	,,	,,	580	526	,,	,,	583	648	,,	,,	530
65	,,	M	196	204	,,	,,	292	381	,,	,,	633	527	,,	,,	427	654	1941	,,	365
69	,,	,,	631	206	,,	,,	372	384	,,	,,	625	532	,,	,,	297	655	1940	,,	641
73	,,	,,	187	213	,,	,,	671	386	,,	,,	636	534	,,	,,	760	662	,,	,,	558
81	,,	,,	455	219	,,	,,	680	391	,,	,,	547	535	,,	,,	562	666	1941	,,	217
86	,,	PC	19	222	,,	,,	366	407	,,	PC	54	538	,,	,,	589	679	1940	,,	587
93	,,	,,	16	228	,,	,,	383	408	,,	M	356	540	,,	,,	592	680	,,	,,	436
96	,,	,,	17	231	,,	,,	375	427	,,	,,	610	542a	,,	,,	685	683	,,	,,	628
99	,,	M	452	237	,,	,,	419	429	,,	,,	564	542b	,,	,,	465	687	,,	,,	573
101	,,	,,	453	239	,,	,,	498	433	,,	,,	572	552	,,	,,	649	694	,,	,,	483
105	,,	,,	451	249	,,	,,	560	434b	,,	,,	674	553	,,	,,	474	697	,,	,,	716
107	,,	,,	139	252	,,	,,	538	437	,,	,,	660	560	,,	,,	614	702	,,	PC	60
108	,,	,,	505	256	,,	,,	624	444	,,	,,	421	562	,,	,,	699	708	,,	M	719
111	,,	,,	101	258	,,	,,	410	446	,,	,,	626	564	,,	,,	744	713	,,	PC	90
113	,,	,,	511	262	,,	,,	458	447	,,	,,	417	566	,,	,,	950	718	,,	M	697
116	,,	PC	38	267	,,	,,	522	449	,,	,,	627	569	,,	,,	577	721	,,	PC	98
127	,,	M	494	269	,,	,,	435	452	,,	,,	432	574	,,	,,	585	727	,,	M	756
129	,,	PC	33	270	,,	,,	385	453	1941	,,	6	575	,,	,,	590	735	,,	,,	811
135	,,	,,	3	315	,,	,,	544	471	1940	,,	689	578	,,	PC	63	739	,,	,,	566
142	,,	M	510	318	,,	,,	519	475	,,	,,	653	590	,,	M	586	743	1939	,,	780
144	,,	,,	441	321	,,	,,	509	481	,,	,,	669	592	,,	,,	470	744	1940	,,	271
148	,,	,,	534	322	,,	,,	422	484	,,	,,	298	600	,,	,,	569	747	,,	,,	588
155	,,	,,	527	324	,,	,,	664	487	,,	,,	433	604	,,	,,	620	749	,,	,,	703
159	,,	,,	513	333	,,	,,	437	491	,,	,,	677	606	,,	,,	478	752	1941	,,	42
171	,,	,,	504	336	,,	,,	463	492	,,	,,	608	608	,,	,,	789	756	1940	,,	418
173	,,	,,	127	339	,,	,,	540	493	,,	PC	45	612	,,	,,	724	758	,,	,,	777
179	,,	,,	495	346	,,	,,	420	509	,,	M	450	615	,,	,,	609				
181	,,	,,	731																

62 Madras Law Weekly = All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1940	PC	105	277	1941	M	40	403	1940	M	925	549a	1940	M	949	773	1941	M	363
10	"	"	55	279	"	"	245	406	"	PC	158	549b	1941	"	27	774	"	"	296
17	"	"	70	282	1940	"	879	409	"	"	181	551	"	"	111	777	1940	PC	204
25	"	"	86	284	1941	"	316	413	"	M	959	553	1940	"	819	788	1941	M	288
32	"	"	75	289	1940	"	794	415	1941	"	30	556	1941	"	129	790	"	"	324
43	"	"	101	292	"	"	885	417	1940	"	928	579	"	"	67	793	"	"	188
50	"	"	82	295	"	"	485	420a	"	"	919	580	"	"	107	800	1940	PC	222
57	"	"	93	301	"	"	808	420b	1941	"	238	582	"	"	59	805	"	M	942
64	"	M	816	303	"	"	791	430	"	"	73	585	1940	PC	183	807	1941	"	125
66a	1941	"	65	306	"	"	909	431a	"	"	100	591	"	"	151	809	"	"	114
66b	1940	"	755	307	"	"	951	432	1940	"	937	595	1941	M	321	810	"	"	262
68	"	"	723	308	"	"	902	436	1941	"	127	598	"	"	103	816	"	"	315
69	"	"	766	310	"	PC	114	437	1940	"	956	604	"	"	285	819	"	"	158
71	"	"	785	313	"	"	160	440	1941	"	179	607	"	"	62	822	"	"	147
78	"	"	602	324	"	M	903	446	"	"	39	610	"	"	91	825	"	"	128
89	"	"	837	326	"	"	911	448	1940	PC	147	617	"	"	186	828	"	"	364
108	"	"	593	328	"	"	900	454	"	M	932	620	"	"	99	830	"	"	193
118	"	"	953	330	"	"	906	458	1941	"	123	621	"	"	19	832	"	"	200
119	"	"	730	332	"	"	612	462	1940	"	957	625	"	"	270	835	"	"	305
120	"	"	776	335	"	"	849	463	"	"	810	629	"	"	97	836	"	"	205
122	"	FC	25	336	"	"	817	465	"	"	929	633	"	"	250	839	"	"	350
124	"	"	19	339	"	"	897	470	1941	"	112	634	"	"	258	842	"	"	204
127	"	"	7	342	"	"	882	471	"	"	276	635	"	"	18	844	"	"	126
131	"	M	831	345a	"	"	892	472	"	"	50	638	"	"	52	846	"	"	362
140	"	"	836	345b	"	"	945	474	1940	"	958	639	1940	"	939	849	"	"	201
141	"	"	828	346a	"	"	904	476	1941	"	51	646	1941	"	73	851	"	"	45
146	"	"	821	346b	1941	"	41	479b	"	"	99	647	1940	PC	167	853	"	"	120
149	"	"	798	347	"	"	71	480	1940	"	941	657	1941	M	151	857	"	"	231
159	"	"	768	349	1940	"	898	481	1941	"	113	660	"	"	198	862	"	"	208
173	"	"	793	351	"	"	884	484a	"	"	74	662	1940	PC	176	876	"	"	36
176	"	"	910	354	1941	"	77	484b	"	"	226	669	"	"	145	881	"	"	194
179	"	"	804	357	1940	"	876	487	"	"	55	673	1941	M	87	884	"	"	280
185	"	"	823	360	"	"	874	488	"	"	256	674	1940	"	940	887	"	"	353
189	"	"	722	364a	1941	"	23	492b	"	"	61	676	1941	"	196	889	"	"	185
191	"	"	826	364b	"	"	110	494	1940	"	915	678	"	"	202	892	"	"	181
195	1941	"	24	366	1940	"	917	495	1941	"	101	680	1940	"	944	893	"	"	320
198	"	"	88	367	"	"	899	500	"	"	58	683	"	"	946	894	"	"	183
204	1940	"	796	369	"	"	888	502	"	"	53	689	1941	"	326	898	"	"	306
205	"	"	783	370	1941	"	71	505	"	"	72	710	"	"	1	903	"	"	313
208	"	"	598	371	1940	"	901	508	"	"	96	719	"	"	207	906	"	"	28
214	"	"	850	373	"	"	905	509	"	"	227	721	"	"	182	910	"	"	259
221	"	"	908	375	1941	"	17	512	"	"	48	724	"	"	154	919	"	"	81
224	"	"	745	377	"	"	75	514	"	"	49	731	"	"	289	924	"	"	225
226	"	"	725	380	"	"	100	516	"	"	38	733	"	"	119	926	1940	PC	230
234	"	PC	124	381	1940	"	889	518	1940	"	943	735	"	"	116	935	1941	M	67
240	"	M	890	383	"	"	952	519	1941	"	26	737	"	"	303	942	"	"	359
244	"	"	825	385	1941	"	76	521	"	"	244	741	"	"	354	947	"	"	63
245	"	"	807	386	"	"	74	522	"	"	84	745	"	"	31	948	"	"	352
247	"	"	878	387	"	"	37	527	"	"	22	753	"	"	272	949	"	"	358
249	"	"	797	388	1940	PC	132	530	"	"	64	755	1940	PC	202	951	"	"	282
251	1941	"	108	391	1941	M	44	533	1940	"	934	757	"	"	211	955	"	"	277
254	1940	"	913	393	1940	PC	134	537	"	"	926	764	1941	M	60	962	"	"	287
258	1941	"	267	397	"	M	955	540	"	PC	173	765	"	"	152	963	"	"	356
262	"	"	56	399	"	"	954	546	1941	M	66	768	"	"	274	966	1940	PC	192
266	1940	PC	116	401	1941	"	197					772	"	"	118	976	1941	M	149
																981	1940	"	710

1940 Madras Weekly Notes = All India Reporter

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1940	PC	1	52	1940	M	631	81	1940	M	196	122	1940	M	671	161	1940	M	370
3	"	"	7	54	"	"	497	86	"	"	710	126	"	"	113	163	1941	"	290
7	"	FC	1	55	"	"	686	93	"	"	372	137	"	PC	30	172a	1940	"	224
9	"	M	33	59	"	"	491	97	1941	"	339	140	"	M	423	172b	"	PC	24
14	"	"	739	60	"	"	507	104	1940	"	623	142	"	"	560	180	"	FC	4
19	1941	"	345	62	"	"	185	105	"	"	814	144	"	"	636	181	"	M	127
24	1940	"	62	64	"	"	131	107	"	PC	17	147	"	"	635	183	"	"	625
29	"	"	505	68	"	"	451	109	"	M	511	148	"	"	493	184	"	"	538
31	"	"	167	69	"	"	615	111	"	"	731	150	"	"	680	187a	"	"	492
35	1941	"	42	71	"	"	617	114	"	PC	16	152	"	"	495	187b	"	"	489
38	1940	"	527	74	"	"	269	115	"	"	86	155	"	"	463	190	"	"	523
41	"	"	187	76	"	"	779	118	"	M	124	157	"	"	375	191	"	"	650
51	"	"	494	80	"	"	450	121	"	"	624								

1940 Madras Weekly Notes = All India Reporter *(Contd.)*

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
195	1940	M	47	404	1941	M	217	588	1940	M	513	826	1940	M	881	963	1941	M	326
197	,,	,,	201	412	1940	,,	478	595	,,	,,	439	828	,,	,,	907	976	,,	,,	72
200	,,	,,	498	413	,,	,,	641	597	,,	,,	504	829	,,	,,	918	978	1940	,,	929
207	,,	,,	385	418	,,	,,	620	598	,,	,,	441	831	,,	,,	808	981	1941	,,	39
235	,,	,,	633	420	,,	,,	724	601	,,	,,	510	832	,,	,,	901	982	,,	,,	96
237	,,	,,	697	422	,,	,,	609	602	,,	,,	461	833	1941	,,	17	983	,,	,,	179
239	,,	,,	509	423	,,	,,	660	603	,,	,,	458	834	,,	,,	123	988	1940	,,	926
242	,,	,,	298	427	,,	,,	584	607	,,	,,	521	837	1940	,,	791	990	,,	,,	958
244b	,,	,,	664	429	,,	,,	412	608	,,	,,	436	839	1941	,,	56	991	1941	,,	112
250	,,	,,	669	433	,,	,,	91	610	,,	PC	105	841	1940	,,	878	992	,,	,,	276
252	,,	,,	621	438	,,	,,	474	616	,,	,,	86	842	,,	,,	804	993	1940	,,	937
254	,,	,,	588	442	,,	,,	592	620	,,	,,	63	846	,,	,,	906	994	,,	,,	957
256	,,	,,	646	443	,,	,,	678	627	,,	,,	101	847	,,	,,	923	995	,,	PC	158
259	,,	,,	749	445	,,	,,	589	632	1939	M	830	849	,,	,,	890	997	,,	M	919
265	,,	,,	419	446	,,	,,	639	642	1940	,,	241	852	,,	,,	602	998	,,	PC	134
266	,,	,,	410	448	,,	,,	470	648	,,	,,	145	859	1941	,,	23	1000	,,	,,	132
268	,,	,,	383	453	,,	,,	217	653	,,	,,	580	860	1940	,,	917	1002	1941	M	66
269	,,	,,	479	459	,,	,,	763	657	,,	,,	725	861	1941	,,	45	1004	1940	,,	928
273	,,	,,	366	462	,,	,,	569	662	,,	,,	689	862	1940	,,	899	1005	1941	,,	51
277	,,	,,	416	464	,,	FC	26	665	,,	,,	653	863	,,	,,	911	1006	1940	,,	941
278	,,	PC	19	470	,,	M	950	669	,,	,,	719	864	,,	,,	888	1007	1941	,,	58
283	,,	M	435	472a	1941	,,	365	672	,,	PC	70	869	1941	,,	41	1009	,,	,,	226
284	,,	,,	675	472b	1940	,,	465	677	,,	,,	55	873	,,	,,	71	1010	,,	,,	113
286	,,	,,	525	479	,,	,,	745	682	,,	FC	7	874	,,	,,	71	1011	,,	,,	22
288	,,	,,	626	480	,,	,,	587	685	,,	,,	25	876	1940	,,	876	1013	,,	,,	186
289	,,	,,	420	481	,,	,,	789	686	,,	,,	10	878	1941	,,	227	1015	1940	,,	949
290a	,,	,,	418	483	,,	,,	585	695	,,	M	823	879	,,	,,	266	1016	1941	,,	79
290b	,,	,,	426	484	,,	,,	577	698	,,	,,	722	881	1940	,,	909	1018	1940	PC	160
292	,,	,,	532	487	,,	,,	452	699	,,	,,	826	882	,,	,,	887	1026	1941	M	49
294	,,	,,	206	488	,,	,,	765	702	,,	PC	60	883	,,	,,	951	1027	1940	,,	593
297	,,	,,	628	489	,,	,,	754	706	,,	,,	75	884	,,	,,	794	1034	1941	,,	256
300	,,	,,	422	490	,,	,,	590	713	,,	,,	114	886	,,	,,	874	1036	,,	,,	48
301	,,	,,	417	493	,,	,,	819	715	,,	M	612	888	,,	,,	889	1037	1940	,,	943
302	,,	,,	545	495	,,	,,	737	717	,,	,,	810	889	1941	,,	77	1038	1941	,,	55
304	,,	,,	611	497	,,	,,	614	718	,,	,,	916	891	,,	,,	110	1039	,,	,,	84
305	,,	,,	683	498	,,	,,	455	720	,,	,,	817	892	1940	,,	879	1042	,,	,,	59
308	,,	,,	700	500	,,	,,	522	721	,,	,,	849	893	,,	,,	954	1043	,,	,,	244
309	,,	,,	421	501	,,	,,	433	722	,,	,,	836	894	1941	,,	37	1044	,,	,,	74
311	,,	,,	656	504	,,	,,	519	723	,,	,,	850	895	,,	,,	197	1045	,,	,,	238
313	,,	,,	140	505	,,	,,	534	747	,,	,,	798	896	1940	,,	884	1053	,,	,,	107
318	,,	,,	627	509	,,	,,	761	753	,,	,,	807	898	1941	,,	40	1054	,,	,,	26
320	,,	,,	703	511	,,	,,	707	754	,,	,,	797	899	,,	,,	245	1056	,,	,,	53
322	,,	,,	437	514	,,	,,	483	756	1941	,,	108	901	1940	,,	934	1058	,,	,,	111
323	,,	,,	573	516	,,	,,	705	758	1940	,,	913	904	,,	,,	955	1059	,,	,,	19
327	,,	,,	544	519	,,	,,	733	760a	,,	,,	825	905	1941	,,	75	1062	,,	,,	91
329	,,	,,	485	523	1941	,,	24	761	1941	,,	88	907	1940	,,	920	1067	,,	,,	321
333	,,	,,	879	525	1940	,,	777	764	,,	,,	316	911	1941	,,	74	1069	,,	,,	285
338	,,	,,	432	527	,,	,,	572	767	,,	,,	267	912	1940	,,	885	1071	,,	,,	97
339	,,	,,	571	528	,,	,,	748	770	1940	,,	793	913	1941	,,	100	1073	,,	,,	103
341	,,	,,	701	529a	,,	,,	816	771	,,	,,	902	914	1940	,,	952	1077	,,	,,	18
342	,,	,,	558	531a	,,	,,	755	772	,,	,,	903	916	,,	FC	19	1078	,,	,,	270
345	,,	,,	566	531b	,,	,,	723	774	,,	,,	828	917	1941	M	21	1081	,,	,,	62
348	,,	,,	674	532	,,	,,	953	777	,,	,,	908	918	1940	PC	124	1083	,,	,,	129
349	,,	,,	222	534	,,	,,	813	778	,,	,,	598	922	,,	,,	93	1101	1940	PC	147
353	,,	,,	297	535	,,	,,	822	782	,,	,,	831	927	,,	M	691	1105	1941	M	1
358	,,	,,	562	536	1941	,,	65	787	,,	,,	768	933	,,	,,	932	1110	,,	,,	250
360	,,	PC	54	538	1940	,,	586	796	,,	,,	882	935	1941	,,	44	1112	1940	PC	176
361	,,	M	610	542	,,	,,	744	797	,,	,,	897	936	,,	,,	76	1116	1941	M	38
362	,,	PC	33	543	,,	,,	699	799	,,	,,	900	937	,,	,,	101	1119	,,	,,	99
365	,,	M	564	547	,,	,,	893	800	,,	,,	796	943	,,	,,	50	1121	,,	,,	73
368	,,	PC	45	551	,,	,,	776	801	,,	,,	904	944	,,	,,	61	1122	1940	PC	222
379	,,	M	427	553	,,	,,	873	803	,,	,,	898	945	1940	,,	925	1125	,,	,,	202
384	,,	,,	760	555	,,	,,	766	804b	,,	,,	938	946	,,	,,	915	1126	,,	M	939
385	,,	,,	682	556	,,	,,	730	805a	,,	,,	945	947	,,	,,	959	1128	1941	,,	52
386	,,	,,	685	557	,,	,,	444	805b	,,	,,	892	948	1941	,,	73	1129	1940	PC	167
387	,,	,,	746	564	,,	,,	453	806	1941	,,	46	949	1940	PC	145	1135	1941	M	202
388b	,,	,,	608	566	,,	,,	716	808	1940	,,	905	951	1941	M	100	1137	,,	,,	151
390a	,,	,,	583	569	,,	,,	785	809	,,	,,	910	952	1940	PC	98	1138	1940	,,	940
390b	,,	,,	681	573	,,	,,	783	811	1941	,,	251	956	,,	M	956	1139	1941	,,	198
391	,,	,,	649	575	,,	,,	756	817	1940	,,	821	958	1941	,,	64	1140	,,	,,	272
392	,,	,,	677	579	,,	,,	811	818	,,	PC	116	959	,,	,,	127	1142	,,	,,	87
393	,,	,,	356	582	,,	,,	530					960	,,	,,	30	1143	,,	,,	182
				584	,,	,,	179					961	,,	,,	27				

1940 Madras Weekly Notes = All India Reporter *(Concld.)*

MWN	A I R			MWN	A I R			MWN	A I R			MWN	A I R			MWN	A I R		
1144	1940	M	946	1167	1941	M	297	1197	1941	FC	1	1229	1941	M	120	1255	1941	M	315
1148	”	”	944	1173	”	”	354	1200	”	M	274	1232	”	”	81	1257	”	”	205
1150	1941	”	207	1175	”	”	119	1202	1940	PC	151	1235	”	”	258	1258	”	”	362
1151	”	”	125	1177	”	”	303	1205	”	M	837	1236	”	”	280	1260	”	”	28
1152	”	”	287	1179	”	”	114	1217	1941	”	60	1238	”	”	306	1263	1940	PC	183
1153	”	”	115	1180	”	”	188	1218	”	”	204	1241	”	”	363	1267	1941	M	63
1155	”	”	116	1185	”	”	154	1219	”	”	147	1242	”	”	320	1268	”	”	352
1156	”	”	289	1189	”	”	118	1221	1940	”	942	1244	”	”	185	1269	”	”	225
1157	”	”	31	1191	”	”	126	1222	1941	”	288	1247	”	”	158	1270	”	”	323
1163	”	”	296	1192	”	”	152	1223	”	”	194	1249	”	”	193	1271	”	”	181
1164	”	”	324	1194	1940	PC	173	1225	”	”	262	1251	”	”	183	1272	”	”	359
												1253	”	”	350	1275	1940	PC	230

1940 Madras Criminal Cases = All India Reporter

MCrC	A I R			MCrC	A I R			MCrC	A I R			MCrC	A I R			MCrC	A I R		
1	1940	M	134	72	1940	PC	54	122	1940	M	699	176	1940	M	900	238	1941	M	1
7	”	”	271	79	”	M	509	125	”	”	755	178	”	”	938	245	”	”	258
9	”	”	292	83	”	”	697	126b	”	”	723	179	1941	”	88	247	”	”	238
10	”	”	257	90	”	”	562	128	”	”	813	183	1940	”	945	255	”	”	320
11	”	”	279	94	”	”	583	130	”	”	745	184	”	”	904	258	”	”	363
14a	”	”	284	95	”	”	608	132	1941	”	65	187	1941	”	41	259	”	”	280
14b	”	”	265	97	”	”	746	133	1940	”	822	189	”	”	71	261	”	”	296
15	”	”	747	98	”	”	653	135	”	”	816	191	”	”	251	264	”	”	120
17	”	”	216	102	”	”	682	137	”	”	953	200	”	”	61	268	”	”	99
21	”	”	423	105	”	”	760	139	”	”	586	201	”	”	50	270	”	”	250
25	”	”	196	106	”	”	677	144	1941	”	24	207	”	”	71	271	1940	PC	176
32	”	”	623	107	”	”	681	147	1940	PC	86	209	”	”	27	277	1941	M	181
33	”	”	872	108	”	”	685	153	”	”	55	210	”	”	38	278	1940	”	892
39	1941	”	339	109	”	”	649	159	”	M	145	213	”	”	26	279	1941	”	63
49	1940	”	370	111	”	”	744	166	”	”	898	215	”	”	101	284	”	”	306
54	”	”	710	112	”	”	465	167	1941	”	267	219	”	”	326	288	”	”	324
64	1941	”	290	121	”	”	587	172	”	”	316								

CASES OVERRULED & REVERSED

IN

A. I. R. 1940 MADRAS

Appasami Pillai v. Morangam Muthirian, (1935) 68 M L J 73=41 M L W 747 =1935 M W N 783=A I R 1935 Mad 371=157 I C 259	Overruled in A I R 1940 P C 63.
Arunachalam Chettiar v. Kalayappa Chettiar, (1937) 45 M L W 203=(1937) 1 M L J 180=1936 M W N 1212= A I R 1937 Mad 253=167 I C 503	Overruled in A I R 1940 Mad 525.
Babu Naidu v. Municipal Council, Adoni, (1938) 1938 M W N 1276 = (1938) 2 M L J 1035=A I R 1939 Mad 177= 181 I C 911	Reversed in A I R 1940 Mad 731.
Chendrayya v. Seethanna, (1939) 49 M L W 25=1939 M W N 449 = A I R 1939 Mad 397	Reversed in A I R 1940 Mad 689.
Cherutty v. Nagamparambil Ravu, (1939) 49 M L W 491=1939 M W N 354= (1939) 1 M L J 683=A I R 1939 Mad 513=185 I C 26	Reversed in A I R 1940 Mad 664.
Co-operative Credit Society v. Chinnaswami Udayan, (1937) I L R (1937) Mad 495 =1936 M W N 1198=44 M L W 720 =71 M L J 759=A I R 1937 Mad 31 =167 I C 223	Overruled in A I R 1940 Mad 635.
D. S. Raju Gupta, *In re*, (1939) I L R (1939) Mad 439=(1939) 1 M L J 480=1939 M W N 243=49 M L W 330=1939 M Cr C 45 = 41 Cr L J 705 = A I R 1939 Mad 472=189 I C 25	Overruled in A I R 1940 Mad 465 (F B).
Jeeyanagarswami v. Mahomed Esoof Sahib, (1925) 21 M L W 398 = A I R 1925 Mad 834=87 I C 386	Overruled in A I R 1940 Mad 798 (F B)
Kesar Singh v. Secy of State, (1926) 49 Mad 652=51 M L J 16=1926 M W N 540 =24 M L W 878 = A I R 1926 Mad 881=95 I C 651	Overruled in A I R 1940 Mad 356 (F B)
Krishnamoorthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam, (1936) 59 Mad 554 = 1936 M W N 193 = 43 M L W 338 = 71 M L J 76=A I R 1936 Mad 514=165 I C 405	Overruled in A I R 1940 Mad 474 (F B).
Krishnaveni Ammal v. Subrahmanya Chetty, (1938) 1938 M W N 235=48 M L W 119=A I R 1938 Mad 547= 181 I C 922	Reversed in A I R 1940 Mad 671.

Mask & Co. v. Secy. of State, (1938) I L R (1938) Mad 1040=1938 M W N 341 =47 M L W 505 = A I R 1938 Mad 608=181 I C 821	Reversed in A I R 1940 P C 105.
Muthu Chettiar v. Muthusami Iyengar, (1932) 55 Mad 758=36 M L W 44= 63 M L J 111=1932 M W N 614= A I R 1932 Mad 516=138 I C 632.	Overruled in A I R 1940 Mad 470 (F B).
Mythili Ammal v. Janaki Ammal, (1939) 50 M L W 815 = 1939 M W N 1237 = 1939 I T R 657=I L R 1940 Mad 329 =A I R 1940 Mad 161=189 I C 722	Overruled in A I R 1940 Mad 768 (F B).
Narayana v. Venkataramana, (1935) A I R 1935 Mad 899=161 I C 924.	Overruled in A I R 1940 Mad 470 (F B).
Ramamurthi v. Narayana Gajapathi Raju, (1933) 56 Mad 366=64 M L J 361= 36 M L W 847=A I R 1933 Mad 279 =141 I C 307	Overruled in A I R 1940 Mad 187 (F B).
Ramanujachariar v. Sundarachariar, (1927) 25 M L W 127=A I R 1927 Mad 287 =99 I C 312	Overruled in A I R 1940 Mad 798 (F B).
Rama Rao v. Sreeramamurthi, (1936) 71 M L J 388 = 1936 M W N 575 = 44 M L W 486=A I R 1936 Mad 801= 164 I C 670	Overruled in A I R 1940 Mad 124 (F B).
Rangiah Chetty v. Subramania Chetty, (1911) 21 M L J 21 = 1910 M W N 755=9 M L T 3=8 I C 512 (F B)	Overruled in A I R 1940 Mad 113 (F B).
Seetharamaraju v. Narayanaraju, (1934) 40 M L W 536 = 1934 M W N 1251 = A I R 1934 Mad 685=152 I C 462	Overruled in A I R 1940 Mad 187 (F B).
Surayya v. Subbamma, (1928) 53 M L J 677=1927 M W N 911=A I R 1928 Mad 42=106 I C 863	Overruled in A I R 1940 Mad 33 (F B).
Suryanarayanamurthy v. Kamayya Sastri, Second Appeal No. 1141 of 1934.	Overruled in A I R 1940 Mad 483 (F B).
Venkanna v. Subbayya, (1933) 37 MLW 117 =64 M L J 241=1933 M W N 1201 =A I R 1933 Mad 300=141 I C 136	Overruled in A I R 1940 Mad 631.

THE
ALL INDIA REPORTER
1940
Madras High Court

* A. I. R. 1940 Madras 1

PANDRANG ROW J.

In re Kanakasabai Pillai — Appellant.

Criminal Appeal No. 33 of 1938, Decided on 8th August 1938, against order of Sess. Judge, East Tanjore Division at Negapatam, in C. C. No. 24 of 1937.

(a) Criminal Trial—Murder—Burden to prove that act alleged to be murder was act of person other than deceased is on prosecution even if accused knew whether crime was committed or not.

The burden lies on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. The burden is not cast upon an accused person of proving that no crime has been committed. The prosecution is not absolved from the duty of proving that a crime was committed even though it is established that the accused has special knowledge on the point whether a crime was committed or not : *A I R 1936 P C 169, Rel. on.* [P 2 C 2]

(b) Criminal Trial—Murder—Alleged murder by husband of his wife — Direct evidence or medical evidence not available—Much reliance cannot be put on conduct of accused.

Where husband is alleged to have murdered his wife and there is no direct evidence justifying a conviction and no medical or other circumstantial evidence justifying a conviction, much reliance cannot be safely placed on conduct of the accused: *A I R 1936 P C 289, Rel. on.* [P 3 C 1]

*** (c) Criminal Trial—Murder — There is no presumption that ligature strangulation must be homicidal and not suicidal.**

There is no presumption in law that a ligature strangulation may or must be presumed to be homicidal and not suicidal. Even taking it as a presumption of fact such a presumption cannot be safely made, and a finding that a particular strangulation was homicidal cannot possibly be made to rest on this so-called presumption. [P 3 C 1, 2]

(d) Criminal Trial—Evidence entirely circumstantial—Reasonable interpretation favourable to accused possible — It should not be rejected even if unfavourable interpretation is equally or even more reasonable.

Where two interpretations are possible, it is not right to adopt the interpretation which is unfavourable to the accused in preference to the other which is favourable to the accused, unless there is some specific reason which justifies the adoption of the unfavourable interpretation. In a case in which the evidence is entirely circumstantial, the Court ought to consider whether the only reasonable interpretation is the one which is consistent only with the guilt of the accused and inconsistent with his innocence. Where a reasonable interpretation is possible which is favourable to the prisoner that interpretation should not be rejected merely because another interpretation—an unfavourable one—appears to be equally or even a little more reasonable. [P 3 C 2; P 4 C 1]

(e) Criminal P. C. (1898), S. 342 — Person accused of murder kept in suspense for several months before trial — In examination under S. 342 two printed pages containing precis of evidence against him read out in one breath and accused asked whether he wanted to say anything—This held not giving real opportunity to accused to explain matters against him.

In an examination under Sec. 342 of a person accused of murder and who had been kept in suspense for several months before trial began, nearly two printed pages containing a precis of the evidence against the accused were read out as it were in one breath, and the accused was asked whether he wanted to say anything :

Held that this kind of question was one which it was impossible for anyone and least of all for a person accused of murder, who had been kept in suspense for several months before the trial began, to answer. It was impossible for him to have remembered all the points which he was asked to explain. This certainly was not giving a real opportunity to the accused to explain matters appearing in the evidence against him. [P 4 C 2; P 5 C 1]

K. S. Jayarama Ayyar and K. Venkataramani — *for Appellant.*

R. N. Aingar — *for the Crown.*

Judgment. — The appellant has been convicted of murder by the Sessions Judge of East Tanjore and sentenced to undergo transportation for life under S. 302, Penal Code. The charge against him is that he murdered his wife Annapurni by strangling her some time during the night of 8th June 1936 in his house at Kuttalam. The appellant and his wife belong to rich mirasdar families. They were married in April-May 1935. The appellant was about 22 years old and his wife about 19 years old at the time of the occurrence. The appellant and his paternal uncle Sivagurunatha Pillai are the only members of a joint family which owns properties worth about three lakhs of rupees. It is clear from the judgment of the learned Sessions Judge that this paternal uncle as well as the appellant's father-in-law and the latter's relations not only did nothing to help the appellant in his defence but even actively assisted the prosecution. At least three vakils appear to have been engaged to assist the prosecution while the appellant was left to his own devices. The trial of the accused in the Sessions Court did not begin till October 1937, that is to say, till after a long interval of 16 months during which period the appellant appears to have been in jail.

The case against the appellant rests entirely on circumstantial evidence. No eye-witness speaks to the alleged strangulation and even the medical evidence as to the cause of death is not clear or even helpful. The learned Judge does not appear to have given sufficient attention to the importance of first deciding whether the crime of murder had been committed, or in other words, whether the death of Annapurni was due to the act of another and not to her own act. It was seriously argued before him that the death was due to suicide and that it was incumbent on him to deal with this aspect of the case separately from the other question which would arise only if it was established by the prosecution that a crime had been committed in respect of the death of the deceased, because until the commission of a crime is proved, it is not incumbent on the accused to explain, nor can he be called upon to explain, anything in the evidence appearing against him. It would appear as if the evidence relating really to the connexion between the alleged crime and the appellant has been relied upon to a considerable extent in support of the conclusion that a crime had been committed. So far as the cause of death is concerned, it may be that it was due to strangulation, though even on this point I am not satisfied that the medical evidence is as cogent as it might have been. The Assistant Surgeon who was examined on this point was not asked what experience he had of cases of strangulation; nor was he asked whether certain injuries observed by him were ante-mortem or post-mortem, questions which obviously should have been asked in order to make sure whether his opinion as to the cause of death was reliable and could be acted upon. Assuming however that the cause of death was strangulation the further question arises whether the strangulation was caused by the deceased herself or by the act of another. In other words, was the death suicidal or homicidal? The burden lies on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. As was laid down by their Lordships of the Judicial Committee of the Privy Council in 44 M L W 86[1] the burden is not cast upon an accused person of proving that no crime has been committed. No doubt this proposition was laid down with reference to the law in Ceylon, but the law in India is the same. Here also, as in Ceylon, there is a provision of law embodied in S. 106, Evidence Act, to the effect that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. But this does not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused has special knowledge on the point whether a crime was committed or not. In that case it was alleged against the accused that he had performed an illegal operation on a woman when she was under chloroform. It was laid down by the learned trial Judge in that case that as the woman who was under chloroform was unconscious, what took place while she was under the influence of chloroform was a fact specially within the knowledge of the accused and therefore the burden was laid upon the accused to show that no criminal operation took place. It was this direction in the charge to the jury that was condemned by their Lordships. This condemnation was reiterated in a subsequent Ceylon case which went up to the Judicial Committee, namely 44 M L W 661.[2] That is a case which is to some extent analogous to the present one. There also the accused was the husband of the deceased and he was charged with having killed her by ad-

---

1. Attygalle v. The King, (1936) 23 A I R P C 169=1936 Cr C 623=162 I C 450=37 Cr L J 628=44 M L W 86 (P C).
2. Seneviratne v. The King, (1936) 23 A I R P C 289=1936 Cr C 900=164 I C 545=37 Cr L J 963=44 M L W 661 (P C).

ministering chloroform to her, and it was contended that the death was suicidal. The evidence in that case also was entirely circumstantial and their Lordships observed, after a full consideration of the evidence, that when there is no direct evidence justifying a conviction and no medical or other circumstantial evidence justifying a conviction

> to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused was to act upon the merest scintilla of evidence, and to be impermissible.

As in that case, so in the present, in dealing with the question of the accused's conduct and in drawing inferences therefrom it has to be borne in mind that the husband "was in danger of incurring at least moral blame" even if suicide were found to be the cause of death, and therefore much reliance cannot be safely placed on conduct which appears no doubt to indicate consciousness of some guilt.

So far as the medical evidence in the present case is concerned, it is not necessary for me to deal with it in any detail because the learned trial Judge himself has come to the conclusion that "the medical evidence in the case is not of much use in deciding whether it is a case of homicide or suicide." The evidence does not clearly show either that the death must have been homicide or that it could not have been suicide. It leaves the question more or less at large, and no definite conclusion can be based on the medical evidence alone. The learned trial Judge thereupon in para. 18 of his judgment refers to "the ordinary presumption in the case of ligature strangulation in favour of homicide rather than suicide." I do not understand exactly what the learned Judge meant by this observation. There is no presumption in law that a ligature strangulation may or must be presumed to be homicidal and not suicidal. Even taking it as a presumption of fact, I am not sure that such a presumption can be safely made, and a finding that a particular strangulation was homicidal cannot possibly be made to rest on this so-called presumption. Then he goes on to observe that

> there was absolutely no motive for the deceased to commit suicide and least of all to commit suicide in the manner in which she is said to have committed it.

He observes further that "if the deceased wanted to commit suicide, she could have done so in her grandfather's house" and that "it must have been quite easy to have drowned herself in a well or tank" instead of strangulating herself. I am not much impressed by this reasoning; moreover it is impossible to say that there was no motive at all for the deceased to commit suicide. There can be no doubt that the relations between the young couple and their elder relatives, were not very smooth. Further, it is the prosecution case that the husband, i. e. the appellant, was treating his wife badly for some time; if so, it could not be said that there was no motive whatever for the deceased to commit suicide. Finally, the learned Judge lays stress on the fact that "there was a motive for the accused to commit the crime," thus begging the question whether a crime had been committed, and that his subsequent attempt to commit suicide and his subsequent conduct in having absconded from the village are circumstances which go to show that he must have committed the crime. So far as the question of motive is concerned, I shall deal with it later on, but I do not think in view of what I have said above that any inference that death was homicidal could be safely drawn from the subsequent conduct of the accused.

So far as the question of the alleged motive for murder is concerned, the evidence does not really establish the existence of any such motive.

* * * *

The important fact to remember in this case is that nothing is elicited as to any unpleasantness between the husband and wife for at least three months or so before the occurrence, and if the appellant and his wife had been living together in an amicable manner to all appearances for above three months prior to the occurrence it is in my opinion unreasonable to rake up the past and build adverse conclusions thereupon. The incidents mentioned are not unusual between young couples during their first year of marriage, and from the evidence regarding the occasional "tiffs" between the couple during this period it is impossible to say that the one did not love the other or that there was no enduring affection between them.

* * * *

In any case, I am of opinion that where two interpretations are possible, it is not right to adopt the interpretation which is unfavourable to the accused in preference to the other which is favourable to the accused, unless there is some specific reason which justifies the adoption of the unfavourable interpretation. In a case in which the evidence is entirely circumstantial, the Court ought to consider whether the only reasonable inference is the one which is consistent only with the guilt of the accused and inconsistent with his innocence. Where a reasonable interpretation is possible which is favourable to the prisoner, that interpretation ought not to be rejected merely because another interpretation—an unfavourable one—appears to be equally or even a little more reasonable.

* * * *

The learned Judge appears to have based his decision on two main grounds, namely that the ordinary presumption in the case of ligature strangulation is in favour of homicide rather than suicide and that while on the one hand there was no motive for the deceased to commit suicide, there was a motive for the accused to commit murder. As I have shown above, the foundation for this finding does not exist and it cannot be said that the prosecution has established clearly that the deceased's death was homicidal and could not have been suicidal. As regards the appearances at the time the corpse was discovered, it is enough to mention that there has been an attempt to make the case stronger than it was against the appellant by introducing particulars in the course of evidence during the trial about which nothing is mentioned in the Inquest Report. For instance the Sub-Inspector, P. W. 25, who was the first to discover the corpse, mentions no less than four details which are not to be found in the Inquest Report, namely: (1) The hands were stretched touching the body on its sides. (2) The legs also were stretched and were together. (3) The saree was undisturbed. (4) The rope was tight at the neck. It must be remembered in this connexion that the Sub-Inspector was examined more than a year after the occurrence and it is difficult to accept his memory as regards these details without question in the absence of any record made by him of these details at the time he observed them. Certainly the tightness of the rope was an important point which, if it had been observed at the time of the inquest, would have been noted in the Inquest Report, and this was not done. Reliance was also placed on the fact that the hands were not holding the rope as an indication that death was not suicidal. But on this point also the Inquest Report is silent. There are some other discrepancies regarding the appearances which I do not think it necessary to mention in full. For instance P. W. 20, the servant boy, mentions that there was a rope tied to the toe of the corpse, about which nothing is said by any other witness. These however are details which do not affect the result of the case. The substantial defect in the judgment appealed from is the omission to attach sufficient importance to the determination of the question whether the death was suicidal or homicidal or in other words, to put it more accurately, whether the prosecution has established that the death was homicidal, that is to say, due to the voluntary act of some person other than the deceased, in which case alone it was necessary to go into the case further. There are no doubt circumstances relating to the subsequent conduct of the accused which justly give room for suspicion and even for strong suspicion, but I am of opinion it is not permissible to base the decision of the question whether death was homicidal or not on the circumstances appearing against the accused so far as his conduct subsequent to the occurrence is concerned, particularly in a case like this where even if the death were suicidal, moral blame would attach to the husband and his subsequent conduct might be due to the consciousness not of having committed any crime but of having done something or omitted to do something which might have led to the suicide.

All the four assessors were of opinion that the accused was not guilty. The learned Judge merely observes that he does not think that the evidence in the case warrants that opinion, and he does not give any other reason for disagreeing with the unanimous opinion of the assessors. I think in the circumstances he would have done well if he had asked the assessors for their reasons and considered them before disagreeing with their opinion. The learned Judge in examining the appellant under S. 342, Criminal P. C., appears to have observed the letter of the law and ignored its spirit. Nearly two printed pages containing a precis of the evidence against the accused were read out as it were in one breath, and the accused was asked whether he wanted to say anything. This kind of question was one which it was impossible for anyone and least of all for a person accused of murder who had been kept in suspense for 16 months before the trial began, to answer. It was impossible for him to have remembered all the points which he was asked to explain and naturally his answer does not deal with all the points. This is certainly not giving a real opportunity to the accused to explain matters appearing in the evidence against him. It is however unnecessary for me to dilate on this point or to deal with the other questions which have been brought to my attention in this case, because as observed already the prosecution in this case has failed to show that the death of the deceased was homicidal or in other words, was caused by the act of some person other than the deceased herself. In short, the commission of a crime has not been established and therefore the question whether the appellant is guilty does not arise.

The conviction and sentence of the appellant are set aside and the accused is acquitted under S. 423, Criminal P. C.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 5

WADSWORTH J.

Akuthota Byre Gowdu — Appellant.

v.

Muniammal and another — Respondents.

Second Appeal No. 95 of 1936, Decided on 25th April 1939, against decree of Sub-Judge, Salem, in A. S. No. 9 of 1935.

Hindu Law — Adoption — Person by will authorizing that both of his wives shall separately make adoption—Construction.

Where a person by will authorizes that both of his wives shall separately make adoptions, the instrument should be construed on the assumption that he intended his widows to do that which the law allowed and not to do something which was unusual and not practised among Hindus. Hence he cannot be intended to have authorized simultaneous adoptions by the widows. Similarly he must have contemplated the procedure whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. In absence of such refusal or consent by the senior widow, the adoption by the junior widow is invalid : *12 Cal 406 and 39 Cal 582, Rel. on.* [P 6 C 1, 2]

D. R. Krishna Rao — *for Appellant.*

C. S. Venkatachariar and D. Ramaswamy Iyengar — *for Respondents.*

Judgment.—This appeal raises the question of the validity of an adoption. The properties in question formed part of the estate of one Sampanghi Rame Gowdu who had a son Byre Gowdu. The father and the son separated and it was agreed as one of the terms of the partition that the father's estate should be held during his lifetime by his second wife Lakshmakkal and on her death should go to Byre Gowdu, the son by the first wife. Lakshmakkal during her lifetime transferred those properties to her nephew, defendant 1. Byre Gowdu had two wives, the first was the plaintiff and the second was one Ramakkal. Neither of them had any children. Byre Gowdu died in 1909 leaving a will which concludes with the following sentence:

> . . . if after my lifetime, both of you (i. e. the two wives) do not agree to live together dividing the said properties into two equal shares, you shall separately make adoptions . . . .

Apparently this was regarded as giving each of the widows power to adopt without regard to the other. At any rate in 1909, shortly after the death of Byre Gowdu, the junior widow Ramakkal adopted defendant 2. There is no doubt about the fact of the adoption which is embodied in a deed, Ex. 2. At the time of the adoption, the two wives who are sisters were living together. The plaintiff made no objection to the adoption; but it has been found as a fact that she did not consent to it. The adopted son lived with the two widows for many years without his status being questioned. However, after defendant 1 got a transfer of Lakshmakkal's property, he also got a surrender from defendant 2 of the latter's interest therein. Ramakkal died in 1930 and Lakshmakkal died in 1932. Byre Gowdu's father had died long before. So that at the time of the suit there were living, the plaintiff who is the senior widow of Byre Gowdu, defendant 2, adopted by the junior widow Ramakkal, and defendant 1, the nephew and transferee of Byre Gowdu's father's second wife.

We are no longer concerned with the plaintiff's right to the half of Lakshmakkal's property which goes to her as the widow of her husband. The appeal relates only to the right of the plaintiff to the half of the property which would have devolved upon Ramakkal had she been alive when Lakshmakkal died and is now claimed to have devolved upon defendant 1 by reason of the surrender by defendant 2, the adopted son of Ramakkal. The main question in the appeal is whether this adoption was valid. Fortunately there is no longer any difficulty about the facts and the only trouble relates to the effect of the provision in Byre Gowdu's will, Ex. B, which has already been extracted authorizing each of the widows to adopt. It seems to me that this difficulty can be resolved by reference to authorities. The Privy Council in 12 Cal 406,[1] dealing with a case in which two widows were each authorized to make adoptions, and in pursuance of that authority made simultaneous adoptions, held firstly that the instrument should be construed on the assumption that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus. Secondly their Lordships held that simultaneous adoptions by two widows were contrary to law.

---

[1] Akhoy Chunder v. Kalapahar Haji, (1886) 12 Cal 406=12 I A 198 (P C).

Next there is the case in 38 Cal 694,[2] the decision being confirmed in appeal by the Bench whose judgment is reported in 39 Cal 582.[3] That case concerned an instrument which authorized two widows to act according to their religious tenets by adopting three sons successively. It was held following the Privy Council decision just cited that the instrument must be read not as authorizing an illegal simultaneous adoption but as giving power of adoption to the widows successively and that this being so the elder widow had the prior right to exercise the power of adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right or refused to use it. The reasoning is that such a construction is not contrary to the terms of the instrument and is in accordance with the ordinary rule of Hindu law, which may be assumed to have been in the mind of the person giving the authority at the time when the instrument was drafted. The confirming decision has been quoted with approval in a Madras case 39 Mad 772,[4] though the point actually arising in that case was rather different.

It seems to me that these decisions dispose of the contention that the adoption of defendant 2 by Ramakkal was valid. Ex. B on its face might be read as authorizing each of the widows to make an adoption either simultaneously or one after the other, in which case there might be living contemporaneously two adopted sons to one man, a notion repugnant to Hindu law. Similarly it is contrary to the ordinary rule of Hindu law that when there are two widows they should be permitted to indulge in an unseemly scramble for priority in adopting a son to their deceased husband, the rule being that in such a case the senior widow should have the right which will only pass to the junior widow if the senior widow refuses to adopt or consents to an adoption by her co-widow. Applying this rule to the construction of Ex. B, we must, I think, infer an intention to authorize each of the widows to adopt, the procedure contemplated being that prescribed by the ordinary rules of Hindu law whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. On the findings of fact it must be held that there was no such refusal to adopt by the plaintiff nor was there any consent to the adoption. It follows that the adoption is invalid. It has also been contended that defendant would be entitled to the property if not as an adopted son at least as a persona designata. There is no force in this contention. The deed of adoption Ex. 2 makes it clear that the rights thereby conferred upon defendant 2 are conferred solely and only by virtue of the adoption made under it. It is not the case of a gift to an individual with an erroneous description of that individual but a case of the performance of a formal act by virtue of which the rights in the property would accrue. The formal act being invalid no rights can pass under it. In the result therefore the appeal is dismissed with costs of respondent 1 (plaintiff). Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 6

BURN J.

M. Govindarajulu Chetty and onother — Petitioners.

v.

O. C. Ramaswamy Chetty and others — Respondents.

Civil Revn. Petn. No. 621 of 1937, Decided on 1st August 1938, from order of Dist. Munsif, Dharmapuri, D/- 16th April 1937.

Civil P. C. (1908), O. 21, R. 58 (2)—Issue of proclamation of sale cannot be ordered while claim petition is pending.

It is not possible for a Court to order the issue of a proclamation of sale while a claim petition is pending. O. 21, R. 58 (2) does not apply to such a case. [P 7 C 1]

D. Ramaswamy Ayyangar — *for Petitioners.*

R. Ramamurthy Iyer—*for Respondents.*

Facts.—The respondents in the revision petition attached certain properties and brought them to sale. The petitioner herein claimed two-third share in the properties as being entitled to it as a coparcener and stated that he had also filed a suit for partition against the Official Receiver, Salem, representing the estate of respondent 3 who was adjudicated insolvent and also stated that he had applied for and obtained an injunction in the partition suit and desired the stay of sale. The District Munsif ordered that pending receipt of the injunction order the "sale may be proclaimed." Against this order the Revision Petition was filed.

---

[2] Bijoy Krishna v. Ranjit Lal, (1911) 38 Cal 694 =12 I C 460.

[3] Ranjit Lal v. Bijoy Krishna, (1912) 39 Cal 582 =14 I C 17.

[4] Venkatappa Mayanim Bahadur v. Ranga Rao, (1916) 3 A I R Mad 919 = 30 I C 106 = 39 Mad 772=29 M L J 18.

Order.—It is not, I think, possible for a Court to order the issue of a proclamation of sale while a claim petition is pending. O. 21, R. 58 (2), Civil P. C., does not apply to this case. The learned District Munsif's order, 'meanwhile the sale will be proclaimed,' is therefore without jurisdiction and is set aside. I make no order as to costs in this petition.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 7

ABDUR RAHMAN J.

Velur Munuswami Mudaliar — Petitioner.

v.

Darwaja Raghupathi — Respondent.

Civil Revn. Petn. No. 299 of 1936, Decided on 2nd September 1938, to revise judgment and order of District Munsif, Tirupati, D/- 27th January 1936.

(a) Civil P. C. (1908), S. 10—Provisions are mandatory.

The provisions contained in S. 10 are mandatory in character and when facts of a particular case invoke the operation of that Section, the Courts have no other alternative but to give effect to it and stay the suit. [P 7 C 2]

(b) Civil P. C. (1908), Sec. 10 — Expression "matter in issue" refers to entire subject-matter in dispute and not to one of the issues — Rent suit—Amount claimed in both suits not for same period—Section does not apply.

The expression "the matter in issue" as used in S. 10 does not mean any matter in issue. The matter in issue in a previously instituted suit refers to entire subject-matter in dispute not to one of the issues however important it may be for the decision of the suit. [P 7 C 2]

Where the amount claimed as rent in the former suit was for a different period from the amount claimed in the later suit and there was no evidence whether the area of land in both the suits was the same :

Held that the matter in issue in both the suits was not the same and therefore Sec. 10 did not apply. [P 7 C 2; P 8 C 1]

B. C. Seshachala Ayyar — *for Petitioner.*
D. R. Krishna Rao — *for Respondent.*

Order. — This is a petition for revision against the order of the District Munsif of Tirupati rejecting the petitioner's application for stay of Suit No. 861 of 1935 under Sec. 10, Civil P. C., until the matter in Appeal No. 6 of 1934 pending in the District Court of Chittoor is decided. It has been urged on behalf of the petitioner that inasmuch as the main contention between the parties in the present suit and in Appeal No. 6 of 1934 relates to the occupancy rights claimed by the petitioner, he is entitled to demand a stay. It cannot be disputed that the provisions contained in S. 10 are mandatory in character and when the facts of a particular case invoke the operation of that Section, the Courts have no other alternative but to give effect to it and stay the suit. I have therefore to determine if the 'matter in issue' in the present suit is directly or substantially in issue in Appeal No. 6 of 1934, which must be taken to be the continuation of a previously instituted suit. At this stage it will be convenient to state that the first suit was filed on behalf of the respondent for rent in respect of a particular period and the present suit is in respect of a subsequent period. It is not quite clear from the record which is in the High Court whether the rents claimed in both the suits were for the same plots of land. The counsel for the respondent asserted before me that they were different. The counsel for the petitioner, on whom the onus lay to show that the provisions of S. 10, Civil P. C., applied to the facts of this case and that the order of the lower Court was wrong, was unable to deny the fact alleged by the counsel for the respondent. Assuming however for the sake of argument that the area of land comprised in both the suits was identical, the question still remains to be decided if "the matter in issue" in the prior suit is the same. The petitioner's counsel contends that the question of the nature of tenure in both the suits is common and this is, it is urged, the main issue in both the suits. But the expression "the matter in issue" as used in S. 10, Civil P. C., does not mean any matter in issue. The matter in issue in a previously instituted suit obviously refers to the entire subject-matter in dispute and not to one of the issues however important it may be for the decision of the suit.

In this case, even if the area of the land in both the suits is regarded to be the same, the amount claimed in the latter suit is apparently for a different period from the amount claimed in the former suit. The matters in issue in both the suits are therefore not the same. S. 10, Civil P. C., does not therefore debar the trial of this suit. The revision is accordingly rejected with costs. It is unfortunate that this petition has been pending for two years although the order passed by the learned Judge admitting the revision on 31st August 1936 was that the civil revision petition would be posted within a month. It is also surprising that the appeal pending in the District Court of Chittoor has not been decided up till now. Both these questions must be investigated and I should be informed of the reasons why the civil revision petition was not posted earlier and how the matter in appeal has not been so far disposed of.

C.R.K./D.B. *Revision rejected.*

A. I. R. 1940 Madras 8

LEACH C. J. AND PATANJALI SASTRI J.

Srimath Kachi Chinna Nallappa Kalakka Thola Udayar Avergal, Zamindar of Udayarpalayam — Petitioner.

v.

Sudai Udayan and others — Respondents.

Civil Revn. Petn. No. 1193 of 1937, Decided on 28th March 1939, to revise order of Collector, Trichinopoly, D/- 24th June 1937.

(a) Madras Estates Land Act (1 of 1908), S. 40 (1)—Ryot paying rent in cash varying with the crop can apply for order under S. 40.

The words "whether in cash or in kind" in S. 40 (1) cannot be read as meaning sometimes in cash and sometimes in kind. Therefore a ryot who has been paying rent in cash at rates varying with the crop has the right of applying for an order commuting the rent payable to a definite money rent. [P 8 C 2]

(b) Interpretation of Statutes—Marginal note —Not to be referred when words in Section are free from ambiguity.

The intention of the Legislature can, so far as the Court is concerned, be gathered only from the words used in the Section uninfluenced by the marginal note when the words are free from ambiguity. [P 9 C 1]

B. Sitarama Rao and A. Srirangachari — *for Petitioner.*

K. Bhashyam and T. R. Srinivasan — *for Respondents.*

Leach C. J.—The petitioner is the proprietor of the Udayarpalayam zamindari. The respondents are the ryots of the village of Kaduvatankurichi which forms part of the zemindari. They applied under S. 40, Madras Estates Land Act, 1908, to the Deputy Collector, Ariyalur for an order commuting the rent payable to the petitioner to a definite money rent. The respondents have for many years paid rent in cash but the amount has varied according to the nature of the crops raised. The petitioner contended that the application did not lie as S. 40 only had in view cases where rents were paid partly in kind. The Deputy Collector held that the application did not come within the Section and accordingly dismissed it. An appeal followed to the Collector, who disagreed with the Deputy Collector and reversed his decision. The petitioner has now applied to this Court to reinstate the order of the Deputy Collector under the powers of revision conferred upon it by Sec. 115, Civil P. C. S. 40 (1), Madras Estates Land Act, reads as follows :

> Where for any land in his holding a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, whether in cash or in kind, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash, either the ryot or the landholder may apply to the Collector to have the rent on the holding commuted to a definite money rent.

There are here five different categories, namely, (1) where a ryot pays rent in kind; (2) where he pays rent on the estimated value of a portion of the crop; (3) where he pays rent at rates varying with the crop whether in cash or in kind; (4) where he pays rent partly in one of these ways and partly in another, and (5) where he pays partly in one or more of these ways and partly in cash. If the case falls within any of these categories the ryot may apply to the Collector for an order commuting the rent to a definite money rent.

In reversing the order of the Deputy Collector and in allowing the respondents' petition the Collector was of the opinion that the case fell within the third category. It is said that he was wrong because the words "whether in cash or in kind" should be read as meaning sometimes in cash and sometimes in kind. To do so would clearly be reading into the Section words which are not there and words which would alter the effect of the Section. The Section clearly says that a ryot who pays rent at rates varying with the crop shall have the right of applying for an order whether he pays the rent in cash or in kind. Instead of the amount varying from year to year or from crop to crop the rent should be fixed at a definite sum per annum. On behalf of the petitioner, Mr. Sitarama Rao has drawn our attention to the Section as it stood before its amendment in 1934. Before the amendment the Section was construed in the way he would have it construed now, but the amended Section is differently worded and we can only construe it in accordance with the words used. It may not have been the intention of the Legislature to permit ryots in the position of the respondents to apply under this Section. The marginal note reads "commutation by suit of rent payable in kind." The marginal note lends some support to Mr. Sitarama Rao's argument, but the argument cannot be accepted. The intention of the Legislature can, so far as the Court is concerned, be gathered only from the words used in the Section when the words are free from ambiguity. They are free from ambiguity in this case and we consider that the Collector read them correctly. The petition consequently fails and will be dismissed with costs. We fix the advocate's fee at Rs. 100.

C.R.K./D.B. *Petition dismissed.*

A. I. R. 1940 Madras 9

PANDRANG ROW AND ABDUR RAHMAN JJ.

G. Abdul Khadir Saheb — Petitioner.

v.

V. Pachaiyappa Chetti and another — Respondents.

Civil Misc. Petn. No. 1397 of 1939, Decided on 18th September 1939, for transfer of case.

Civil P. C. (1908), Sec. 24 — Application to transfer suit from Court of Small Causes to City Civil Court can be entertained.

An application made under Sec. 24 of the Code for the transfer of a suit from the Court of Small Causes, Madras to the City Civil Court, Madras, can be entertained. In view of Sec. 5, Madras City Civil Courts Act, this is not a case of conferring by the order of transfer itself jurisdiction on the Court to which the transfer is made, which it would not possess but for the transfer. [P 9 C 2]

P. K. Janakiram — *for Petitioner.*

N. Panchanatha Iyer and P. G. Krishna Iyer — *for Respondents.*

Order. — This is an application made under Ss. 24 and 151, Civil P. C., for the transfer of S. C. S. No. 11852 of 1938 on the file of the Court of Small Causes, Madras, from that Court to the City Civil Court, Madras, to be tried along with O. S. No. 157 of 1939 on the file of the latter Court on the ground that the two suits are connected and that it is convenient that they should be tried by the same Court. A preliminary objection has been raised to the application on the ground that under S. 24, Civil P. C., there could be no transfer of the kind asked for. Reliance is placed on S. 3, Madras City Civil Courts Act, which gives jurisdiction to the City Civil Court to try certain suits excluding suits cognizable by the Court of Small Causes, Madras. There is however a distinct provision in S. 5 of the same Act to the effect that every person appointed a Judge of the City Civil Court shall be by virtue of his office a Judge of the Court of Small Causes, Madras, with respect to cases cognizable by the latter Court. It cannot therefore be said that the City Civil Judge to whom the present case may be transferred would have no jurisdiction to try the suit. On the other hand there is a distinct provision in S. 24, Civil P. C., which under S. 8 of the Code applies to a Small Cause Court to the following effect. The Court trying any suit transferred or withdrawn under this Section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes. In view of Sec. 5, Madras City Civil Courts Act, this does not appear to be a case of conferring by the order of transfer itself jurisdiction on the Court to which the transfer is made, which it would not possess but for the transfer.

There can thus be no sound objection to the entertainment of the application in a case like this under Sec. 24, Civil P. C. In the view we have taken of the preliminary objection it seems unnecessary to decide whether another remedy is not available to the petitioner by way of an application to the Chief Justice of the High Court under S. 5, Madras City Civil Courts Act. On the merits it is clear that the balance of convenience is in favour of the transfer asked for. It seems to us however that we cannot reject the complaint made by respondent 2 that he may have, as a result of the transfer to be made, to pay additional court-fee in the City Civil Court. It is not proper that we should deal in advance with the question whether additional court-fee would be properly leviable in the circumstances. But assuming that such additional fee would be leviable, which question however we entirely leave to the City Civil Court to decide, it seems to us that respondent 2's complaint is one for which some redress should be provided. We therefore direct the transfer as prayed for but with the condition that the additional court-fee, if any, which may be required to be paid as a result of the transfer, should be paid by the petitioner in this application in the first instance, and that amount should be treated as the costs of the petitioner in the suit and provided for by the final decree in that suit. There will be no order as to costs of this petition.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 10

LEACH C. J. AND KUNHI RAMAN J.

R. V. and Co. — Petitioners.

v.

Hindu Religious Endowments Board and others — Respondents.

Civil Misc. Petn. No. 2002 of 1939, Decided on 28th August 1939, to issue order calling for records.

Madras Hindu Religious Endowments Act (2 of 1927), Ss. 34 and 76—S. 76 must be regarded as exception to S. 34—Board has no power to cancel lease under Sec. 34—Court only can do it.

The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception : *5 Bing 177, Rel. on.* [P 11 C 2]

Hence S. 76 must be regarded as an exception to Sec. 34. The fact that sub-s. (2) and sub-s. (3) of Sec. 34 were inserted later does not affect the rule. No doubt it was the intention of the Legislature in amending S. 34 to invest the Board with large powers and it is the intention of the Act that the Board shall have power of superintendence, but this does not mean that the Board has the power to interfere with the rights of third parties. The Board would have power to interfere with the resolution of the temple Committee before the resolution is carried into effect and in some cases it may have power to interfere after the resolution has been given effect to, but it has not got the power to cancel a lease. The Legislature has placed the power of interference expressly in the Court and if the action of the temple Committee in sanctioning the lease is improper, the Court and the Court alone can interfere. The action of the Board in taking steps with a view to the cancellation of the lease under S. 34 is unlawful. [P 11 C 2]

Srinivasaraghavan and Thiagarajan — *for Petitioners.*

V. V. Chowdhury, M. Seshachalapathi, T. V. Ramiah, K. Parasurama Iyer and N. T. Raghunathan — *for Respondents.*

Leach C. J. — The petitioner has applied for the issue of a writ of certiorari with the view to the quashing of the proceedings taken by the Hindu Religious Endowments Board for the cancellation of a lease granted to him by the trustee of the temple of Sri Adimooleswarar, Agaram, Chidambaram Taluk, South Arcot District. Notice was issued to the Board and the Court has heard the arguments of the learned advocates who have appeared for the respective parties. In August 1938 the petitioner applied to the trustee of the temple for a lease for a term of 99 years of certain lands belonging to the temple. His intention was to utilize the lands for salt pans. The trustee granted the lease and it was registered on 29th August, but it had not been sanctioned by the South Arcot Temple Committee and therefore admittedly it was invalid. On 30th November 1938 the matter of the lease was considered by the committee which resolved to cancel it, but decided to sanction a new lease for a period not exceeding 25 years. In pursuance of the resolution passed by the committee the trustee granted a lease to the petitioner on the same terms as the cancelled lease except that the period was reduced from 99 years to 25 years. The resolution of the committee can only be read as sanctioning a lease on the same terms as the previous lease with this modification.

In the neighbourhood of the land covered by the lease are salt pans owned by a salt contractor carrying on business under the style of Sri Sivananaintha Nadar and Company. The proprietor of this firm felt aggrieved at the granting of the lease to the petitioner and moved the Board to cancel it. The result was that the petitioner was called upon to show cause why his lease should not be cancelled. The decision of the Board was embodied in an order dated 5th April 1939. The Board considered that the resolution of the committee sanctioning the lease was improper and not in accordance with the requirements of the law. The reasons for this opinion are stated and are these : The committee had not shown why a lease for 25 years should be granted, when a lease is granted for more than five years. S. 76 Madras Hindu Religious Endowments Act, 1926, requires it to be established that it is necessary or beneficial to the temple and this had not been done; the lease had been given privately and not as the result of public auction; the lease would not be beneficial to the temple and it would change the character of the land, there being on it 70 tamarind trees bearing fruit. The area covered by the lease is 24 acres. In pursuance of this order the Board called upon the Temple Committee to submit a report on the action taken by the committee in sanctioning the lease. It is admitted that in passing these orders the Board purported to be exercising powers conferred upon it by S. 34 of the Act. The petitioner says that the Section does not vest the Board with power to cancel the lease and that action with a view to its cancellation can only be taken under the provisions of S. 76. S. 34 of the Act reads as follows:

> (1) The resolutions of a committee shall be carried into effect by its President in whom the entire executive power of the committee shall, save as hereinafter provided, be vested.
>
> (2) (a). All the resolutions of a committee shall be notified to the Board within one week after they are passed. (b). The Board may call for any record or proceedings or other document or paper from any commitee for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceedings recorded or passed by such a committee.
>
> (3) (a). The Board shall have the power of staying, for reasons to be recorded by it, the execution of any of the resolutions of the Committee and remitting the same to the Committee for reconsideration. (b). If the Committee upon such reconsideration confirm the said resolutions, the Board may, whenever it deems such step necessary in the interests of the temple affected or the proper management of the affairs of the Committee, modify or cancel the said resolutions.

Section 76 is in these terms:

> (1) No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the Committee in the case of other temples.
>
> (2) The trustee of the math or temple or any person having interest may, within one year of the date of the order of the Board or Committee under sub-s. (1), apply to the Court for modifying or cancelling such order.
>
> (3) The order of the Board or Committee under sub-s. (1) when no application is made under sub-s. (2) and the order of the Court when such application is made shall be final.

The temple with which this application is concerned is a non-excepted temple and therefore the Temple Committee had full power under sub-s. (1) to sanction the lease. The learned advocate for the petitioner contends that inasmuch as the lease was lawfully sanctioned by the Committee, executed by the trustee and registered, he has obtained a title which can only be taken away from him under the procedure contemplated by sub-s. (2) of S. 76, namely an application to the Court. There can be no doubt that this contention is sound unless S. 76 must be read as being subject to S. 34. For the Board it is said that S. 76 must be read as being subject to S. 34, because all the provisions of S. 34, except those of sub-s. (1) were added by a later Act, namely the Madras Hindu Religious Endowments Act of 1930. The rule of construction to be applied here was stated by Best C. J. in 5 Bing 177=130 E R 1028[1]:

> The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.

There has been no modification of this rule by subsequent decisions. Therefore S. 76 must be regarded as an exception to S. 34. I cannot accept the argument that the fact that sub-ss. 2 and 3 of S. 34 were inserted later affects the rule. No doubt it was the intention of the Legislature in amending S. 34 to invest the Board with large powers and it is the intention of the Act that the Board shall have powers of superintendence, but this does not mean that the Board has the power to interfere with the rights of third parties. That is what the Board is contemplating doing here. The Board would have power to interfere with the resolution of the Temple Committee before the resolution is carried into effect and in some cases it may have power to interfere after the resolution has been given effect to, but it has not got the power to cancel a lease. The Legislature has placed the power to interfere expressly in the Court and if the action of the temple Committee in sanctioning the lease was improper, the Court, and the Court alone, can interfere. The action of the Board in taking steps with a view to the cancellation of the petitioner's lease under S. 34 is unlawful and the proceedings must be quashed. This does not mean that the Board will not be able to call for a report from the Temple Committee with a view to possible action under S. 76, but it cannot cancel the lease as it obviously intends to do.

I would add that the learned advocate for the petitioner appeared before the Board before the passing of the order on 5th April 1939 and made representations which he has made to us today, but there is no reference in the proceedings to this and action was taken by the Board in spite of the protest against its validity. The petitioner is entitled to his costs which will be paid by respondents 1 and 2. Respondent 3, the trustee, has not opposed the application.

---

[1] Churchill v. Crease, 5 Bing 177=130 E R 1028 =2 M & P 415.

C.R.K./D.S. *Order accordingly.*

---

* A. I. R. 1940 Madras 12

MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Emperor

v.

Taduturu Poligadu — Prisoner Accused.

Referred Trial No. 60 and Criminal Appeal No. 258 of 1939, Decided on 19th June 1939, referred by Sess. Judge, Vizagapatam, D/- 5th April 1939.

*** (a) Evidence Act (1872), S. 27 — Confessional statement should be voluntary.**

The general rule that a confession should be voluntary applies also to a confessional statement under Section 27. [P 14 C 2]

A statement, containing a confession, extracted from the accused by taking him, holding him for a long period, subjecting him to incessant questions and pressing him to confess is not receivable in evidence even under Section 27. [P 14 C 1, 2]

*** (b) Criminal Trial—Murder—Presumption as to guilt—Accused's recent possession of property of murdered person—Cause of death not proved—Presumption does not arise.**

Where the charge is specific, that the murder was caused by throttling, and it is not proved and there is no evidence to show that the deceased was murdered at all, the presumption of guilt cannot be drawn from the recent possession by the accused, of jewellery taken from the murdered person: *A I R 1933 Mad 233, Disting.* [P 14 C 2]

Public Prosecutor — *for the Crown.*

R. Sadasivam Pillai — *for Accused.*

Mockett J.—The appellant has been convicted and sentenced to death for the murder of one Allu Akkamma by throttling her on 4th December 1938, and it is well to remember that the charge is specific, that the murder was caused by throttling. On the morning of 4th December the deceased was proceeding from Goladi, a village which will be found on the south of the plan, Ex. M, towards a village called Yedlavalasa, which is not marked on the plan, but which it is conceded is beyond Mettavalasa which is to the north of the plan. The learned Judge has summarized the facts in this case very fully and we may say at the outset that we are largely in agreement with him with regard to his findings of fact. The deceased set out on that morning according to P. W. 5, her brother-in-law, at about 8 A. M. and she was seen about one furlong from Goladi village walking in front of a man who P. W. 16 was almost but not quite certain was the accused. She was wearing a black sari similar to M. O. 2, for that is no doubt what P. W. 16 means when he says that she was wearing M. O. 2. Her later history is spoken to by P. Ws. 17 and 18. P. W. 17 says that at about 9 o'clock he saw her near the uplands between two hillocks. He says he was going to Goladi with change to pay coolies. He also saw the accused. He was 100 yards in front of the deceased when he saw him. If that is so, between the place where P. W. 16 saw the accused and the deceased and the hillocks the accused had overtaken the deceased. P. W. 18 who also was in the neighbourhood of the hillocks says that he saw the accused going towards Mettavalasa and behind him a woman with a black sari similar to M. O. 2. He says he saw P. W. 17 going towards Goladi. We agree with the learned Sessions Judge that the evidence is more than sufficient to show that on that morning the deceased left her house and proceeded along the road, and we think too that the accused was sufficiently identified as walking at one time behind and at a later stage in front of her. That was the last heard of the deceased. She did not return to her village and there seems to be little doubt that the next seen of her was by P. W. 4, a little boy, who on Tuesday 6th December went to the neighbourhood of P. W. 3's field, which is adjacent to the road, to cut grass. He said he saw a person lying down with a black sari covered over the face in the cholam field of P. W. 3. He went away because he thought it was P. W. 3 watching for persons who had gone to cut grass without his permission. P. W. 3 on the Thursday next went to the field and there discovered the body, or rather half the body, of the deceased. She has been satisfactorily identified and no argument was seriously put before us that that was not her body. But by that time the body was in two pieces, one-half of which was found a considerable distance to the west of the point where the upper half was found, which was at the point E, on the plan near P. W. 3's field.

It is naturally important to ascertain the cause of death in a case of murder. P. W. 2, the Assistant Surgeon of Bobbili Local Fund Hospital, has given evidence about it. He has described the state of this body, which it must be remembered was in two pieces, and he quite definitely says: "I cannot give the cause of death owing to the fragmentary nature of the corpse and the advanced nature of decomposition." The tongue was protruding apparently. He says that this might have been due to strangling, but it might equally well have been due to decomposition. He does however make one interesting statement, namely that there was a stab on this woman, three-fourths of an inch long, on the left side of the chest between the sixth and seventh ribs. He was unable to trace it further owing to the fact that the lung underneath it had decomposed. He says that might have been caused by the tusk of a wild boar. In this connexion it is evident there are wild boars in the neighbourhood, because after seeing what was supposed to be P. W. 3 concealed under a black sari, P. W. 4 actually joined a hunting party who were after wild pigs. So we are in this position, that it is not possible to say on the evidence before us how this woman met her death.

The police were obviously at a loss. They seem to have suspected a lot of people although they were not willing to admit it. P. W. 6 says that at first P. W. 5, the brother-in-law of the deceased, was suspected and was arrested as also were three other persons, but this is denied by P. W. 20, the Sub-Inspector, who says that he never arrested any other person. He did, he admits, suspect P. W. 5 and some gamblers of Mettavalasa. But in this connexion it is right to say that apparently in this district the police take a rather strange view as to what constitutes an arrest. For reasons which naturally are not known, being no doubt part of police investigation, the accused was later arrested, he was arrested by P. W. 20, and we use that expression advisedly because what happened was he was taken from Goladi village where he was repeatedly questioned by P. W. 20 in custody to Mettavalasa at 11 or 12 noon. From then or from an earlier stage, because there is a variation in the evidence as to the exact time when he was taken there, it is evident that this man was subjected to persistent questioning by the Circle Inspector. P. W. 9 states that the Circle Inspector questioned him from 9 or 10 in the morning till 1 or 2 in the after noon. At first the accused denied everything, but after persistent questioning he gave the statement in Ex. J at 1 or 2 P. M. Then says P. W. 9 the accused was arrested after he had given the statement in Ex. J. That was not the only thing that happened. The Circle Inspector seems to have thought it well to make a production of P. Ws. 17 and 18 before the accused and examined them for the second time in his presence. P. W. 10 also states—and he is the president of the Panchayat Court and the Co-operative Union — "The Sub-Inspector of Police or the Circle Inspector of Police arrested him formally at 12-30 P. M. or so." Now in our opinion there is not the slightest doubt that this man was taken in charge by the police at Goladi village, questioned there and taken to Mettavalasa and there closely questioned for a period of some hours. This seems to us, apart from any other aspect of the case, to be entirely contrary to the orders issued to the Madras police relating to investigation of offences. Para. 303 is most explicit that while questions to persons who might give useful information are proper, when once an accused person has been arrested the police are strictly forbidden to interrogate him or press him to make any statement, and we consider that it is tantamount to reducing this paragraph to a farce for the police to take a man, hold him for a long period, subject him to incessant question, press him to confess, as we think happened, and then after they had extracted what they wanted, go through the solemn process of formally arresting him. The importance of this is that under this process the accused made a statement which is recorded in Ex. J. It is as follows:

> Last Sunday Allu Akkamma, a Golla woman of Goladi Village, was coming 20 yards behind me. I threw her down and throttled her and she died. Then I removed her two gold nose rings, two gold ear rings and four gold top ear rings. On the next day while it was still dark I secreted them (the ornaments) after tying them up in small rags, in the row of pots in a corner of my sister Poli's house in Mugada. I will pick out and give the ornaments if you come with me.

That was attested by the Village Munsif, P. W. 9, P. W. 10 and the Circle Inspector P. W. 21, in addition to two other persons who were examined. It will be observed that the statement, namely about the woman coming behind him, bears considerable resemblance to the evidence of some of the prosecution witnesses and in this case the accused has suggested that this crime has been laid at his door in order to remove the suspicion from the other Gollas including P. W. 5. On receipt of this statement the police and certain of the witnesses including P. Ws. 9 and 10 proceeded to the house of P. W. 11 who is the sister of the accused. She seems to have been a curious person to choose as a depository for stolen goods because according to her cross-examination she was not friendly with the accused and he had not visited her for a long time. But the police party went there and according to them they recovered a bundle which contained M. Os. 3, 4 and 5. Their procedure also seems to have been strange. It appears from the evidence of P. W. 12 that on their arrival they sat down outside P. W. 11's house for a period of an hour or 1½ hours, presumably until it was dark. According to the Police Officers they recovered these material objects from a pot. P. W. 11 is quite clear that she never saw them until they were in the hands of the police. She has denied that she ever looked at them in the interval between the accused going away and the police coming, though this statement seems to contradict her evidence in chief. That is the evidence for the prosecution.

The defence was a complete denial of the whole affair and an allegation that it has been foisted upon the accused by the Gollas in order to take away suspicion from themselves. The prosecution therefore say that the inference of guilt is sufficient to enable us to uphold this conviction and they summarize their case as follows: First, they say there has been a murder. Secondly that, from the accused has been recovered jewels proved to have been on the body at the time of the murder. We may say that it is amply established that the jewels, M. Os. 3, 4 and 5, were the property of the deceased and were worn by her on the day of her death. We agree with the learned Judge in his conclusion with regard to that. Thirdly, the prosecution says that there is a statement receivable within S. 27, Evidence Act, which led to the discovery of a fact and is therefore admissible and which contained a confession so wrapped up with the statement leading to the discovery of the fact as to make it, even though it was a confessional statement, admissible under S. 27. Had the statement been free from the infirmities to which we shall later refer, this contention with regard to its admissibility might have been acceptable. We think that the learned Judge rightly admitted that part of it as is reproduced in Ex. J on the basis that it was an ordinary statement under S. 27. But was it an ordinary statement under S. 27? We take the view that it was not. It contained a confession extracted from the accused by a process which we consider wholly foreign to methods and notions which are accepted by the Courts and, we hope, by the heads of the police themselves. This man had been persistently questioned at Goladi; he was persistently questioned for hours at Mettavalasa; throughout being under arrest and we consider that this process was such as to taint any result which may arise from it. It was a clear breach, in our view, of the police instructions which are not to pester people who are under arrest, as this man undoubtedly was. We consider that so far as the statement was a confession it was not a voluntary confession and was not receivable in evidence. We see no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under S. 27; but in any case, induced as it was, it is of no evidential value. We therefore exclude from consideration of this case the statement attributed to the accused, and we are left entirely with the fact that he took the police to the house of his sister and there produced the jewellery which was on the body of the deceased the day before. The position therefore is that the prosecution must rely on the presumption of guilt which has to be drawn from this recent possession of jewellery taken from a murdered person. But the answer to that is that there is no evidence on which we can say with certainty that the deceased was murdered at all. It is probable that she was murdered. But it is not impossible according to the evidence on the record that she might have died otherwise and not necessarily by strangling. The stab wound and the possibility of it being a wound from a tusk of a boar cannot be overlooked. The nature of the wild animals in this part of the world was not investigated, but there were wild pigs according to the evidence. The fact is however that the cause of her death is not proved. That being so, the presumption which might well have been hostile to the accused within the decision in 56 Mad 231[1] does not arise. The only evidence we have against this man when Ex. J is rejected is that he was in recent possession of jewellery belonging to a woman who had died owing to an unknown cause. That being so, it is inevitable in our view that this case must fail. It may be that the accused is fortunate. But if the police in excess of zeal think fit to employ methods of this sort they must expect results of this sort also. In view of the above observations we are satisfied that it would be in the highest degree unsafe to maintain this conviction. The conviction will therefore be set aside, the appeal allowed, and the appellant set at liberty.

---

[1] **Narayana v. Emperor, (1933) 20 A I R Mad 233=1933 Cr C 289=143 I C 46=34 Cr L J 481=56 Mad 231=64 M L J 88.**

C.R.K./N.K. *Conviction set aside.*

---

* A. I. R. 1940 Madras 15

WADSWORTH J.

Sri Chelikani Sitaramayya—Appellant.

v.

Koppula Pedda Venkanna — Respondent.

Appeal No. 107 of 1936, Decided on 18th July 1939, against order of Sub-Judge, Coconada, D/- 26th July 1935.

*** Civil P. C. (1908), S. 144—Application by judgment-debtor for stay of execution granted on condition that he furnished security for decretal amount — Judgment-debtor instead of security depositing cash—Court accepting it and ordering decree-holder not to withdraw it except on furnishing security — Decree-holder failing to withdraw — Decree subsequently reversed — Judgment-debtor held entitled to interest on amount of his deposit.**

On an application for stay of execution the Court ordered the judgment-debtor to furnish security for the amount of the decree as a condition precedent to the grant of stay. He found difficulty in furnishing security and instead of obeying the Court's order literally, he deposited into Court the full amount of the decree, praying the Court to order the decree-holder not to draw out the amount except on furnishing security. The Court did so order ; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the judgment-debtor applied for restitution, including in his claim interest on the amount in the deposit for the period for which it was in Court :

Held that the order for the retention of the money in Court as a condition of stay and the terms imposed upon the decree-holder formed part of an act of the Court resulting directly from a decree which had been held to be erroneous. The judgment-debtor therefore was entitled to interest on the amount of his deposit : *A I R 1933 Mad 33, Rel. on.* [P 16 C 1, 2]

K. Bhimasankaram — *for Appellant.*

Ch. Raghava Rao, S. Rajaraman and S. Kothandarama Nainar — *for Respondent.*

Judgment.—This appeal arises out of an application for restitution made by a judgment-debtor, the decree against whom had been reversed in appeal. The appellant is the plaintiff whose decree was reversed. The full records of the proceedings after this decree are not before me, and to a large extent I have had to rely upon statements of the learned advocates on both sides the correctness of which I do not doubt. It is established that after the decree was passed the appellant took out execution but withdrew his petition on the respondent paying the amount of costs. After this execution petition had been withdrawn the respondent, presumably apprehending further steps in execution, though there was no overt act so far as we are aware by the decree-holder, applied to the Court to stay execution of the decree. This application was opposed and the Court appears to have ordered the respondent (judgment-debtor) to furnish security for the amount of the decree as a condition precedent to the grant of stay. The respondent found difficulty in furnishing security and instead of obeying the Court's order literally, he deposited into Court the full amount of the decree, praying the Court to order the decree-holder (appellant here) not to draw out the amount except on furnishing security. The Court did so order; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the respondent applied for restitution, including in his claim interest on the amount in deposit for the period for which it was in Court. The lower Appellate Court has awarded interest at 12 per cent. on this amount and it is against this order for interest that the present appeal is preferred by decree-holder.

So far as I am aware there is no case which precisely covers the point now before me though the decision of the Bench in 63 M L J 383[1] deals with somewhat similar facts. That was a case of a decree for money in which an application was made for stay at a time when no execution petition was pending, as is also the position here, but the Court itself ordered the deposit of a portion of the decree amount in cash and the giving of security for the remainder and directed the decree-holder not to draw the cash deposit except on furnishing security. The deposit was made; the decree-holder failed to furnish security and draw out the cash deposit and on the decree being reversed, restitution was ordered in the shape of interest on the amount deposited in cash, the reason being that the basis of an order of restitution should not be the benefit which had accrued to the party whose decree has been reversed, but the loss suffered by the successful party as a result of the erroneous decree and the Court's orders thereunder.

---

[1] Shanmughasundara v. Ratnavelu, (1933) 20 A I R Mad 33=139 I C 348=55 Mad 1025 = 63 M L J 383.

It is argued for the appellant here that the position in the present case is different in that the order of the Court as a result of the decree and the stay application was not for the deposit of cash but for the giving of security and that it was the voluntary act of the present respondent in substituting a cash deposit in place of the security ordered which resulted in the loss of interest on the money so deposited. On the other hand it is contended for the respondent that though the respondent on his own initiative made the cash deposit instead of giving security, the act of the respondent was ratified and adopted by the Court in its final order staying the decree by virtue of this deposit and ordering the appellant to furnish security as a condition for withdrawing the amount deposited. With some hesitation, I accept the contention of the respondent. If once we adopt the criterion laid down in the case just quoted that the basis of restitution is to be the loss suffered by the judgment-debtor by reason of the wrongful decree and the orders resulting therefrom, I think it follows that the present respondent is entitled to interest on the deposit. It is true that he could have escaped the necessity for a deposit by furnishing security. He was unable to do so and tendered the money into Court subject to certain terms. The Court accepted the deposit and decided that the terms suggested by the respondent were suitable terms upon which the appellant should be allowed to withdraw the money and it was on the basis of these terms that the Court stayed execution of the decree. It seems to me therefore though the first act in the making of the deposit instead of furnishing security was due to the initiative of the respondent the Court itself took the responsibility for treating that deposit as the basis for the stay order and imposing certain terms upon the appellant. It follows that the order for the retention of the money in Court as a condition of stay and the terms imposed upon the appellant form part of an act of the Court resulting directly from a decree which has been held to be erroneous and that order has in fact deprived the respondent of the use of money which would have been at his disposal had it not been for the erroneous decree. Therefore in accordance with the general principle embodied in S. 144, Civil P. C., the order of the lower Appellate Court requiring the appellant to pay interest on the amount of his deposit is correct. The appeal is therefore dismissed with costs. (Leave to appeal is granted.)

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 16

WADSWORTH J.

Rm. Pl. S. Sivaswami Chettiar — Appellant.

v.

Marudaiya Goundan — Respondent.

Appeal No. 278 of 1936, Decided on 7th August 1939, against order of Dist. Court, Coimbatore, D/- 18th October 1935.

Civil P. C. (1908), Sec. 146 — Benamidar releasing right in property claimed by him in suit in favour of real purchaser — Latter can file appeal against dismissal of benamidar's suit —Release deed does not offend against S. 6 (e), T. P. Act.

A person can be allowed to file an appeal against the dismissal of the suit instituted by his benamidar, if the latter has released his right in the property claimed in the suit by a deed which recites that the person was the real purchaser of the property. The release deed does not offend against S. 6 (e), T. P. Act. [P 16 C 2]

P. S. Ramachandran — *for Appellant.*

P. J. Kuppanna Rao — *for Respondent.*

Judgment. — I see no reason why the appellant should not with reference to the terms of S. 146, Civil P. C., be allowed to file an appeal against the dismissal of the suit instituted by his benamidar, the latter having released his right in the property claimed in the suit by a deed which recites that the appellant was the real purchaser of the property. Whatever may be said regarding the superfluous deed of assignment subsequently executed, it cannot be contended that the release deed offends against S. 6 (e), T. P. Act. And though O. 22, R. 10, Civil P. C., does not in terms apply, the Court has ample powers under Sec. 146, Civil P. C., to permit the person in whose favour the plaintiff has released his rights in the property to file the appeal. The appeal is therefore allowed with costs and there will be a direction to the learned District Judge to permit the appellant to file the appeal as a person claiming under the plaintiff.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 17

PATANJALI SASTRI J.

Rekanti Chinna Govinda Chettiyar and others — Appellants.

v.

S. Varadappa Chettiar and others — Respondents.

Second Appeal No. 494 of 1936, Decided on 15th August 1939, against decree of Sub-Judge, Salem, in A. S. No. 52 of 1933.

Civil P. C. (1908), O. 47, R. 1 — Any other sufficient reason"—Misapprehension of counsel causing erroneous impression of Judge is a sufficient reason for review.

Owing to the misapprehension the counsel for the respondents did not urge all his arguments in support of the finding recorded in favour of his client by first Court and the Judge was led thereby to form an erroneous impression that he had no arguments to meet the points raised by the appellant's counsel:

Held that it was analogous enough to an error apparent on the face of the record to be a sufficient reason for a review under O. 47, R. 1 and hence the decree of the Judge passed on rehearing the appeal could be sustained as one made on review: *A I R 1925 Rang 314 and A I R 1925 Mad 1031, Rel. on; A I R 1922 P C 112, Ref.* [P 18 C 1]

A. Bhujanga Rao and D. R. Krishna Rao — *for Appellants.*

C. S. Venkatachariar, D. Ramaswami Ayyangar and K. S. Sundaram — *for Respondents.*

Judgment. — This appeal arises out of a suit brought by the appellants for a declaration of their title to the wall existing between their house and the house belonging to the respondents and for an injunction restraining the respondents from letting the water from the terrace of their house into the appellants' property. The trial Court dismissed the suit and on appeal the parties filed a joint memo agreeing to a certain arrangement regarding the disposal of the water falling from the terrace of the respondents' house and this arrangement was directed to be incorporated in the decree and no question now arises as to that part of the case. As regards the wall in dispute, the learned Subordinate Judge found that it belonged to the appellants and accordingly decreed that part of the appellants' claim. This was on 23rd September 1935. After the judgment was signed and the decree also was issued in accordance with the judgment, the respondents filed I. A. No. 68 of 1935 on 15th October 1935 in which they prayed for a rehearing of the appeal. The ground of the prayer was that though the trial Court had found that the wall belonged to the respondents, their advocate represented to the Court that they would have no objection to the wall being held to be a common wall and that under the impression that the Court would, in consequence of this concession, give a finding accordingly, he did not meet the points mentioned by the appellants' advocate, though he had arguments to urge in support of the finding of the trial Court. The respondents having denied the allegations in the appellants' affidavit in support of the prayer for rehearing, the lower Appellate Court apparently called for a statement from the counsel on both sides as to what exactly happened at the previous hearing and a joint statement was filed on 30th October 1935 and this was supplemented by a further explanatory statement by the respondents' counsel. Thereupon the Court below passed the following order on I. A. No. 68 of 1935 on 31st October 1935:

> In view of the joint statement filed by the learned advocates that appeared for the parties and of the explanatory statement filed by the learned advocate for the applicant, I think it fair and just that he should be given an opportunity to argue his case fully. The appeal will therefore be posted for rehearing on 21st November.

The appeal was thus re-heard and the learned Subordinate Judge came to the conclusion that the wall in dispute was a common wall belonging to both the parties and passed a decree accordingly in supersession of his earlier decree. The present appeal is directed against the decree passed on rehearing and the only point urged by the learned counsel for the appellants is that the lower Appellate Court had no jurisdiction after it delivered and signed the judgment on 23rd September 1935 to alter it in any manner, in view of the provisions of O. 20, R. 3, Civil P. C., and that therefore the revised decree passed by the lower Appellate Court as a result of the re-hearing on 21st November 1935 is one passed without jurisdiction and cannot stand. The appellants' counsel, has relied upon several decisions showing that after a judgment has been signed by the Judge, he has no authority to alter it except as provided by S. 152 or O. 47, Civil P. C. But it is unnecessary to discuss these decisions as, in my view, the respondents' contention that the present case could be regarded as coming within the provisions of O. 47 and that though this provision was not referred in the respondents' application for re-hearing, I. A. No. 68 of 1935, the decree of the Court below can be sustained as one made on review, is correct and must be accepted in the circumstances of the case.

The appellants' counsel objects that having regard to the Privy Council decision in 3 Lah 127[1] holding that the expression "any other sufficient reason" in O. 47, R. 1 must be taken as meaning "a reason sufficient on grounds at least analogous to those specified immediately previously," the power of review conferred by that provision cannot appropriately be invoked in this case. I am unable to agree. I cannot see why the facts disclosed in the statements of the learned counsel who appeared for the parties in the Court below which were accepted and acted upon by that Court should not be held to be a sufficient reason for reviewing the judgment delivered on 23rd September 1935 even according to the restricted interpretation placed upon R. 1 of O. 47 in 3 Lah 127.[1] There was of course no mistake or error apparent on the face of the record in this case. If there were, that would obviously be a sufficient ground by itself for a review. But the misapprehension owing to which the learned counsel for the respondents says he did not urge all his arguments in support of the finding recorded in favour of his clients by the first Court, and the consequent erroneous impression on the part of the learned Subordinate Judge—for which, of course, he was not at all to blame but the counsel was alone responsible—that the latter had no arguments to urge to meet the points raised by the appellant's counsel seem, to my mind, to be analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, R. 1, Civil P. C. The decisions in 3 Rang 261,[2] at p. 267 and 49 M L J 671,[3] which recognize a power of review in cases of mistake of counsel or mistake of the Judge leading to errors in the judgment though not apparent on the face of the record, seem to support this conclusion. The appeal therefore fails and is dismissed with costs. No leave.

C.R.K./D.B. *Appeal dismissed.*

---

[1] Chhajju Ram v. Neki, (1922) 9 A I R P C 112 =72 I C 566=49 I A 144=3 Lah 127 (P C).

[2] Kyone Hoe v. Kyon Soon Sun, (1925) 12 A I R Rang 314=91 I C 509=3 Rang 261.

[3] Nagabhushanam v. Jagannaikulu, (1925) 12 A I R Mad 1031=90 I C 775=49 M L J 671.

A. I. R. 1940 Madras 18

LAKSHMANA RAO J.

Public Prosecutor — Appellant.

v.

Amirtham Servai and others — *Accused* — Respondents.

Criminal Appeal No. 142 of 1938, Decided on 25th August 1938, against acquittal by City First Class Magistrate, Madura, in Cr. A. No. 59 of 1937.

Penal Code (1860), Ss. 147 and 352—Accused arrested by police officers in good faith under colour of their office assaulting them — He is guilty under S. 352 — Persons attempting to rescue him by use of criminal force are guilty under S. 147.

Where an accused who is arrested by police officers in good faith under colour of their office assaults them, he is guilty under S. 352. It is immaterial whether the place of arrest was a public place and the arrest was strictly legal. There is no right of private defence against such an act of a public servant, and accused who attempted to rescue such accused by use of criminal force will unquestionably be guilty under S. 147. [P 19 C 1]

Appellant in person.

V. S. Chandrasekharan — *for Respondents.*

Judgment. — This is an appeal by the Public Prosecutor against an appellate order of acquittal and the undisputed facts are that on their way to investigate a case of house-breaking and theft, P. Ws. 1 and 11, the Sub-Inspector and Head Constable of Sembatti, found accused 1 to 6 gambling with dice and money in the Silvathinnai an open platform with roof used by the villagers like a village chavadi at Karisalpatti. Accused 7 to 10 were watching the game and the police officers hurried to the spot. The accused got down the Silvathinnai and P. W. 1 asked accused 1 to 6 to stop. P. W. 11 seized the dice and some cash from the Silvathinnai and accused 1 and 2 were asked their names. They refused to give their names and P. Ws. 1 and 11 caught them saying that they had been arrested. Accused 1 assaulted P. W. 1 and he struck accused 1 on the head with a lathi in self-defence. The other accused then attempted to rescue accused 1 and 2 by use of criminal force but P. Ws. 1 and 11 held them firm, and P. Ws. 2, 3, 4, 5, 7, the villagers intervened. Accused 1 and 2 were then taken to the school building about 50 feet away and accused 3 to 10 assembled near the school. The Sub-Inspector apprehended a breach of the peace and information was sent to the Village Munsif and police station. The Village Munsif and four constables arrived soon after and accused 3 to 10 ran away. Accused 1 and 2 were arrested by police officers in good faith under colour of their office and it is immaterial whether the Silvathinnai is a public place and the arrest was strictly legal. There is no right of private defence against such an act of a public servant, and accused 3 to 10 who attempted to rescue accused 1 and 2 by use of criminal force will unquestionably be guilty under S. 147, I. P. C. Accused 1 and 2 will be guilty under S. 352, I. P. C., and the acquittal of the accused on the ground that the arrest was not legal is unsustainable. The order of acquittal is therefore set aside and the accused are convicted, accused 1 and 2 under S. 352, I. P. C., and accused 3 to 10 under S. 147, I. P. C. As regards sentence the occurrence was not premeditated and it is unnecessary to send the accused to prison at this distance of time. The accused are therefore sentenced to pay a fine of Rs. 25 each and in default to rigorous imprisonment for one month.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 19

KING AND KRISHNASWAMI AYYANGAR JJ.

Jhorama — Appellant.

v.

Viswasarayi Latchanna Dora — Respondent.

Appeal No. 265 of 1936, Decided on 15th September 1938, against order of Sub-Judge, Berhampur, D/- 30th October 1935.

Civil P. C. (1908), S. 48 — Application for execution not made within 12 years — Court in special circumstances has discretion to allow amendment so as to allow decree-holder to proceed further with execution.

It is true that when an application has not been properly made within the 12 years period provided in S. 48 no amendment should be allowed in execution petition which would have the effect of depriving the judgment-debtor of putting forward the plea of limitation. But in special circumstances the Court has discretion to order such amendments in order to enable the decree-holder to proceed further with execution. [P 20 C 1, 2]

C. S. Venkatachariar and D. Ramaswami Ayyangar — *for Appellant.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

King J. — The appellant here is the decree-holder in O. S. No. 68 of 1921. In 1926 the appellant filed an execution petition seeking to attach certain property and obtain orders of attachment. That execution petition was recorded in 1927 with a direction to the appellant to apply by separate application for sale of the attached property. A subsequent application, E. A. No. 49 of 1928, was made in March 1928 and was ordered in July to be "struck off the file to be restored when applied for after the stay is raised," an order having been received from the High Court, where a civil miscellaneous appeal has been filed, to stay execution shortly before this. Unfortunately the disposal of the civil miscellaneous appeal occupied several years, and it was not until 27th April 1934 that the judgment of the High Court was delivered. That judgment runs as follows:

> The only question for decision is whether the attachment of the several items made on 2nd and 3rd February 1926 is according to law. So far as the superstructure of the houses described in items 4 to 6 are concerned, no objection to the validity of the attachment is raised before us and the attachment thereof must be held to be lawful. As regards the other items and the land on which the superstructure stand, they were undoubtedly unenfranchised Dorathanam service inams on the dates of the attachments and therefore not liable to attachment. In this view of the case it is unnecessary to decide whether the subsequent order of Government directing the resumption of the inams was a completed and effective resumption. The attachment of items 1 to 3 and of the lands on which the houses are situate must be set aside and the appeal allowed to this extent.

About six months after the judgment had been delivered, the appellant applied in E. A. No. 256 of 1934, praying for the restoration of E. A. No. 4 of 1926 to file and for ordering attachment for the second time of the property which had been attached in 1926 and the attachment of which, as we have just seen, had been set aside by the High Court. The learned Subordinate Judge of Berhampore in his order dated 17th October 1935 refused to grant this part of the appellant's application, but permitted him to continue the petition, E. P. No. 49 of 1928, with respect to those items of property the attachment of which had been declared valid by the High Court. This is therefore an appeal by the appellant against that part of the learned Subordinate Judge's order which is against him. The learned Subordinate Judge has recognized the right of the appellant to make this application in 1934 even though the 12 years period laid down in S. 48 of the Code had already expired, and there is no serious contest before us that one if not two execution petitions were not still pending from 1926 to 1928, as there had been no final order disposing of them. The only questions therefore which have to be decided are: (1) whether the High Court in its judgment in C. M. A. No. 234 of 1928 has in effect dismissed these execution petitions so that with respect to the items with which we are now concerned it is impossible to regard them as any longer continuing or being regarded as valid; and (2) whether the circumstances of this case are such that we ought to permit such amendment of these petitions as may be necessary in order to enable the appellant to proceed further with his execution.

On the first point we think considerable difficulty might arise if we consider only execution application No. 4 of 1926, but we are of opinion that if E. P. No. 49 of 1928 is taken into account there can be nothing in the judgment of the High Court in C. M. A. No. 234 of 1928 which in any way relates to the prayers in that petition. All that the High Court said was that an attachment effected in February 1926 was invalid. In 1928, the appellant applied for the sale of properties which had been attached in 1926. The High Court has said nothing as to whether if a prayer had been inserted in the petition in 1928 for the attachment of those properties and the attachment had been effected accordingly that attachment would or would not have been valid. That matter, as we read the judgment of the High Court, has been left open. The appellant's learned counsel has therefore requested us to permit him to amend E. P. No. 49 of 1928 by asking for the attachment of the properties now in dispute, a request which he did not make in 1928 itself because at that time an attachment was already in force.

The second question which we have to decide is whether in the special circumstances of this case we should permit such an amendment to be made. It has been argued by Mr. Subba Rao, for the respondent, that we have no discretion in this matter and that once it is discovered that an application has not been properly made within the 12 years period provided in S. 48 no amendment can be allowed which would have the effect of depriving the respondent of putting forward the plea of limitation. The authorities however which he has brought to our attention on this point do not go so far as to say that there is no discretion left to the Court. They lay down the very salutary rule that ordinarily an amendment should not be allowed which would have the effect of depriving the respondents of putting forward such a plea. They do not say that in special circumstances the Court is powerless to order such amendments. We are clearly of opinion that the circumstances in this case are so exceptional as to justify the amendment proposed. In 1926 the appellant obtained the attachment of these properties. No doubt it has since been decided that that attachment was illegal. But the matter was obviously a disputed one upon which the attaching Court itself took a different view. Then when the appellant attempted to have the property which had been attached sold in 1928 his attempt was frustrated by an order of stay issued by this Court. By that time proceedings to resume the inams had been taken by the Government and it is the contention of the appellant that had attachment not already been effected he might have validly applied in 1928 for the attachment of these properties. But for the whole of the period 1928 to 1934 he could take no such action owing to unfortunately long continued pendency of the appeal in the High Court. He took no steps after the appellate judgment had been delivered within a reasonable time, and although he appears to have asked specifically only for the revival of the earlier petition 4 of 1926 the learned Subordinate Judge himself has decided that the proper petition to be revived for the limited purpose which he was prepared to concede was E. P. No. 49 of 1928. Although until the actual hearing of this appeal there has been no explicit request either to the Court below or to this Court for the granting of the amendment which is now proposed, we think in all the circumstances that the amendment should be allowed. It appears that E. P. No. 49 of 1928 has by this time been dismissed as it was not seriously pressed with regard to the comparatively unimportant properties against which it was allowed to proceed. We direct that the application be restored to file and that the petitioner-appellant be allowed to amend it by asking for the attachment of the properties which are the subject-matter of this appeal. The learned Subordinate Judge will then proceed to dispose of E. P. No. 49 of 1928 according to law. We direct in the peculiar circumstances of this case that each party bear his own costs of this appeal. It is of course clear that this judgment has in no way decided the question whether these properties are or are not liable to attachment.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 21

VENKATARAMANA RAO J.

James C. P. Fernandez and another — Appellants.

v.

Ramakrishna Marthoba Rao Kesbekar and others — Respondents.

Second Appeal No. 1206 of 1934 and memo of objections, Decided on 20th February 1939, against decree of Sub-Judge, South Kanara in A. S. No. 108 of 1934.

(a) Landlord and Tenant — Mulgeni tenancy —Suit for rent — Persons in possession as mulgeni tenants held could claim apportionment of rent.

An estate was granted on mulgeni in favour of certain persons. Since the date of the original mulgeni lease, both the muli right and the mulgeni right had been enjoyed by various persons. Not only was the right to receive the rent apportioned among the persons entitled to the muli right but also the rent that was being paid by the tenants to the various mulgars who became possessed of a fractional interest in the muli right was being apportioned :

Held that the principle of apportionment had become an incident of the tenancy. Hence, in a suit for rent the persons in possession as mulgeni tenants could claim apportionment of rent. [P 22 C 1]

(b) Transfer of Property Act (1882), S. 36— Principle of S. 36 whether applies to case of assignee of lessee *(Quære).*

Whether the principle of S. 36 applies to the case of an assignee of lessee claiming apportionment of rent : *32 Mad 86 and A I R 1928 Cal 52, Ref.* [P 22 C 1]

V. Thayagarajan and G. A. Pais — *for Appellants.*

K. Ramanatha Shenoi—*for Respondents.*

Judgment. — This second appeal arises out of a suit for recovery of rent and also for recovery of possession of the suit property in the occupation of the defendants as mulgeni tenants under the plaintiff. The suit properties formed a portion of the estate called Kudru which was granted on mulgeni in favour of three persons by a deed dated 13th April 1842. Within half a century from the date of the grant both the muli right and the tenant right became split up and came to be enjoyed by a number of persons. One-seventh portion of the muli right became vested in the present plaintiff and one Fernandez, the plaintiff, being entitled to six-sevenths thereof and Fernandez being entitled to the remaining one-seventh. Fernandez was also a mulgeni tenant in respect of the six-seventh share under the plaintiff. Fernandez died leaving a will and appointing defendant 1 as sole executor. Defendant 1 after obtaining probate of the will distributed the estate among the devisees under a deed of partition, Ex. 1, dated 22nd April 1931. He also sold portions of the estate to defendants 3 to 6. From the date of the partition the mulgeni right has been enjoyed by defendants 1 to 6, defendants 5 and 6 holding their portion jointly. The plaintiff claimed a certain amount for cesses and a certain amount as enhanced rent. So far as the actual amounts claimed in respect of these are concerned, there does not seem to be much of a serious contest and the findings of both the lower Courts in this behalf have not been challenged. The learned District Munsif appointed a commissioner to apportion and report about the rent. On receipt of the report he held that defendants 1 to 6 were not jointly liable for the rent but were liable separately according to the extent of the land owned by them and in their possession. He accordingly passed a decree directing defendants 1 to 4 separately and defendants 5 and 6 jointly to pay the amount of rent stated in the memo affixed to the decree. On appeal, the learned Subordinate Judge modified the decree holding that defendants 4 to 6 were severally liable but defendants 1 to 3 were jointly liable for the entire balance due. Defendants 1 to 3 have preferred this appeal and the plaintiff has preferred a memorandum of objections.

The contention of defendants is that they are severally liable to pay the rent and the contention of the plaintiff is that all the defendants are jointly liable and that both the learned District Munsif and the learned Subordinate Judge were in error in apportioning the rent. The contention of Mr. Shenoi is that Fernandez was the sole tenant and the fact that his property came to be vested in a number of persons either by inheritance or by partition among his legal representatives and their alienees from them would not affect their joint liability to pay rent because the liability is one and indivisible. On the other hand, the contention of Mr. Thayagarajan is that an assignee of a lease is entitled to ask for apportionment of rent and that the view taken by both the lower Courts is sound. Apart from any question of law, for over 90 years since the date of the original mulgeni lease both the muli right and the mulgeni right have been enjoyed by various persons. Not only was the right to receive the rent apportioned among the persons entitled to the muli right but also the rent that was being paid by the tenants to the various mulgars who became possessed of a fractional interest in the muli right was being apportioned. It can therefore be said that the principle of apportionment has become an incident of the tenancy. As a question of law, Sundara Iyer J. in 38 Mad 86,[1] took the view that the principle of S. 36, T. P. Act, would also apply to the case of an assignee of a lessee claiming apportionment of rent. At p. 90 he observed thus :

> If the assignment be of a portion only of the premises included in a lease, it is settled law that the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment.

This principle was followed in 54 Cal 788[2]: see the observations at pp. 792 and 793. To what extent this principle should be applied it is unnecessary to consider having regard to the history of the present mulgeni tenancy. I am therefore of the opinion that the learned District Munsif was right in apportioning the rent in the manner he has done. The learned Subordinate Judge modified the decree of the District Munsif on the ground that defendant 1 was in possession of the holding for the benefit of himself and defendants 2 and 3. This is a mistake. Defendant 1 was only in possession up to the date of the partition, that is 22nd April 1931. Till that date the learned District Munsif has accordingly made defendant 1 liable. After that date the property came to be enjoyed severally. The learned Subordinate Judge was not therefore right in granting a joint and several decree against defendants 1 to 3 after that date. I therefore reverse the decree of the learned Subordinate Judge and restore that of the learned District Munsif. I direct each party to bear his own costs in the appeal and in the memorandum of objections. Leave to appeal refused.

C.R.K./D.S. *Decree reversed.*

---

[1] Kunnisow v. Chathu, (1916) 3 A I R Mad 768 =17 I C 933=38 Mad 86=23 M L J 695.

[2] Rash Behari Mandal v. Hemantha Kumar Ghose, (1928) 15 A I R Cal 52=106 I C 71= 54 Cal 788.

A. I. R. 1940 Madras 22

VENKATARAMANA RAO J.

Nambar — Appellant.

v.

Pandikadan Mullathil Chandukutty — Respondent.

Second Appeal No. 698 of 1934, Decided on 29th September 1938, against decree of Sub-Judge, South Malabar, in A. S. No. 103 of 1932.

Malabar Law—Tarwad— Property devolving on heir can be mortgaged by him as his own — Mortgage unless proved to be mala fide will prevail against ancestor's creditor's right to recover his debt.

Once the property has devolved upon an heir, it becomes his property and he is entitled to mortgage the property as his own. The property cannot be said to be hypothecated for the ancestors' debt and the creditor of the ancestor. Unless the alienation is proved to be mala fide, it will prevail against the ancestor's creditor's right. It may be, the creditor's right to recover the property from the heir may remain unaffected, because the creditor can have recourse against the heir not only against the assets inherited but also personally in so far as the heir is not able to satisfy the Court that the assets had been utilized for purposes binding on the estate of the ancestor. [P 22 C 2; P 23 C 1]

N. R. Sesha Iyer — *for Appellant.*

P. Govinda Menon — *for Respondent.*

Judgment. — The question for decision in this second appeal is whether defendant 15 is entitled to priority by virtue of his decree against Gopala Menon, a junior member of defendant 1's tarwad, in S. C. S. No. 56 of 1921 on the file of the District Munsif of Parappanangadi. The facts are as follows: Gopala Menon who was entitled to a sub-mortgage right, died in 1917 and under the Malabar law he having died intestate, his property, that is his sub-mortgage right lapsed to the tarwad, but subject to the right being treated as an asset available for the payment of debts due to his creditors. In 1920 after the property lapsed to the tarwad, the tarwad mortgaged the properties including the suit property to the plaintiff. The suit property was thereafter purchased by defendant 15 in 1931. The two questions that fell to be decided before the lower Courts are : (1) whether defendant 15 can claim any priority over the plaintiff and (2) whether defendant 15 is entitled to the benefit of improvements since the date of his purchase. The learned Subordinate Judge allowed both the contentions advanced by defendant 15. So far as the question of improvements is concerned, the matter is said to have been conceded by the plaintiff's vakil and I do not therefore propose to disturb the finding of the lower Appellate Court in regard thereto. But the decree in so far as it gives defendant 15 priority over the right of the plaintiff in respect of the debt must be set aside. Once the property has devolved upon an heir, it becomes his property and he is entitled to mortgage the property as his own. The property cannot be said to be hypothecated for the ancestors' debt and the creditor of the ancestor, i. e. defendant 15 in this case, has not taken appropriate proceedings to seize the property before the mortgage. Unless the alienation is proved to be mala fide, it will prevail against the ancestors' creditor's right. It may be, the creditor's right to recover the property from the heir may remain unaffected, because the creditor can have recourse against the heir not only against the assets inherited but also personally in so far as the heir is not able to satisfy the Court that the assets had been utilized for purposes binding on the estate of the ancestor. The right of defendant 15 therefore to recover his debt must only be subject to the mortgage right of the plaintiff.

The decree of the lower Appellate Court will be modified in accordance with my judgment. I direct each party to bear his own costs of this second appeal. The direction given by the lower Appellate Court that the plaintiff should pay the costs of defendant 15 is set aside. Whatever rights the parties may have under the Madras Agriculturists' Relief Act, they will remain unaffected by this judgment.

C.R.K./D.S. *Decree modified.*

---

* A. I. R. 1940 Madras 23

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND PATANJALI SASTRI JJ.

In re Muthuswami Chettiar and others Petitioners.

Criminal Revn. Cases Nos. 245, 246, 298 and 340 and Petns. Nos. 226, 227, 276 and 316 of 1939, Decided on 19th September 1939, to revise order of Sub-Divisional Magistrate, Pollachi, D/- 22nd February 1939.

*** Criminal P. C. (1898), Ss. 107 and 112 — Code does not require that notice under S. 107 must relate to breach of peace or wrongful act in contemplation at time when information is given to Magistrate.**

Action taken under S. 112 constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case : *A I R 1918 All 93, Rel. on ; Case law explained.* [P 25 C 2; P 26 C 1]

K. S. Jayarama Iyer, N. Shanker Bhat, G. Gopalaswami, S. R. Subramaniam and N. Somasundaram — *for Petitioners.*

Public Prosecutor — *for the Crown.*

ORDER OF REFERENCE

Patanjali Sastri J. — These criminal revision cases raise an important question as to the construction and scope of S. 107, Criminal P. C. On the one hand, it is argued for the petitioners that the information and the evidence on which a Magistrate can act under this Section must relate to a breach of the peace or wrongful act in contemplation at the time when such information is given to the Magistrate, and that any wider construction of the provision might have the effect of turning the Section into a weapon of oppression in the hands of the magistracy. On the other hand, it is contended by the learned Public Prosecutor that such a restriction of the scope of the Section would impair its practical usefulness as a provision authorizing preventive or precautionary proceedings being instituted against persons who, in the opinion of the local Magistrates, are likely to disturb public tranquillity, and it is therefore urged that a wider construction should be placed upon it. The language of the provision is by no means free from ambiguity and there is considerable divergence of judicial opinion on the point : *see*, for example, 2 Weir 49,[1] 1937 M W N Cr 9[2] and 22 W R Cr 79,[3] relied upon for the petitioners; and 1937 M W N Cr 224[4] and the decision of Lakshmana Rao J. in Criminal Revision Case No. 105 of 1939 (not yet reported), relied upon by the Public Prosecutor. Having regard to the general importance of the question raised and the conflict of decisions referred to above, I think it is desirable that there should be an authoritative ruling on the point by a Division Bench or Full Bench and I therefore direct this case to be placed before my Lord the Chief Justice for necessary orders as to posting.

---

1. High Court Proceedings No. 1952, dated 29th August 1876, (1876) 2 Weir 49.
2. Maruthapali Goundar v. Emperor, (1937) 24 A I R Mad 356=169 I C 97=38 Cr L J 699= 1937 M W N Cr 9.
3. Raja Run Bahadur Singh v. Rani Tilessuree Koer, (1874) 22 W R Cr 79.
4. Kumarappa Chettiar v. Emperor, (1938) 25 AIR Mad 213=174 I C 248=39 Cr L J 416= 1937 M W N Cr 224.

Order of the Full Bench

Leach C. J.—In the village of Negamam in the Coimbatore District there are two factions and there is strong enmity between them. Their enmity dates back to the Legislative Assembly elections held in 1934, if not earlier. At the present time the factions are opposing one another with regard to the management of an institution known as the Lakshmi Vilas and Dravyasagaya Nidhi Limited and the management of a temple known as the Kannikaparameswari temple. On 23rd September 1938, the Sub-divisional Magistrate of Pollachi served notice on twelve persons under Sec. 112, Criminal P. C., calling upon them to show cause why they should not be ordered to execute security bonds under S. 107. According to an affidavit of the petitioner in Cr. R. C. No. 245 of 1939 filed in the present proceedings rioting had taken place on that day. The accusations against these twelve persons, who have been referred to as the counter-petitioners, are set out in para. 3 of the petitioner's affidavit which reads as follows :

> The counter-petitioners 1 to 12 noted in col. 4 who are residents within the jurisdiction of the Sub-divisional Magistrate, Pollachi, and who are members, partisans and hirelings of a faction of which Pillaya Chetty of Negamam is the leader, have been systematically committing acts of rowdyism, assault, trespass and intimidation on members of the opposite party, and on 23rd September 1938 all of them were found armed with weapons for a similar purpose endangering public peace. The feelings between the parties are very much strained and they are likely to come to a clash at any moment resulting in a breach of peace disturbing the public tranquillity seriously. Hence it is requested that the counter-petitioners may be ordered to execute a bond with sureties for keeping peace for a period of one year. Pending termination of the proceedings all the counter-petitioners may be ordered to execute interim bonds as breach of peace is likely to occur at any time.

The Magistrate considered that the information was of such a nature that he was justified in ordering the counter-petitioners to execute interim security bonds. These bonds were executed on 14th October 1938. On 5th February 1939 the police laid information against the petitioner, and it is obvious from the notice which was subsequently served upon him under S. 112 that the information was to the effect that he was also a leader of the faction of which the counter-petitioners were said to be members and was giving them active support. At the same time information was laid against Pillaya Chetti, the person previously referred to as the leader of the faction, and one Mylsami Goundan. The Magistrate was satisfied that there was a likelihood of a breach of the peace occurring and issued notice under S. 112 against the petitioner and the two other persons. In this notice they were referred to as counter-petitioners 13, 14 and 15 respectively. The petitioner says that the notice served upon him does not comply with the requirements of the Section and that the proceedings which have been instituted against him have been unlawfully instituted. The notice reads as follows :

> Whereas it has been made to appear to me by credible information that there are two factions in the village of Negamam led by Annal Chetti on the one side and Muthuswami Chetti (petitioner) and Pillaya Chetti on the other side ;
>
> That there is misunderstanding between Annal Chetti and counter-petitioners 13 and 14 (Muthuswami Chetti and Pillaya Chetti) regarding the management of Lakshmi Vilas and Dravyasagaya Nidhi Limited, and owing to the Delhi Assembly elections in 1934 and also in respect of the management of the Kannikaparameswari temple ;
>
> That there is dispute and civil litigation between the two factions regarding possession of the temple lands, that consequently the feelings between the two parties have become strained and that there is likelihood of a breach of the peace in the village, that counter-petitioners 13 to 15 (petitioners herein and the counter-petitioners 14 and 15) are giving active support to counter-petitioners 1 to 12 to further their nefarious activities in the village ;
>
> That counter-petitioner 15 trespassed into the house of Kamatchi Chetti on 23rd September 1938 and created trouble ;
>
> That counter-petitioners 1 to 12 who were responsible for the disturbance in the village on 23rd September 1938 had come there at the instance of counter-petitioner 15 to help counter-petitioner 14 and his son and to retaliate the attempted attack on them on 21st September 1938 ;
>
> That you are likely to commit a serious breach of the peace and disturb the public tranquillity at the village of Negamam ;
>
> You are hereby required under S. 107 (1), Criminal P. C., to appear before this Court at 11 a. m. on 8th March 1939 at Pollachi and to show cause why you should not be ordered to execute bonds for Rs. 1000 each with two sureties each in a like sum to keep the peace for one year.

As pointed out by our learned brother Patanjali Sastri J., in the Referring Order, the petitioner's case is that a notice under S. 107, Criminal P. C., must relate to a breach of the peace or wrongful act in contemplation at the time when the information is given to the Magistrate, and that a notice which does not go to this length is necessarily void. The Public Prosecutor challenges this contention and says that if the Section were so interpreted it would impair its practical usefulness. S. 107 (1) states :

> Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magis-

> trate of the First Class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity the Magistrate if, in his opinion, there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without surety, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

The requirements of this sub-section are therefore : (i) there must be information that a person is likely to commit a breach of the peace or disturb the public tranquillity or do a wrongful act which may probably cause a breach of the peace or disturb the public tranquillity ; (ii) the Magistrate, if he is of the opinion that there is sufficient ground for requiring the person against whom the information is laid to show cause why he should not be ordered to execute a security bond for keeping the peace, should issue notice to him ; (iii) and in calling upon the person to show cause the Magistrate must proceed "in manner hereinafter provided" which means that he must issue a notice in accordance with the requirements of S. 112. That Section says that when a Magistrate deems it necessary to require a person to show cause he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character, and class of sureties (if any) required. As will be shown presently, S. 112 has on occasions been misread and further particulars than those required by the Section have been insisted upon. All that the Section requires is that the substance of the information shall be set forth and if this is done and the other requirements of the Section are complied with the notice is a valid one.

Section 117 provides the procedure to be followed when a notice has been issued under S. 112. When an order under S. 112 has been read or explained under S. 113 to a person present in Court, or when a person appears or is brought before a Magistrate in compliance with, or in execution of a summons or warrant issued under S. 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. The enquiry shall be made as nearly as may be practicable where the order requires security for keeping the peace, in the manner prescribed for conducting trials and recording evidence in summons cases. Therefore before a person on whom a notice has been served under Sec. 112 can be required to enter into a security bond under S. 107 the matter must be fully investigated by the Magistrate.

The cases on which the petitioner relies in support of his contention that the notice must set forth the particular breach of the peace or wrongful act in contemplation are 2 Weir 49[1] and the decisions in 41 Mad 246,[5] 1937 M W N Cr 9,[2] 1937 M W N Cr 189[6] and 59 M L J 887.[7] In 2 Weir 49[1] complaints were made against 21 persons that they were constantly creating disturbances in bazaars and they were called upon to show cause why they should not be bound over to keep the peace. The Court expressed the opinion that the act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time the information is given and not merely one a repetition of which may be apprehended from past misconduct of the kind without anything further. This case was under the old Code, but the language of Ss. 107 and 112 was materially the same. While we agree that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, we are unable to agree that the Code requires the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case. In 41 Mad 246[5] Abdur Rahim and Napier JJ. considered that proceedings under Sec. 107, Criminal P. C., should be quashed if the notice issued did not give particulars of the persons threatened and when the apprehension of a breach of the peace arose. There the notice stated that,

> seven persons headed by Nagi Reddi Konda Reddi, accused 1, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace.

The decision in a particular case must depend on the facts of the case and we are

---

5. Nagireddi Konda Reddi v. Emperor, (1918) 5 A I R Mad 555=41 I C 990=18 Cr L J 878=41 Mad 246.
6. Santhanaramaswami v. Emperor, (1937) MWN Cr 189.
7. In re Kalia Goundan, (1930) 17 A I R Mad 859 1930 Cr C 1035=127 I C 652=32 C L J 27=59 M L J 887.

unable to agree that the absence of such particulars as these would necessarily vitiate the notice. In the first instance the particulars may not have been given to the Magistrate, but nevertheless he may have been convinced that there was a likelihood of a breach of the peace, in which case it was his duty to issue the notice. The passing of an order requiring security will, of course, depend on the nature of the evidence given at the subsequent inquiry. In 1937 M W N Cr 9[2] Pandrang Row J. accepted the proposition that it was necessary to state in the notice the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace. In 1937 M W N Cr 189[6] King J. considered that the notice in that case was wrong because neither time, nor place, nor any indication of the identity of the persons alleged to have been threatened had been given, but here the learned Judge was insisting upon something which the Section does not insist upon. In 1937 M W N Cr 224,[4] King J. rightly observed that in order to justify an order under Sec. 107 it must be proved that the persons concerned are likely to break the peace. In 59 M L J 887[7] Krishnan Pandalai J. considered that S. 112 requires the Magistrate to give an "abstract of the facts" upon which he charges the persons proceeded against with being likely to commit a breach of the peace. If by an abstract is meant something more than the substance of the information we do not agree. The learned Judge did not regard the notice in that case as being sufficient but this opinion is certainly to be doubted. It is however not necessary for the purposes of this case to discuss the facts of that case as the judgment does not appear to go beyond the other judgments to which reference has been made.

There is no doubt that action taken under S. 112 constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. The person who gives the information may not be in a position to give details, but the source of the information may be sufficient to convince the Magistrate that a breach of the peace is likely, and if he is convinced the law requires him to take action. We consider that Knox J. aptly stated the position in 16 A L J 567[8] when he said :

> As I read this Section, there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended. Apparently from the information he received, he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by S. 112.

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of S. 112, but before doing so it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under S. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. Far too much stress has been laid in the past on the wording of the notice and too little regard paid to the safeguards provided by the subsequent procedure. In the course of the arguments advanced on behalf of the petitioner, several cases have been quoted which relate to action taken under S. 110. There are conflicting decisions on the question of what the notice in such a case should contain. It is however not necessary for us to discuss the cases relating to S. 110. S. 107 is a self-contained Section and the Court is not required for the purposes of this petition to travel beyond the cases which have reference to that Section.

Now, applying the provisions of S. 112 to the notice issued in this case, what is the position ? The notice states that the petitioner is a leader of one of the rival factions in the village, that the feelings between the factions have become strained, that there is a likelihood of a breach of the peace in the village and that the petitioner is giving active support to the members of his faction to further their nefarious activities in the village. The nefarious activities referred to are known to the petitioner who has set them out in the affidavit which he has sworn and filed in support of his petition asking for the quashing of the proceedings. It is impossible in these circumstances to say with reason that the substance of the information received by the Magistrate has not been set out and it is also impossible to say with reason that there is no case shown for inquiry under S. 107. We regard this notice as complying with the requirements of the Section, and therefore there is no foundation for the application to this Court to exercise its revisional powers. It follows that the petition must be dismissed and the Magistrate will proceed with the inquiry in accordance with law.

---

[8] Jaguji Rai v. Emperor, (1918) 5 A I R All 93 =47 I C 72=19 Cr L J 876=16 A L J 567.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 27

ABDUR RAHMAN J.

Mellepeddi Pitchamma — Petitioner.

v.

Medabalimi Venkataramayya — Respondent.

Civil Revn. Petn. No. 907 of 1936, Decided on 17th March 1939, to revise decree of District Munsif, Repalli, D/- 23rd March 1936.

Promissory Note — Promissory note endorsed to another person for collection of principal and interest — Endorsee is agent for collecting money and cannot negotiate it to another person unless so authorized by principal.

An endorsee for collection can be regarded only as an agent for collecting the money due under the promissory note from its maker and cannot deal with it in any other manner. Not having the property in the promissory note in himself he is not in a position to transfer it to any other person unless he is expressly authorized to do so. If not so authorized the transfer will be ineffectual : *(1850) 15 Q B 995, Rel. on.* [P 27 C 2]

A. Lakshmayya — *for Petitioner.*

P. Satyanarayana Rao—*for Respondent.*

Order.—The suit out of which this revision arises was brought on the basis of a promissory note (Ex. A) executed by the defendant-petitioner on 20th November 1932 in favour of one Ratamma. It was indorsed on 20th June 1934 by the said Ratamma to her sister's son Venkataramayya Garu for collection. The indorsement (Ex. A-2) reads as follows :

> An order (transfer) has been made in favour of Venkataramayya Garu son of Gummadi Rattayya Garu, for collection of the principal and interest due on this note.

Venkataramayya Garu instead of collecting the amount from the defendant indorsed the promissory note in favour of one Medabalimi Venkataramayya who happened to be the defendant's son-in-law. The endorsement contains a statement that Venkataramayya Garu has received a bull-calf and a sum of Rs. 110 from the indorsee to whom the hundi has been indorsed for collection. On the suit being instituted by Medabalimi Venkataramayya it was contended on behalf of the defendant that the note had been discharged by him by making payment to Ratamma. This contention did not prevail in the trial Court and the suit was decreed. The other plea specially raised in para. 2 (a) of the written statement was to the effect that G. Venkataramayya was only an agent for collection and was not authorized to indorse the promissory note in favour of the plaintiff. This plea was not considered by the lower Court. It was therefore contended here that the plaintiff had obtained no rights under the indorsement and he was not entitled to maintain the suit. Since the facts necessary to determine this question of law are not in dispute, it is unnecessary to remand the case.

The promissory note which formed the basis of the suit is undoubtedly a negotiable instrument and an indorsement of the same, followed as it was by delivery, would, unless it was restricted, transfer the property to G. Venkataramayya with the right of further negotiation. The only question then is whether the indorsement (Ex. A-2) restricted G. Venkataramayya's rights in the note. A reference to Ex. A-2 would show that the indorsement was apparently for collection and could not have conferred any property in the promissory note upon G. Venkataramayya. In other words, he, i. e. G. Venkataramayya, could be regarded only as an agent for collecting the money due under the promissory note from its maker and could not deal with it in any other manner. Not having the property in the promissory note himself, G. Venkataramayya was not in a position to transfer any to the plaintiff. The transfer to the plaintiff being unauthorized must consequently be held to be ineffectual : *see* (1850) 15 Q B 995.[1] It was contended on behalf of the respondent that if G. Venkataramayya was entitled to realize the amount due on the promissory note from the maker, he must be held to have been empowered to bring a suit as well. To this extent the contention appears to be unobjectionable but it is obviously useless to the respondent. It was therefore contended on his behalf that if the indorsee for collection could institute a suit against the maker, he could also indorse the note in favour of another person. This contention is in my opinion unsound and must be repelled. An indorsee for collection must be held to be an agent for collecting the money due on the promissory note. He might have been able to indorse it for that purpose if expressly authorized by his principal, but G. Venkataramayya, as Ex. A-2 would show, was not authorized to delegate the authority given to him. In any case he was not authorized to negotiate the note to any other person. The cases cited on behalf of the respondent are not relevant to the point which has to be determined here.

---

[1] **Lloyd v. Howard, (1850) 15 Q B 995=20 L J Q B 1=15 Jur 218.**

The plaintiff must be presumed to have knowledge of the indorsement made in favour of G. Venkataramayya and should have known that the promissory note could not have been negotiated. In view of the express words in the indorsement Ex. A-2 it must be held that the endorsement and negotiation by G. Venkataramayya were beyond his powers and could not confer any rights on the plaintiff and that he was not entitled to maintain the suit on the basis of the promissory note. The revision must therefore be and is hereby accepted and the suit ordered to be dismissed. The petitioner will have his costs both in this and in the trial Court.

C.R.K./D.S. *Revision accepted.*

A. I. R. 1940 Madras 28

WADSWORTH J.

K. Chinnaswami Udayar and others — Appellants.

v.

Narasimha Bhattar and another — Respondents.

Miscellaneous Second Appeal No. 49 of 1936, Decided on 24th July 1939, against order of Dist. Court, Trichinopoly, D/- 5th October 1935.

Madras Hindu Religious Endowments Act (2 of 1927), S. 43— Person appointed actually performing functions of paricharaka office — He is office-holder attached to temple and can be dismissed only by trustee—Power of his dismissal given to archaka by decree cannot have any force.

Where a person having been appointed paricharaka, actually performs the functions of the paricharaka office, which is an office attached to the temple, he is an office-holder attached to the temple and by virtue of S. 43 of the Act the power of punishment and dismissal in respect of that office-holder vests in the trustee. The power of his dismissal given to the archaka by a decree cannot have any force in view of the express statutory provisions of S. 43. [P 29 C 1]

A. Srirangachari — *for Appellants.*

R. Gopalaswami Iyengar — *for Respondents.*

Judgment. — This appeal involves a consideration of the effect of a decree in a suit of 1896 wherein the holder of the archaka office in the suit temple obtained a declaration that he was entitled both to the office of archaka and paricharaka and to appoint fit and proper persons to the office of paricharaka, dismiss them and generally control the paricharaka so appointed in the temple during his term. By virtue of this decree respondent 1 (the archaka) appointed an individual as paricharaka. The appellants, trustees, were dissatisfied with the conduct of this paricharaka and ejected him from office. Thereupon respondent 1 brought an application, claiming that the appellants should be punished for disobedience to the decree of 1896. When the application was actually heard, the only relief claimed actually was a recognition of respondent 1's right under the decree and costs. Both the Courts below have held that by virtue of the decree of 1896 the archaka is solely entitled to appoint, control and dismiss the person who performs the functions of paricharaka. In appeal it was contended that even under the terms of the decree this sole right was not vested in the archaka but that the general powers of the trustee enabled the trustee also to exercise disciplinary control. I cannot accept this contention. The decree seems to me to be perfectly plain as conferring the right of appointment, dismissal and control solely on the archaka. It remains, however, to consider whether this decree is in full force and effect, having regard to subsequent judicial and statutory changes. In a suit of 1912 there was a scheme framed for the temple whereunder powers of appointment of non-mirasi servants and punishment of mirasi servants were vested in the additional trustee. This scheme appears to have been referred to in the proceedings in the Court below but the actual instrument was not exhibited. It is not, however, necessary to go in detail into the effect of the scheme decree, for there has been a subsequent statutory enactment which has substantially the same effect. Sec. 43, Madras Hindu Religious Endowments Act, provides that

> all office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust etc.

S. 79 of the same Act provides that

> save as otherwise expressly provided in or under this Act, nothing herein contained shall affect any established usage of a mutt or temple, etc.

It is argued that S. 79 has the effect of saving this decree of 1896 which is not expressly affected by any provision of the Act. I cannot accept this contention. It seems to me that the terms of Sec. 43 contain an express provision vesting solely in the trustee a power of disciplinary control which is entirely inconsistent with, and abrogatory of, the power given under the decree. It is argued that the paricharaka is not an office-holder but a mere deputy for the archaka in whom the paricharaka office is vested. This argument seems to me to ignore the facts. The person who actually performs the functions of the paricharaka office is the person who has been ejected from office by the appellants. It is true that he was admitted into the office owing to the appointment by respondent 1. But having been so appointed, so long as he performs the functions of the paricharaka office, it being certainly an office attached to the temple, he is an office-holder attached to the temple and by virtue of S. 43 of the Act the power of punishment and dismissal in respect of that office-holder vests in the trustee. It cannot, I think, be contended that the inconsistent power of control based on the decree of 1896 can any longer have force in view of the express statutory provision under S. 43, Hindu Religious Endowments Act. In this view, I allow the appeal and dismiss the execution petition with costs throughout as against respondent 1 here.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 29

LEACH C. J. AND PATANJALI SASTRI J.

Thirugnanavalli Ammal — Petitioner.

v.

P. Venugopala Pillai and others — Respondents.

Civil Misc. Petn. No. 1781 of 1939, Decided on 9th August 1939, praying to issue order directing amendment of decree of High Court in Appeal No. 130 of 1929.

Civil P. C. (1908), Ss. 34 (2) and 152 — Decree following judgment and silent with respect to payment of further interest from date of decree to date of payment — Omission even if accidental cannot be rectified.

Where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment and the decree follows the judgment, the Court must be deemed to have refused it. Hence, even if the decree-holder ought to have had further interest granted to him and this was accidentally overlooked, the Court cannot in face of the provisions of S. 34 (2) rectify the omission. [P 30 C 1]

T. E. Ramabhadrachariar — *for Petitioner.*

R. Visvanathan for J. R. Gundappa Rao — *for Respondents.*

Order. — This is an application by a decree-holder for the amendment of a decree passed by this Court on 30th August 1932 on the ground that there has been an accidental omission. The petitioner obtained a decree in the Court of the District Judge of South Arcot for the payment of two sums, Rs. 10,817 and Rs. 11,183, with interest at 9 per cent. per annum. On the first amount interest was to be calculated from 16th March 1925 and on the second amount from 16th March 1926 "till this date," that is the date of the decree, 21st December 1928. There was no reference to further interest in the judgment and the decree was drawn up in accordance with the judgment which was signed by the District Judge who delivered it. On appeal this Court held that the petitioner was entitled to Rs. 10,276 and Rs. 10,623 with interest on these amounts at 6 per cent. per annum from 16th March 1925 and 16th March 1926 respectively to the date of the decree. Again there was nothing said in the judgment with regard to the payment of further interest after the date of the decree. The draft decree was submitted to the learned advocates who appeared in the case and they approved of the wording. It is clear however that they did not realize that further interest had not been awarded, because in the subsequent execution proceedings the amounts claimed included further interest and no objection was taken. Recently the judgment-debtors applied for the scaling down of the balance due under the decree in accordance with the provisions of the Madras Agriculturists' Relief Act. In those proceedings it was discovered that the decree which had been passed was silent on the question of further interest. This led to the present application being filed and the Court is asked to amend the decree by allowing further interest on the decretal amount from the date of the decree to the date of payment or realization.

Section 152 empowers the Court to correct clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. As the decrees passed are in accordance with the respective judgments it is difficult to support the contention that there has been an accidental omission, but even if the decree-holder ought to have had further interest granted to him and this was accidentally overlooked, the Court cannot, in face of the provisions of Sec. 34 (2), Civil P. C., rectify the omission. S. 34 (1) provides that where and in so far as a decree is for the payment of money the Court may award further interest, but sub-sec. (2) expressly states that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. As in the decree which the petitioner wishes to have amended there is no reference to further interest and the decree follows the judgment the Court must be deemed to have refused it. I do not suggest that if in the judgment further interest had been specifically allowed Sec. 34 (2) would prevent the Court acting under S. 152 and correcting the decree, but as the decree is in accordance with the judgment the provisions of S. 34 (2) govern the matter. The application must be dismissed with costs.

C.R.K./D.S. *Application dismissed.*

A. I. R. 1940 Madras 30

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Coimbatore Venkataramana Vilas Co. Ltd. — Petitioner.

v.

Official Receiver, Coimbatore, and another — Respondents.

Civil Revn. Petn. No. 761 of 1937, Decided on 4th August 1939, to revise order of Dist. Court, Coimbatore, D/- 24th June 1937.

Insolvency—Son accepting in insolvency proceedings contention that he was personally liable for his father's debts and that he committed acts of insolvency—Son thereupon adjudicated insolvent — Order when not appealed against cannot be challenged in revision.

The mere asking for and obtaining of time for payment will not make a son personally liable for his father's debts and as he is not personally liable he cannot be adjudicated for his father's debts. But where he has accepted in the insolvency proceedings the contention that he was personally liable and had committed acts of insolvency and thereupon he is adjudicated insolvent and has acquiesced in the adjudication and in the administration of the estate by the Official Receiver, the order of adjudication cannot be challenged in revision if there was no appeal from that order or from the order of vesting the property in the Official Receiver.

[P 31 C 1, 2]

K. S. Desikan and N. R. Raghavachariar — *for Petitioner.*

P. Govinda Menon — *for Respondents.*

Leach C. J. — One Kandaswami Pillai died in 1923 leaving a considerable amount of property, but large debts. He was survived by two widows and seven sons, of whom only two were majors. The eldest son was Sivagurunatha. On 16th January 1924 the second son Chidambaram, and the widows purporting to act as the guardians of their respective sons, granted a power of attorney to Sivagurunatha to administer the estate of the deceased. Why it was necessary to execute this power of attorney is not apparent. Sivagurunatha was under Hindu law the manager of the family and lawful guardian of the minors. On 18th January 1924 Sivagurunatha sold certain immovable property belonging to the estate and five days later sold other estate property. On 22nd February 1924 a creditor applied for his adjudication in insolvency on the ground that the two transfers which he had effected in the previous month constituted fraudulent preferences under the insolvency law. The application was filed in the District Court of Coimbatore and the District Judge dismissed it. An appeal followed to this Court and this Court being of the opinion that the case had not been properly dealt with on the merits set aside the order of dismissal and remanded the case for further enquiry. When the case came before the District Judge on remand Sivagurunatha consented to an order of adjudication being passed against him and to an order vesting in the Official Receiver the properties which his father had left. Accordingly orders to that effect were passed on 11th August 1926. The Official Receiver took possession of the estate and has to a very large extent carried out the task of administration. Nearly all the properties have been sold and the creditors have been paid eight annas in the rupee.

The present petitioner is admittedly a creditor of the estate. He also claims to be a secured creditor under two bonds executed respectively on 30th January 1924 and 21st February 1924, but the validity of these documents is being challenged by the Official Receiver. On 18th March 1932 the petitioner, as a counterblast, filed an application for an order annulling the adjudication. This application was heard by the Subordinate Judge of Coimbatore and was dismissed. The petitioner appealed to the District Judge, who concurred in the order dismissing the petition and consequently dismissed his appeal. He then filed a petition asking this Court in the exercise of its revisional powers to set aside the adjudication. When the case was before the District Judge the petitioner contended that the order was bad because Sivagurunatha had no personal liability in the matter and that in any event the Court had no power to order the vesting of the entire estate properties in the Official Receiver. On the first point the District Judge held that there was personal liability because when pressed for payment by a creditor Sivagurunatha had asked and obtained time to collect the outstandings. On the second point he held that the petitioner could have appealed against the vesting order, but as he had not done so it was too late to attack it. The petition now before us came in the first instance before Varadachariar J. who referred it to a Bench because he was unable to accept as correct the opinion of the District Judge that the mere asking for and the obtaining of time to collect the outstandings was sufficient to make Sivagurunatha personally liable for his father's debts. The learned Judge also considered that the language used in the judgment of this Court in 49 Mad 217[1] in setting aside the order dismissing the application for adjudication and remanding that application for inquiry was too general in character.

We are in entire agreement with Varadachariar J. that the mere asking for and obtaining of time for payment would not make Sivagurunatha personally liable and if he was not personally liable he could not be adjudicated for his father's debts. But the question of what is the effect of time being asked for and granted really does not arise in this case. The position here is that Sivagurunatha accepted in the insolvency proceedings the contention that he was personally liable and had committed acts of insolvency. What was operating in his mind, it is not necessary to inquire. It is far too late in the day for the petitioner to challenge the order of adjudication, and the same remark applies to his attempt to have the vesting order set aside. For over 11 years he and the members of Sivagurunatha's family have acquiesced in the adjudication and in the administration of the estate by the Official Receiver. Had he so desired, the petitioner could have challenged on appeal both the order of adjudication and the vesting order. He accepted these orders as being proper orders and would not have come into Court today if the Official Receiver had not questioned his claim to rank as a secured creditor. This is certainly not a case in which the exercise of the Court's revisional powers are called for. The order of the District Judge was a proper one and the application for its revision must be dismissed with costs.

C.R.K./D.S. *Application dismissed.*

---

[1] Muthu Veerappa Chettiar v. Sivagurunatha Pillai, (1926) 13 A I R Mad 133=92 I C 603=49 Mad 217=49 M L J 697.

A. I. R. 1940 Madras 31

STODART J.

In re Ellappa Chettiar — Petitioner.

Civil Revn. Petn. No. 273 of 1939, Decided on 6th October 1939, to revise order of the Dist. Munsif, Kallakurichi, D/- 21st November 1938.

Madras Debt Conciliation Act (11 of 1936), Sec. 25 — Judgment-debtor cannot obtain stay under Sec. 25 of any individual suit more than once.

A judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once. [P 32 C 1]

P. S. Ramachandran and K. R. Krishnaswamy — *for Petitioner.*

Order. — The District Munsif is clearly right. The first application to the Board though nominally filed by defendant 4 was clearly adopted by all the defendants. For they applied for and got stay of execution from the District Munsif under S. 25, Debt Conciliation Act, on the strength of that application. It is also argued that having made another application to the Board, this time through defendant 2, the judgment-debtors are again entitled to stay. To admit such a proposition would lead to absurd results. In the Debt Conciliation Act there is nothing to prevent a debtor filing one application after another and under S. 25 of the Act he can obtain stay of a suit or other proceedings so long as an application is pending before the Board. When he files an application before the Board a little time must elapse before it is dismissed. In that time under S. 25 he can obtain stay of proceedings in suits and other proceedings and so on indefinitely without limit of time, and obviously without any great expense. In my opinion this is not the intention of the law. A judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once. Petition is dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 32

LEACH C. J. AND KUNHI RAMAN J.

Doraikannu Ammal — Appellant.

v.

T. Ramaswami Mudaliar — Respondent.

Letters Patent Appeal No. 24 of 1939, Decided on 5th September 1939, against decree and judgment of Somayya, J., D/- 19th April 1939.

Landlord and Tenant — Lessor leasing land for laying out flower garden — Lessee and his assignee building permanent structures on land — Lessor is entitled for mandatory injunction requiring demolition of buildings.

A lessor granted a lease of his land for the purpose of laying out a flower garden, but the lessee erected on the land a cattle shed and his assignee erected dwelling houses in place of cattle shed and other masonry structures to which the lessor objected:

Held that the lessor was entitled to an injunction requiring the lessee to demolish the house as well as the other buildings: *(1878) 3 A C 709 and (1912) A C 623, Disting.* [P 33 C 1, 2]

K. Rajah Ayyar — *for Appellant.*

A. S. Nataraja Ayyar — *for Respondent.*

Leach C. J. — This is an appeal under Cl. 15, Letters Patent, from a judgment granting the respondent a mandatory injunction for the removal of certain buildings on land leased to the appellant. The land belongs to the Sri Kasi Viswanatha Devasthanam, G. T. Madras, of which the respondent is the trustee. Before 1920 the land was leased to one Chinna Venkatesa Devar, who on 27th September 1920 transferred his interest therein to P. L. Natesa Mudaliar. After he had acquired the interest of Chinna Venkatesa Devar, Natesa Mudaliar entered into an agreement with the then trustee of the temple for a new lease. The agreement was executed on 19th February 1921 and was duly registered. It stated:

> I have agreed to pay you a rent of Rs. 2 (Rupees two) per month for laying out a flower garden in the said land, and paid you this day an advance of Rs. 25 (Rupees twenty-five). As I have taken on lease the said land for a period of 30 years from this date, myself or my heirs shall pay you or order the rent of every month before the 10th of the next month and obtain a receipt. If the rent remains unpaid, you shall recover the same by proceeding against my property. You shall yourself pay the quit rent of the above land. I shall myself pay the tax that may be levied by the municipality. If we again require the site after the expiry of the said 30 years you are at liberty to get a fresh rental agreement according to the rent prevailing then in respect of other similar sites. If you want me to vacate the land without there being a renewal of the rental agreement after the said period of 30 years, the cost of the said compound wall that may be fixed by the mediators according to the then market rate, and the said advance amount shall be taken from you and the said site together with plants therein and the compound walls will be delivered to you.

At that time there was nothing on the land except the compound wall referred to in the agreement. It is quite clear from the wording of the agreement that the lease was granted to Natesa Mudaliar merely for the purpose of laying out a flower garden, but in breach of the agreement he erected on the land a cattle shed made of zinc sheets. On 31st August 1931 he assigned his interest in the new lease to the appellant. At the time of the assignment no other structure had been erected on the land. In 1935 the appellant demolished the cattle shed and erected in its place a two storied masonry dwelling house. On another part she built a firewood depot, also of masonry. She then erected two huts made of zinc sheets. The appellant is living in the house and she rents out the two huts to "Boyees," which I understand is a term used to denote a certain class of Telugu coolies. The respondent as trustee of the temple objected to the erection of these buildings and filed a suit in the City Civil Court for an injunction requiring their demolition. The City Civil Court Judge held that the respondent was entitled to an injunction in respect of all the buildings except the house. He did not grant an injunction in respect of the house because it was built on the site of the cattle shed which was on the land when the appellant became the assignee of the lease. Both the parties appealed to this Court. Their appeals were heard by Somayya J. who allowed the appeal of the respondent and rejected that of the appellant. The result was that an injunction was issued requiring the demolition of the house as well as the other buildings. The appellant asks the Court to dissolve the injunction in its entirety.

I have no hesitation in concurring in the judgment of Somayya J. The lease having been granted for the laying out of a flower garden the appellant was not entitled to erect these buildings on the land. It is admitted that if the land is to be regarded as agricultural land the injunction which has been ordered is right, but it is said that it is not agricultural land and therefore the lease falls within Sec. 108, T. P. Act. The provisions of that Section do not help the appellant ; in fact they provide a complete answer to her case. Cl. (o) of that Section provides that the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage building belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious to the property. There is no ambiguity in the language used. While the lessee may use the property as a person of ordinary prudence would use it, he is expressly prohibited from using it or permitting another person to use it for a purpose other than that for which it was leased. Cl. (p) says that he must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes. It is not suggested that the temple authorities have granted any permission.

Mr. Rajah Ayyar in support of the appeal has stressed two English cases dealing with the rights of lessees where there are no negative covenants. The first of these is (1878) 3 A C 709[1] in which a building which had been used as a store was converted into dwelling houses. There was no covenant prohibiting this and the House of Lords held that the landlord was not entitled to an injunction restraining the conversion. The building could be reconverted into a store at the end of the lease. The second case is (1912) A C 623[2] in which relief from forfeiture for breach of covenant was sought. There a building was being used as a cinematograph theatre. The land on which the building stood had been leased for the purpose of erection of a chapel. A chapel was erected and was used as a place of religious worship for 60 years. The lease was then sold with the consent of the Charity Commissioners and the premises were adapted for a cinematograph theatre. It was held that in view of the fact that the lease did not prohibit the contemplated user of the premises the alterations did not constitute a breach of covenant. Those cases are entirely different from the case which we have now before us. Moreover, we have got to decide this case on the provisions of an Indian statute, and, as I have shown, the statute clearly prohibits the appellant from using the land for the purposes for which she has used it. The respondent was fully justified in instituting the suit and I consider that the proper relief is the injunction which Somayya J. has granted.

As the learned Judge has pointed out, if these erections were allowed to remain on the land, at the end of the lease there would no doubt be a claim preferred by the appellant or the appellant's successor-in-title for the benefit of the Madras City Tenants' Protection Act, 1921, and a demand made on the trustee to convey the land at a value to be fixed by the Court. To allow such a position to arise here would certainly be unjust to the respondent. I may mention that there is another reason why the injunction should not be dissolved. Cl. (o) of S. 108, T. P. Act, says that a lessee shall not be allowed to commit an act which is destructive or permanently injurious to the land. The maintenance of the buildings on the land would certainly alter its character and would prevent the land being used as a flower garden. The appeal will be dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

* * A. I. R. 1940 Madras 33

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Karinagisetti Chennappa — Appellant.

v.

Karinagisetti Onkarappa — Respondent.

Second Appeal No. 318 of 1935, Decided on 2nd October 1939, against decree of District Court, Bellary, in A. S. No. 59 of 1933.

(a) Limitation Act (1908), Ss. 20 and 21— Acknowledgment by de facto guardian does not prevent debt being time-barred.

An acknowledgment of a debt made by a de facto guardian of a minor does not prevent the debt from being time-barred : *A I R 1938 Mad 853, Rel. on.* [P 35 C 1]

*** * (b) Hindu Law — Guardian — Paternal grandmother of minor is not his lawful guardian**

---

[1] Richard Wheeler Doherty v. James Clagston Allman and W. C. Dowden, (1878) 3 A C 709 = 39 L T 129=26 W R 513.

[2] Hyman v. Rose, (1912) A C 623=81 L J K B 1062 = 106 L T 907 = 28 T L R 432 = 56 S J 585.

even if she happens to be his nearest living relation — Endorsement of payment made by her cannot bind minor under S. 21, Limitation Act : *53 M L J 677 = A I R 1928 Mad 42 = 106 I C 863, Overruled.*

The ancient texts of the Hindu law do not provide for the management of a minor's property beyond stating that the guardianship shall vest with the king. The position of the king is now taken by the Court. Custom has however recognized that the father of a Hindu minor, and on his death minor's mother, is entitled to the guardianship of the minor's estate. But this custom has not extended the rule beyond the mother. Neither by Hindu law nor by custom is the grandmother recognized as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognized as having the right of guardianship. All other things being equal the nearest relative of the minor should have the position of guardian, but if the father and the mother have died no relative can become the lawful guardian without an order of the Court. Hence, neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of S. 21, Limitation Act, even if such person happens to be the minor's nearest living relation. Endorsement of payment made by the minor's paternal grandmother cannot therefore bind the minor : *53 M L J 677=A I R 1928 Mad 42=106 I C 863,* **Overruled**; *2 C L R 583; 2 C W N 191; 35 Mad 728; A I R 1915 Mad 659 and 32 Bom 50, Rel. on. Opinion of Viswanatha Sastri J. in A I R 1926 Mad 457, Disapproved.*
[P 35 C 2 ; P 36 C 2 ; P 38 C 1]

(c) Minor—Guardian — Appointment — Desirability—When relevant stated (Per *Mockett J.)*

Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. [P 37 C 1]

(d) Limitation Act (1908), S. 21 — Lawful guardian — Who is lawful guardian stated — Lawful guardian is de jure guardian in contrast to de facto guardian (Per *Krishnaswami Ayyangar J.)*

A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a de jure guardian, in contrast to a de facto guardian. The law does make a real distinction between a de jure guardian and a de facto guardian. A de facto guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a de facto guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate. [P 37 C 2]

A. Bhujanga Rao and D. R. Krishna Rao — *for Appellant.*

K. Srinivasa Rao — *for Respondent.*

Leach C. J. — This appeal raises the question whether the paternal grandmother of a Hindu minor is his lawful guardian when she happens to be his nearest living relation. From 1917 to 1924 the respondent's father had on various occasions borrowed money from the appellant. On 18th September 1924 an account was taken and it was found that the respondent's father owed the appellant an aggregate sum of Rs. 3825 for which he executed a promissory note. The instrument was not properly stamped and therefore was not admissible in evidence. Realizing the defect the appellant filed a suit in the Court of the District Munsif of Bellary for relief on the basis of a settled account. The date of the institution of the suit was 16th July 1932 and unless the appellant was entitled to rely on certain endorsements on the promissory notes his suit was time barred. I should mention that the respondent's father had died on 4th October 1924 and the suit was against the respondent as his legal representative. The respondent's mother had predeceased his father and on his father's death Neelamma, his paternal grandmother, took charge of his property. On 6th September 1927 she paid to the appellant a sum of Rs. 70 in reduction of the interest due on the loans and made an endorsement to this effect on the promissory note. On 10th November 1927 the District Court of Bellary acting under the provisions of the Guardians and Wards Act appointed one Basappa the guardian of the minor's property. On 18th February 1928 Basappa paid a sum in reduction of the amount due and made an endorsement on the promissory note recording the fact of payment. On 18th July 1929 Neelamma made another payment in reduction of the debt and this was also followed by an endorsement on the instrument. Basappa was then alive and was still the lawful guardian of the respondent, but he died a month later. The last payment to the appellant was made by Neelamma on 25th August 1929. This was a sum of Rs. 1000 paid towards the principal. Again she made an endorsement on the promissory note recording the fact of payment. In order to save limitation the appellant has to rely on the endorsements made by Neelamma on 6th September 1927 and on 25th August 1929. The District Munsif and on appeal the District Judge of Bellary held that the suit was time barred. The appellant then filed this second appeal which has been placed before a Full Bench in view of conflicting decisions of this Court bearing on the question whether Neelamma was under Hindu law the lawful guardian of the minor when she made these particular endorsements. Sec. 20, Limitation Act, states that where interest on a debt is, before the expiration of the prescribed period, paid by the debtor or his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent, a fresh period of limitation shall be computed from the time when the payment was made, provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. S. 21 (1) states that the expression "agent duly authorized in this behalf" includes the person's lawful guardian. The fact that Neelamma was the de facto guardian of the minor would not help the appellant. It was expressly held by a Bench of this Court (Madhavan Nair and Abdur Rahman JJ.) in (1938) 2 M L J 501,[1] that an acknowledgment of a debt made by a de facto guardian of a minor does not prevent the debt from being time barred. This decision followed a previous decision of this Court to the same effect. The wording of S. 20 and S. 21, Limitation Act, leaves no room for doubt that this decision is correct. The appellant however says that Neelamma was the lawful guardian of the minor, except during the period when Basappa was acting in pursuance of the order passed under the Guardians and Wards Act. In support of this contention the learned advocate for the appellant has relied on a passage in the edition of Strange's "Hindu Law" published in 1864, Edn. 4 and a passage in Macnaghten's "Principles and Precedents of Hindu Law" quoted in 2 C L R 583.[2] The passage from Strange is at page 72 and reads as follows:

> The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives.

The passage from Macnaghten is in these words:

> A father is recognized as the legal guardian of his children, when he exists; and when the father is dead the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power.

The learned advocate would have it that these passages must be accepted as authoritative support for the proposition that the legal guardianship devolves upon the nearest paternal relative and in default of a paternal relative on the nearest maternal kinsman. I am not prepared to accept this argument. I consider that it is contrary to principle and accepted authority. It is common ground that the ancient texts of Hindu law do not provide for the management of a minor's property beyond stating that the guardianship shall vest with the king. The position of the king is now taken by the Court. Custom has however recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial so universally that the right of the father or of the mother, as the case may be, cannot now be disputed, but it appears to be equally clear that custom has not extended the rule beyond the mother. In 2 C L R 583[2] Garth C. J., referring to the passage from Macnaghten which I have quoted, said:

> We do not think that this passage means that all the persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority from the ruling power. If it did mean this, the authorities cited would not appear to support it.

Garth C. J. then went on to point out that Jagannathan, one of the authorities, cited after quoting from Manu this passage: "The king should guard the property which descends to an infant by inheritance, until he returns from the house of his preceptor, or until he has passed his minority," and from the Ratnacara this statement: "Wealth which descends to an infant by inheritance, and becomes the property of the minor, let the king guard; that is, let him protect it from the other heirs," had proceeded to add these observations of his own:

> Consequently, the meaning is, let him (the king) act in such manner that other heirs may not take the whole, defrauding the infant who is incapable for non-age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian.

There is here authority that no one in the family is entitled as of right to act as the guardian of the minor. The right to act then depended upon the decision of the king. The judgment in 2 C L R 583[2] is of special importance in the present case as it related to a contest between the paternal grandmother and the paternal uncle on the one side and the maternal grandmother on the other for the custody of a minor. The Court held that none of them was entitled to claim custody as the lawful guardian. The judgment in 2 C L R 583[2] was accepted as correctly stating the law in 2 C W N 191,[3] which was also decided by the Calcutta High Court. This was a case under the Guardians and Wards Act and the contesting parties were the maternal grandmother and step-sister of a minor who were his nearest relatives. Trevelyan and Stevens JJ. held that there was not, even before the Guardians and Wards Act was passed, any one other than the father or the mother who had an absolute right to the custody of a Hindu minor.

---

[1] Nagayya v. Narasayya, (1938) 25 A I R Mad 858=179 I C 201=(1938) 2 M L J 501.

[2] Kristo Kissor Neoghy v. Kader Moye Dossee, (1878) 2 C L R 583.

2 C L R 583[2] has been cited with approval in two decisions of this Court: 35 Mad 728[4] and 38 Mad 1125.[5] In the latter case Sadasiva Iyer J., following 2 C L R 583[2] and 2 C W N 191,[3] held that under Hindu law nobody else than the father and mother of a minor "with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor" is entitled as a matter of natural right to be, and to act as, guardian of a minor's person and properties. Recourse must, he said, be had to the Court (representing the rights of the king which are paramount to even the rights of the parents) where there is no natural guardian alive. It was not indicated how exceptions might arise in favour of the elder brother or the direct male and female ancestors of a minor and the decision cannot be taken as going really beyond what was decided in the two Calcutta cases. In 49 Mad 768[6] Viswanatha Sastriar J. expressed the opinion that there is nothing in Hindu law "which limits guardianship only to the father, the mother, and, failing them the king." This statement cannot be accepted as correctly stating the position. As I have already pointed out the Hindu law, in so far as it is to be gathered from the ancient texts, only provides for the king having charge of a minor's property. There is nothing to be found in the ancient writings which can be interpreted as giving the father or the mother any right to guardianship. Their present rights in this respect are based merely on custom.

In 53 M L J 677[7] Devadoss and Jackson JJ. went very far and it is this decision which has caused this appeal to be placed before a Full Bench. They decided that under the Hindu law, in the absence of the father and the mother the paternal grandmother is the natural guardian of the grandchildren. They said that there was no direct authority for the contention that the paternal grandmother was not the natural guardian of her grandchildren in the absence of their father and mother, but they did not consider the bearing of the two Calcutta cases to which I have referred. The basis of their decision that the paternal grandmother is the natural guardian of her grandchildren is to be gathered from this statement in the judgment:

> Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grandchildren in the absence of their father and their mother.

The short answer to this statement is that neither by Hindu law nor custom is the grandmother recognized as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognized as having the right of guardianship and this statement receives full support from Mayne, Edn. 10, p. 299, from Mulla's Principles of Hindu Law, Edn. 8, p. 565 and from Trevelyan's "Hindu Law" Edn. 3, p. 231. The Bombay High Court in effect expressed the same opinion in 32 Bom 50.[8] Of course all other things being equal the nearest relative of the minor should have the position of guardian but if the father and the mother have died no relative can become the lawful guardian without an order of the Court. I hold that the Courts below were right in refusing to recognize Neelamma as the guardian in law of the minor and in rejecting the claim that her endorsements bound him. It follows that I consider that 53 M L J 677[7] was wrongly decided and therefore should not be followed. I would dismiss the appeal with costs.

Mockett J. — I entirely agree and am only adding a few words in view of the fact that we are differing from a Bench of this High Court. After the very full investigation into this subject which has been made today—the learned counsel for the appellant referred to all the relevant decisions—I think it is clear that at least at some period of time which it is difficult to fix, the only guardian of a minor was "the king," as he is so described in the texts. But today undoubtedly it cannot be argued that the father and in his absence the mother are not the legal guardians. They have been so recognized by usage and custom. Indeed the position of the father is impliedly recognized by statute under S. 19, Guardians and Wards Act. How all this came about is attractively put in the latest edition of Mayne on Hindu Law, para. 231, at p. 299. The learned author envisages the natural delegation to the parents by the king of duties so intimately affecting their son, but that idea, as has been pointed out in the authorities to which my Lord has referred, although now having attained the force of law, has never been extended beyond the parents by the Courts with the exception of the decision in 53 M L J 677.[7] In the case of persons other than the parents, an express delegation or appointment is required and this has been done and is today done through the machinery of the Court of Wards. With all respect, I think the learned Judges who decided 53 M L J 677[7] confused the two positions, namely a consideration as to who was the most desirable person to be appointed as guardian of a minor with a consideration of whether desirability constituted a person a legal guardian automatically. The difference between the two positions is fully recognized by Davar J. in 32 Bom 50[8] and it seems to me that if these two distinctions are kept apart, this subject presents very little difficulty. Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. I agree that the decision of my learned brothers Devadoss and Jackson JJ. in 53 M L J 677[7] is not in conformity with authority and that this appeal must be dismissed with costs.

---

[3] Mt. Bhikus Koer v. Mt. Chamela Koer, (1898) 2 C W N 191.

[4] Ranganayaki Ammal v. Ramanuja Iyengar, (1912) 35 Mad 728 = 11 I C 570 = 21 M L J 600.

[5] Thayammal v. Kuppanna Kaundan, (1915) 2 A I R Mad 659=26 I C 179=38 Mad 1125=27 M L J 285.

[6] Seetharamanna v. Appiah, (1926) 13 A I R Mad 457=92 I C 827=49 Mad 768=50 M L J 689.

[7] Surayya v. Subbamma, (1928) 15 A I R Mad 42=106 I C 863=53 M L J 677.

[8] In re Gulbai and Lilbai, (1908) 32 Bom 50=9 Bom L R 923.

Krishnaswami Ayyangar J. — It is scarcely necessary for me to add anything after, if I may say so with the utmost respect, the full and elaborate consideration that the matter has received at the hands of my Lord. The question in short is whether a paternal grandmother can by reason of her relationship alone be held to be a lawful guardian within the meaning of Sec. 21, Limitation Act. She may in a sense be regarded as a natural guardian as her relationship to the minor is so close that she may be expected naturally to watch over and guard his interests. It is however better to avoid the use of the expression for the present purpose, as we are not concerned with finding whether in the ordinary course of nature she is or is not a fit and proper person to protect the minor's interest in the absence of a nearer relation. The statute has used the expression lawful guardian and the introduction of the term natural guardian can scarcely elucidate discussion, but on the contrary may divert the attention.

The Act does not define the expression 'lawful guardian.' But it is obvious, that we must resort to the personal law of the minor or to other enactments, if any, to ascertain its meaning. The only enactment having a bearing is the Guardians and Wards Act, 1890, which does no more than define the word 'guardian' simpliciter. We have therefore to fall back on the personal law of the minor, viz., the Hindu law, to get at the meaning of the expression with which we are concerned. If a person has been appointed or declared a guardian by Court under the Guardians and Wards Act, he or she is undoubtedly a lawful guardian. The difficulty arises only when no such appointment has been made. A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a de jure guardian in contrast to a de facto guardian. The law does make a real distinction between a de jure guardian and a de facto guardian. A de facto guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a de facto guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

There is in the texts of Hindu law no warrant for regarding a paternal grandmother or indeed even the parents themselves for that matter, as the lawful guardians of a minor entitled to manage his property as of right. The texts bearing upon the point are few, and do not throw any direct light on the point under consideration. They only seem to establish the proposition that it is the king alone who as *parens patriæ* is the universal and supreme guardian of all the minors and their estates in the kingdom. He of course has the power to delegate his authority and to appoint guardians, and that power is now vested in the Courts established by law by a process of legislative delegation, if I may so call it. As has been pointed out by my Lord, the parents of a minor have been so long and so consistently regarded as lawful guardians by the Courts no less than by the community that an exception in their favour must be held to have been engrafted on the primeval law of the Hindu text writers. The father and in his absence the mother must accordingly be regarded as lawful guardians, not requiring an appointment for acting as such, and this has now to be treated as an integral rule of the law itself. But such a custom is wholly lacking in the case of other remoter relations not excluding the paternal grandmother, however much they may be interested in the welfare of the minor. In the passages cited from Macnaghten and Strange, there would seem to be at the first look a statement of the order of lawful guardianship which includes other relations besides the father and the mother.

It is however clear to my mind that the enumeration was not intended to declare the persons to be recognized as lawful guardians under the Hindu law without reference to an appointment by Court. It seems to me that it will be more in consonance with the spirit of the law to hold that what was intended by the enumeration was but an indication of the order of preference which the Court should bear in mind in making the choice of a guardian among the available relations, the dominant consideration being the welfare of the minor. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of S. 21, Limitation Act. I have the less hesitation in assenting to this view, as I consider that it will tend to the better protection of the minors' properties than if I were to hold that a series of relations commencing from the elder brother and including the paternal and the maternal relations have the inherent right directly and without an appointment by the Court to assume charge of a minor's estate and proceed to keep alive debts on his behalf. Such an expansion of the rule is, it seems to me, fraught with dangerous consequences, and in the absence of binding authority, should not be upheld. I concur in the judgment just now pronounced by my Lord.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 38

WADSWORTH J.

Kannappa Mudali and another — Appellants.

v.

Varadachariar — Respondent.

Appeal No. 166 of 1938, Decided on 2nd August 1939, against order of Dist. Court, Chingleput, D/- 5th April 1938.

Madras Co-operative Societies Act (6 of 1932), Rules under, R. 15 (7) — Award by Registrar transferred to Civil Court for execution — Civil Court has jurisdiction to recognize assignment under O. 21, R. 16, Civil P. C.

The power of the Civil Court is not merely to execute the decree as if the Registrar passing an award under the Madras Co-operative Societies Act were a Court and as if the decree were merely a decree of the Registrar's Court transferred to it for execution; but it is a power to enforce the award, as if it were a final decree of the Court itself. That is to say, the executing Court is for purposes of execution put in the same position as a Court executing one of its own decrees. Although the Registrar may for certain purposes be a Court, yet he exercises no powers other than those which have been granted to him under the Act and the rules framed under it. Neither the Act nor the rules under the Act contain any provision whereby the Registrar can permit an assignee of an award to apply to the Registrar for recognition of the assignment and for execution. [P 39 C 2]

The Civil Court to which an award by a Registrar under the Madras Co-operative Societies Act has been transmitted for execution has jurisdiction to recognize an assignment under O. 21, R. 16, Civil P. C. Even assuming that it is not competent, execution should not be stopped at the instance of the transferee from the judgment-debtors, if the assignment was recognized after due notice to the judgment-debtors and it was only after sale had been ordered that a stranger purchaser comes forward to object to the exercise of a jurisdiction to which no objection was taken at the proper time. It cannot be said that the executing Court acts wholly without jurisdiction : *A I R 1928 P C 162, Rel. on.* [P 39 C 2; P 40 C 2]

S. Ramachandra Iyer — *for Appellants.*

M. E. Rajagopalachariar and C. Krishnamachariar — *for Respondent.*

Judgment.—This appeal raises the question of the jurisdiction of the Civil Court to which an award by a Registrar under the Madras Co-operative Societies Act has been transmitted for execution, to recognize an assignment under O. 21, R. 16, Civil P. C. In a very recent case (C. M. S. A. No. 188

of 1936) I held that an assignee could apply under O. 21, R. 16 for execution. But that decision was not based on any specific argument regarding the forum in which an application for assignment should be made in the first instance. The argument now put forward is that if there is any power in the assignee to execute an award under the Co-operative Societies Act, the assignment must first be recognized by the Court which passed the decree, which is in effect not the Civil Court but the Court of the Registrar of Co-operative Societies. The award in the present case was in favour of a Co-operative Bank and it was transferred to the Civil Court at the instance of the Bank and execution was taken out by the Bank. While the execution petition was pending, there was an assignment to the present respondent and the execution proceedings instituted by the Bank were stopped and the assignee applied to the executing Court for recognition of his assignment and for execution. Notice of this application went to the judgment-debtors. There was no objection and the assignment was recognized. Further notice was issued of the sale application and again there was no objection. After the sale had been ordered the present appellants, one of them claiming to be a transferee from the judgment-debtors of the properties to be sold, applied to the Court by way of review to cancel the order recognizing the assignment in favour of the respondent. Both the Courts below have held that the recognition of the assignment was within the powers of the Court.

Section 51, Co-operative Societies Act, gives the Registrar power to deal with disputes of members and persons claiming under them either inter se or with the society or between the society and its servants touching the business of a registered society. R. 15 (7) of the rules framed under the Act prescribes three ways in which the decision or award of the Registrar in such a dispute can be enforced. One is by invoking the powers of the Registrar himself under R. 22 to execute the award. The second is by a requisition to the Collector or his deputy to recover the amounts awarded as if they were arrears of land revenue. The third with which we are now concerned, is by an application to the Civil Court having jurisdiction over the subject-matter of the decision or award, which Court shall enforce the decision or award as if it were a final decree of the Court. I would point out that the power of the Civil Court is not merely to execute the decree as if the Registrar were a Court and as if the decree were merely a decree of the Registrar's Court transferred to it for execution; but it is a power to enforce the award, as if it were a final decree of the Court itself. That is to say, the executing Court is to my mind for purposes of execution put in the same position as a Court executing one of its own decrees.

If this view is correct, it disposes of the argument for the appellants. The appellants' contention is that the Registrar is a Court, that an award comes within the definition in the rules of a "decree" and that since O. 21, R. 16 authorizes the recognition of an assignment of a decree only by the Court which passes the decree and not by the Court to which it is transferred for execution, the power to recognize an assignment, if it exists at all, can be exercised only by the Registrar. Now with reference to this argument it must be observed that though the Registrar may for certain purposes be a Court, he exercises no powers other than those which have been granted to him under the Act and the rules framed under it. Neither the Act nor the rules under the Act contain any provision whereby the Registrar can permit an assignee of an award to apply to the Registrar for recognition of the assignment and for execution. I am not called upon now to decide whether the Registrar would be acting legally or not if he permitted an assignee to execute an award by application to the Registrar. All I would say is that there is no express provision in the rules whereby the Registrar can perform the function, which a Civil Court can perform in respect of its own decrees, of recognizing an assignment. The machinery of the Act seems to contemplate the treatment of an award in different ways for different purposes. It may be enforced by a purely executive machinery such as that constituted under the Revenue Recovery Act. It may be enforced by the semi-judicial machinery constituted by the Registrar under the rules under the Act. Or it may be made material for the purely judicial machinery by its transfer for execution to a Civil Court. When once it is transferred to the Civil Court, it is transferred subject to the proviso that it shall be executed as if it were a decree of that Court. It seems to me impossible to read into that provision a reservation that for purposes of assignment of the decree and for the recognition of such assignment in execution, it shall be not the decree of that Court but the decree of the Registrar.

There is very little authority on this subject. Cases under the old Co-operative Societies Act have no direct bearing, for under the old rules the award of the Registrar of Co-operative Societies could be executed only by a procedure similar to that applicable to an award of an ordinary arbitrator. It is established that under the old Act when an award was transferred to the Civil Court for execution, that Civil Court had the necessary power to treat the decree as its own decree for purposes incidental to execution including the granting of a certificate transferring the decree to any Court for execution: *vide* 46 Bom 128.[1] There is authority for the view that the award of an arbitrator when it has been filed in Court and has become the decree of the Court can be assigned and the assignment can be recognized by the Court in which that award is filed: A I R 1924 Cal 117.[2] It is contended for the appellants that the provision of R. 15, sub-rule 8 is significant and that this rule contemplates that the person to be recognized as the decree-holder by the Civil Court must always be the person in whose favour the Registrar has granted an award and cannot be his assignee, for the original holder of the award is given the power to apply to the Court for the return of the award with a certificate of non-satisfaction. It seems to me to be going too far to hold that because the person in whose favour an award has been passed may apply to the Court for its transfer back to the Registrar, the Court has necessarily no power to recognize an assignment. If the Court has recognized such an assignment and in spite thereof the original holder of the award applies for its transfer back to the Registrar, the position is one with which the Court executing the decree can deal by passing appropriate orders on the application for a certificate under O. 21, R. 6.

On a consideration of the contentions of both sides it seems to me clear that though the Registrar is a Court for certain limited purposes, when the award is transferred to the executing Court empowered to enforce it as if it were a final decree of the executing Court itself, in the absence of any explicit provision in the rules for the recognition of assignments by the Registrar, the natural inference is that the executing Court is competent to recognize the assignment. Even if it were not competent, the present case is to my mind not one in which execution should be stopped at the instance of the transferee from the judgment-debtors, for the assignment was recognized after due notice to the judgment-debtors and it was only after sale had been ordered that a stranger purchaser comes forward to object to the exercise of a jurisdiction to which no objection was taken at the proper time. It seems to me to follow that if there was an irregularity (in my opinion, there was none), it is nothing more than an irregularity and there is no error of law apparent on the face of the record which would justify the cancellation of the recognition of the assignment in review. Nor can it be said that the executing Court acts wholly without jurisdiction: *vide* the decision of the Privy Council in 3 Luck 314.[3] The result therefore is that the appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

---

[1] Krishnaji Shridhar v. Mahadeo Sakharam, (1922) 9 A I R Bom 377=64 I C 337=46 Bom 128=23 Bom L R 909.

[2] Gladstone Wyllie & Co. v. Joosub Peer Mohomed & Co., (1924) 11 AIR Cal 117=77 I C 868 =27 C W N 666.

[3] Jang Bahadur v. Bank of Upper India Ltd., (1928) 15 A I R P C 162=109 I C 417=55 I A 227=3 Luck 314 (P C).

A. I. R. 1940 Madras 40

WADSWORTH J.

Chelikani Kondayyarao and others — Appellants.

v.

Vuppalapati Naganna and others — Respondents.

Appeal No. 202 of 1938, Decided on 19th July 1939, against order of Sub-Judge, Masulipatam, D/- 11th October 1937.

Madras Estates Land Act (1 of 1908), Ss. 3 (2) (d), 77 and 181 — Landholder permanently alienating kudiwaram right in home-farm land within village admitted to be "estate" — Land continued to go by name of kam-battam—Land becomes "ryoti" land in spite of it and even in absence of express intention under S. 181 — Suit for rent in respect of such land falls under S. 77 and is cognizable only by Revenue Court.

If the landholder of a home-farm land situated within a mukhasa village which is admitted to be an "estate" falling under cl. (2) (d) of S. 3, alienates his right in the kudiwaram with such permanence as to preclude the probability of its ever again coming into his personal enjoyment, then quite clearly that land, whatever it was in the past is no longer the home farm land of the landholder and the mere fact that it continues to go by the name of kambattam land would not restore it to the privileges which it has ceased to enjoy; and even in the absence of any express intention to convert land, which was once home-farm land, under S. 181 into ryoti land, land which has ceased to be in fact home-farm land of the landholder cannot be treated in law as retaining a character which it has lost. If the land is no longer the private land of the landholder, then by the definition of "ryoti land" it will automatically be treated as ryoti land to which all the incidents of ryoti tenure will apply. One of these incidents is that a suit for rent in respect of that land will fall under S. 77 of the Act and will be cognizable only by the Revenue Court. [P 41 C 1; P 42 C 1, 2]

V. Rangachari — *for Appellants.*

K. Kameswara Rao and B. S. Ramachandrudu — *for Respondents.*

Judgment.—This appeal arises out of an order returning a plaint for presentation in a Revenue Court. The land in respect of which this suit for rent arose is admittedly situated within a mukhasa village which according to the trial Court's judgment was admitted to be an "estate" falling under cl. (2) (d) of S. 3, Madras Estates Land Act. It is common ground that the land in question was formerly the kambattam land of the plaintiffs and that it was demised to the defendant in 1920 under Ex. A which is described as a "permanent khat relating to the sale of kudivaram right for Rs. 33,492." This instrument recites that the lands demised form part of the plaintiff's private kambattam land in which they have a permanent kudiwaram right as well as melwaram right and that the plaintiffs have sold to the defendant all the rights possessed by them in the lands excepting the melvaram right thereto, the consideration being the payment of a substantial cash premium and future payments of rents at rates specified. The trial Court applied the provisions of the Amending Act (18 of 1936) and held that the suit related to land which was ryoti land within the terms of the Act and that therefore the suit to recover arrears of rent in respect of that land fell under S. 77, Madras Estates Land Act, and it could only be entertained by a Revenue Court.

It seems to me unnecessary to go into the question whether Act 18 of 1936 which had not been passed when the suit was instituted governs the forum in which the suit should be decided, for I am of opinion that the suit was ab initio filed in the wrong Court even under the statute in force at the time when the litigation started. Under the Madras Estates Land Act as amended upto 1934, "ryoti land" means cultivable land in an estate other than private land and "private land" means the domain or home-farm land of a landholder by whatever designation known. The argument of the appellants is that because this land was admittedly at one time the home-farm land and is designated as kambattam, it retains for all time its character as home-farm land regardless of the use to which it is put and of the tenure upon which it is granted, provided there is no explicit conversion of that land into ryoti land. It seems to me that this contention runs quite contrary to the scheme of the Madras Estates Land Act. The Act contemplates lands of various categories. There is poramboke land not suitable for assignment and there is "old waste" with neither of which we are here concerned. Cultivated land is for all practical purposes divided into ryoti land in which the ryot has an occupancy right and in which the conditions of his tenure are governed by the Act and home-farm land which the land holder retains in his own occupation for his private use though he may for convenience of enjoyment make temporary arrangements for its cultivation by others. In my opinion it is not in accordance with the scheme of the Act to recognize another category of land, namely land which was initially the home-farm land of the landholder but which he has no intention to retain for his own use and in which he has transferred the occupancy right to a cultivating tenant for cash consideration as a permanent measure.

It is contended that the demise in favour of the defendant contains terms which are inconsistent with the provisions of the Act regarding the tenure of an occupancy right, particularly in that there is a permanently fixed rent, that there is a rate of interest on arrears different from that prescribed by the Act, that the landholder retains the right to existing trees on the land demised and that there is a provision for variation in the amount of premium to be paid in accordance with any survey excess or deficiency which may be found on accurate measurement of the land demised. It seems to me that all these terms are matters of minor importance and the question whether all of them would be of binding force in view of the provisions of the Act, is a matter on which I am not now called upon to express an opinion. The fact however remains that by this demise of 1920 the plaintiffs divested themselves for all time of any right in the kudivaram of the land in question other than the right to receive a recurring rent and an interest in the trees then standing on the land. It cannot be said that this land any more partook of the character of the private domain of the landholder, kept for his own use and enjoyment, or that there was any intention on the part of the landholder that it should ever revert to the condition of private home-farm land. What the landholder clearly intended to do was to transfer the kudiwaram permanently for a cash consideration, while reciting in the conveyance the fact that it was the kambattam land presumably in the hope that thereby he would be able to evade the provisions of the Estates Land Act designed for the protection of occupancy ryots. The Estates Land Act does not define what is meant by "home-farm land," but the term has been defined by the Courts and the definition is now well settled. Sir John Wallis C. J., in 39 Mad 341[1] at p. 347 adopted the definition of similar land in a case from North India as

> land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season.

This definition was approved by the Privy Council in 42 Mad 400[2] at p. 405 and it has been followed in subsequent cases. We may therefore take it as settled that home-farm land is land regarding which the landholder at least retains an expectation that he will at some not too distant date use it for his own cultivation and enjoyment. If land does not fall within this definition, if the landholder has alienated his right in the kudiwaram with such permanence as to preclude the probability of its ever again coming into his personal enjoyment, then quite clearly that land, whatever it was in the past, is no longer the home-farm land of the landholder and the mere fact that it continues to go by the name of kambattam land would not restore it to the privileges which it has ceased to enjoy. Apart from the presumptions to be drawn under S. 185 of the Act, and even in the absence of any express intention to convert land, which was once home-farm land, under S. 181 into ryoti land, it seems to me to be apparent that land which has ceased to be in fact home-farm land of the landholder cannot be treated in law as retaining a character which it has lost. If the land is no longer the private land of the landholder, then by the definition of "ryoti land" it will automatically be treated as ryoti land to which all the incidents of ryoti tenure will apply. One of these incidents is that a suit for rent in respect of that land will fall under S. 77 of the Act and will be cognizable only by the Revenue Court.

I am clearly of opinion that the land in this case is no longer the private land of the landholder but has become ryoti land and that the suit for rent falls under S. 77 and has to be brought in the Revenue Court. In this view it seems to me to be unnecessary to go into the question of the effect of S. 127, sub-s. (2) of Madras Act 8 of 1934 on the course of this litigation in the trial Court or to consider the question whether the Amending Acts of 1936 in terms apply. The appeal is therefore dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

A. I. R. 1940 Madras 42

LEACH C. J. AND KUNHI RAMAN J.

S. Soundararajan and others—Applts.

v.

Khaka Mahomed Ismail Saheb of Messrs. Roshan & Co. — Respondent.

Appeal No. 40 of 1938, Decided on 1st August 1939, from order of Gentle J., D/- 11th April 1938.

Civil P. C. (1908), O. 21, R. 92—Court sale — Confirmation — Auction-purchaser making adequate bid—No irregularity or fraud with respect to sale—Court is bound to confirm sale though at late stage some one else is willing to pay more.

The fact that the sale is subject to the confirmation of the Court does not mean that the Court shall refuse to accept the highest bid because at a later stage some one else is willing to pay more. The condition is only a safeguard against irregularity or fraud in connexion with the sale and against property being sold at an inadequate price and an auction-purchaser making an adequate bid and complying with all the requirements of the Court and there being no irregularity or fraud is entitled to have the sale confirmed even though at a late stage, some other person is willing to pay more. [P 43 C 1]

C. S. Venkatachariar — *for Appellants.*

V. C. Gopalaratnam — *for Respondent.*

Leach C. J.—In pursuance of an order passed by Gentle J. in a partition suit on the Original Side of this Court a public auction of the estate properties was held on 13th September 1937. One of the properties offered for sale was a house and its site known as Napier's Gardens. A reserve price of Rs. 1,10,000 was fixed and the members of the family were allowed to bid and set off the values of their respective shares. Appellant 1, who is a defendant in the suit and a member of the family, bid for this property, but when the reserve price was reached he refused to bid further. There were higher bids by others and the property was eventually knocked down to the respondent for Rs. 1,12,500. The condition of the sale required that the sale should be confirmed by the Court. The commissioners who conducted the sale reported the result to the Court and the sale came before Gentle J. for confirmation on 7th April 1938. Appellant 1 informed the Court that he would like to have the property for himself as it had been in his family for a long time. The learned Judge having inquired whether he was prepared to offer more, the matter stood adjourned until 11th April when the appellant informed the Court that he was prepared to offer Rs. 1,15,000. The respondent naturally objected to the matter being re-opened. He pointed out that he was the highest bidder at the public auction and that he had complied with all the conditions of sale, including the payment of a deposit of Rs. 28,000. He contended that it would not be proper in these circumstances for the Court to re-open the matter. The learned Judge accepted the respondent's contention and confirmed the sale. The appeal is from the order of confirmation.

---

[1] Zamindar of Chellapalli v. Somayya, (1915) 2 A I R Mad 750=27 I C 77=39 Mad 341=27 M L J 718.

[2] Mallikarjuna Prasad Nayudu v. Somayya, (1918) 5 AIR P C 182=49 I C 708=46 I A 44 =42 Mad 400 (P C).

The order passed by the learned Judge is not open to serious question. The fact that the sale is subject to the confirmation of the Court does not mean that the Court shall refuse to accept the highest bid because at a later stage some one on second thought says that he is willing to pay more. It is only right and proper that the sale should be subject to the confirmation of the Court. The condition is a safeguard against irregularity or fraud in connexion with the sale and against property being sold at an inadequate price. No such consideration applies here. No complaint is made of any irregularity or fraud, and it is not suggested that the respondent's final bid was inadequate. Having exceeded the reserve price agreed upon by the parties it could not be said to be inadequate. The respondent having made an adequate bid and having complied with all the requirements of the Court and there being no irregularity he was entitled to have the sale confirmed. The appeal will be dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

A. I. R. 1940 Madras 43

PANDRANG ROW J.

In re Mohideen Pichai Rowther and others — Appellants.

Criminal Appeal No. 666 of 1937, Decided on 1st August 1938, against convictions and sentences passed by Sessions Judge, Madura Division, in C. C. No. 93 of 1937, D/- 18th October 1937.

(a) Criminal Trial—Evidence—It cannot be said to be reliable against some and unreliable against other accused.

Where the witnesses are more or less the same, it cannot be said that their evidence is unreliable as against certain accused only and reliable as against others. [P 44 C 2]

(b) Penal Code (1860), Secs. 299 and 300—Attack with dangerous weapons by several persons on one—Instantaneous death—Inability to find person inflicting fatal injury—Culpable homicide, at least, is made out.

If there is a joint attack with dangerous weapons by four or five persons on one man and the latter dies almost on the spot as a result of the injuries inflicted on him, at least the offence of culpable homicide must be said to have been made out. The mere fact that it is not possible to say who inflicted the fatal injury will not be sufficient to support the finding that no offence of murder or culpable homicide had been committed. [P 44 C 2; P 45 C 1]

(c) Penal Code (1860), Secs. 300 and 324 — Evidence as to attack and persons attacking doubtful and unsatisfactory — Offence of murder reduced to one of hurt — Conviction even for hurt is not justified.

When the determining reason to reduce the offence of murder to one of hurt under Sec. 324 is the doubtful and unsatisfactory character of evidence relating to the attack on the deceased and in particular to the persons who took part in it, there is really no justification even for conviction under S. 324. [P 45 C 1]

(d) Penal Code (1860), Secs. 147 and 148 — Conviction—Accused claiming to be owner of land and preventing harvest of crop on it by deceased—Deceased actually on land before such prevention—Court failing to determine possession of land and ownership to crop—Accused cannot be convicted for rioting.

The preventing of harvesting of one's crop by persons who have no right whatever to it, is not unlawful and the mere fact that the party which had no right was actually on the land before the rightful owners could prevent the harvesting of the crop cannot make its entry otherwise than unlawful and will not make the rightful owners other than persons acting in lawful exercise of their right. The taking of possession in these circumstances would not confer any legal right, it would not be possession in the eye of the law. In such a case it is the duty of the Court to determine whether as a matter of fact, the land was in possession of the accused party alleging to be rightful owners and the crop belonged to them, because if that contention were made out, there could be no conviction even for rioting: *A I R 1927 Mad 986; 24 Cal 686 and 113 E R 950, Rel. on.* [P 45 C 1, 2; P 46 C 1]

K. S. Jayarama Ayyar, G. Gopalaswami and C. R. Pattabhirama Ayyar — *for Appellants.*

Public Prosecutor — *for the Crown.*

Judgment.—The appellants six in number appeal from their convictions and sentences by the Sessions Judge of Madura in S. C. No. 93 of 1937. The charge in that case consisted of no less than sixteen counts and as many as 22 persons were accused in the case. The appellants alone were convicted and the rest were acquitted. The convictions now appealed from relate only to counts 1 and 2, the first count being one of rioting which was against 12 persons under S. 148, Penal Code, and against the remaining ten under Sec. 147, Penal Code. The second count is one of murder. The conviction is not for murder or culpable homicide but under Sec. 324, Penal Code. The occurrence to which the case relates took place some time in the morning of 21st December 1936 and it arose out of a dispute regarding the groundnut crop in S. No. 442-2 in the village of Chokkalingapuram, to which the accused belong. The prosecution party headed by accused Kailasam Chetti appear to have gone to the field in the morning determined to harvest the crop. Kailasam Chetti was the person who claimed to be in possession of the land under a lease granted by one late Ramalinga Servai. He brought his men in a bus from Melur which is 18 miles away, apparently after making preparations for harvesting the crop in spite of the threatened opposition on the part of accused 2 and 5 who claimed the land and also claimed to have raised the crop through their farm servant, one Kuppan. Information of the impending clash reached the Village Munsif, P. W. 22, and he at once went to the police station to report it and to obtain the necessary bandobust. A fight however actually took place between two groups in the course of which persons on both sides were injured, and one belonging to the group of Kailasam Chetty and related to him was killed. The evidence for the prosecution appears to have been unsatisfactory as would be seen from the fact that a large number of persons accused were acquitted and numerous specific charges against particular accused were held not to be established. The first charge sheet implicated only accused 1 to 12; the second charge sheet, which was filed a fortnight later, implicated accused 13 to 18 and the third charge sheet, which was filed after an interval of a month and a half, implicated four more accused, namely accused 19 to 22. The evidence of identification as disclosed by the identification parades was held to be not satisfactory by the trial Judge, and he observes that some of the witnesses for the prosecution had previous opportunities of seeing the accused before they identified them.

He also points out in para. 16 of his judgment that numerous mistakes were made by the witnesses in the course of the actual identification. In another place in his judgment the learned Sessions Judge observes that the evidence against the accused except those convicted by him is rather vague, scanty and unreliable. So far as the unreliable character of the evidence is concerned, it cannot be said to be unreliable as against certain accused only and reliable as against others, the witnesses being more or less the same. The principal witness, namely, P. W. 3, who alone made statements regarding the occurrence soon after it (*vide* Exs. D and E) is characterized by the learned Sessions Judge as a wobbler and this characterization appears to be justified in view of the different statements made by him regarding the occurrence (*vide* para. 33 of the judgment of the Court below). At least as many as ten persons in the prosecution party, namely, P. Ws. 2 to 11, had received injuries and produced wound certificates, and it is remarkable that no conviction could be had in respect of any of the injuries sustained by these witnesses—a fact which shows that the evidence of even persons who were injured was not accepted as satisfactory even so far as the identity of their assailants was concerned. As regards the injuries inflicted on the deceased, the evidence is nearly as unsatisfactory as the evidence relating to the infliction of injuries on the others, and really there is no justification for making a difference. It would appear from the judgment of the learned Sessions Judge that there was an attempt made to rope in accused 19 as an abettor of the murder. In other words, the witnesses for the prosecution had shown a desire to implicate persons who were really innocent of the particular act alleged against them. If as a matter of fact the learned Judge accepted the evidence regarding the attack on the deceased and the infliction of the injuries on him by certain of the accused, the mere fact that it was not possible to say who inflicted the fatal injury would not be sufficient to support the finding that no offence of murder or culpable homicide had been committed. If there was a joint attack with dangerous weapons by four or five persons on one man and the latter died almost on the spot as a result of the injuries inflicted on him, at least the offence of culpable homicide must be said to have been made out. Apparently the learned Judge thought that it was not possible to convict the persons charged with murder even of culpable homicide. But the reason given, namely, that it will not be possible to say who inflicted the fatal stab is not sufficient. The other reason which seems to have weighed in the mind of the learned trial Judge, namely that the evidence itself was of a doubtful character, must have been the determining reason which led the learned Sessions Judge to reduce the offence to one of hurt under S. 324, I. P. C. There is really no justification for this conviction in view of the unsatisfactory evidence relating to the attack on the deceased and in particular to the persons who took part in it.

Then remains the charge of rioting, that is to say, the first count in the charge. The common object is stated in the charge to be to prevent Kailasam Chetti and his men from harvesting groundnut crops from R. S. No. 442-2, the field in their possession and to cause hurt to Kailasam Chetti and his men. As regards the latter, namely the object of causing hurt, nothing is said in the judgment of the learned Sessions Judge. As a matter of fact he does not find that this common object has been proved. There is a reference to the other common object, namely of preventing by force the harvest of the crop. As regards this point however the learned Sessions Judge in his otherwise careful judgment fails to consider the question adequately. He merely observes as follows:

> There can be little doubt on the evidence that a large crowd of 40 to 50 persons marched on the morning of 21st December 1936 from Chokkalingapuram to the field with the common object of preventing by force its harvest by Kailasam and his men and that the rioters were armed with weapons like spears, aruvals and sticks.

Nowhere has he given reasons for this conclusion, namely that the common object was to prevent by force the harvest of the crop by Kailasam Chetti and his men. Assuming however that the evidence supports this finding, it remains to be seen whether its common object can be regarded as an object which will render the assembly an unlawful one. It cannot be said that preventing by force the harvest of one's own groundnut crop is an unlawful object, and if in this case the groundnut crop belonged to accused 2 and 5, it is obvious that the preventing of the harvesting of such crop by persons who had no right whatever to it was not unlawful and could not be unlawful. This is not a case of maintaining a particular right by force but of preventing the commission of an offence like theft or mischief which was threatened. It is enough in this connexion to refer to 51 Mad 91,[1] where it was held that where five or more persons assemble for maintaining by force a right which they bona fide believe they possess and not for enforcing by such force or show of force a right or supposed right of theirs, they do not constitute an unlawful assembly. The present case is more or less similar to 24 Cal 686[2] with this difference, namely that in this case Kailasam Chetti and his party were actually on the land before the accused's party could prevent the harvesting of the crop. This does not however make any difference if the crop really belonged to the accused's party. The mere fact that the party which had no right was able to get on the land a few minutes before the rightful owners could get to the spot for protecting their crop could not make their entry otherwise than unlawful and would not make the defenders other than persons acting in lawful exercise of their right. The taking of possession in these circumstances would not confer any legal right: it would not be possession in the eye of the law. As observed by Mayne, relying on 113 E R 950,[3] a mere trespasser cannot obtain what is known in law as possession by an act of entry or by the continuance of that act so long as the act is disputed and resisted (Mayne's Criminal Law of India, 4th Edn., page 738). It was therefore absolutely necessary in this case to determine to whom the crop belonged, and incidentally to determine in whose possession the land was prior to the occurrence, because that would assist the determination of the ownership of the crop. On this point the learned Sessions Judge's observations are somewhat halting. In one place he says:

> It may be possible, but I express no definite opinion on this subject, that the original lease (Ex. O) by Ramalingam in favour of Kailasam and two

---

1. In re Veerabadra Pillai, (1927) 14 A I R Mad 986=105 I C 657=28 Cr L J 945= 53 M L J 696=51 Mad 91.
2. Pachkauri v. Queen-Empress, (1897) 24 Cal 686 =1 C W N 423.
3. Browne v. Dawson, 113 E R 950.

others was a nominal or colourable document as contended by accused 2 and 5, and it may be that even after the lease Ramalingam dealt with some of the properties as if they were his own and that after his death his heirs—accused 2 and 5—asserted the absence of any title in Kailasam Chetti.

He leaves the matter there remarking that all this relates to a civil dispute between the parties and has nothing to do with the question now before us, and it is surprising that the learned Sessions Judge should have gone the length of saying that this is a civil dispute which has nothing to do with the question before him. It had everything to do with the case before him, and it was his duty to determine whether as a matter of fact, as contended by the accused, the land was in their possession and the crop belonged to them, because if that contention were made out, there could be no conviction even for rioting. This is not a case in which the dispute relates to mere possession of land, but it relates to the ownership of the crop, and it is not unlawful for a person to protect his own property from theft or mischief. It may be that, where there is a dispute relating to possession alone and one party by force or show of force attempts to obtain possession from another who has already got possession, or at least is in the land, the case is different. It is not necessary for the purpose of this case for me to decide whether in such a case the employment of force by five or more persons with such object would not amount to an offence, and that is not the case here. We are dealing with a case in which one party alleges that it was acting in the exercise of its rights to property, that is to say, in defending such property from theft or mischief. For instance, if a person were told that certain unauthorized persons had broken into his house and were taking away his property or damaging it, there would be nothing unlawful in his collecting his friends and arming them for the purpose of repelling the invaders. The present case is one comparable to this, and it is therefore a matter for regret that the learned Sessions Judge did not think it was for him to decide whether or not the accused's claim to ownership of the crop in question was made out. Looking at the evidence myself, I may mention that the accused's contention appears to be justified by the evidence of the Village Munsif who appears to me to be one of the few disinterested witnesses. He says that even after Ramalinga's lease in favour of Kailasam Chetti and two others, Ramalinga continued to be in possession till his death. This shows that Ramalinga regarded the lease as not binding on him and retained possession of the land in spite of it. It follows that Kailasam Chetti could not have obtained possession at least during Ramalinga's lifetime, though his case is that he got possession under the lease itself, and it is not his case that after Ramalinga's death he got into possession. This case therefore that he got possession under the lease cannot be true. Ramalinga was in possession according to the Village Munsif till his death and was paying the kist. It was only after his death that disputes arose according to the Village Munsif and both the parties paid the kist. The evidence in support of the allegation that the crop was raised by Kailasam Chetti's tenants is not entitled to credence. The learned Judge remarks in para. 17 of his judgment that

> though it was argued on behalf of the accused that possession of the field was with the accused and that it was Kuppan, the farm servant of accused 2, that had raised the groundnut crop on the field, and that the aggression was on the part of the prosecution party in driving Kuppan away from the field and that when he was gathering the crop, I think we can safely say that this is not correct and that the prosecution case about the groundnut crop having been raised by P. Ws. 14 and 23 under sub-lease from Kailasam Chetti is more probably true.

Here again the learned Sessions Judge has not given any particular reasons for coming to the conclusion that it could be safely said that the accused's version is not correct, and that the prosecution case is more probably true. In any case a conviction must rest on something more substantial than a mere probability. It is impossible to say in this case that the accused's contention is not true or that the prosecution case has been established so far as possession of the land and the ownership of the crop are concerned. It must therefore be held that the prosecution has failed in this case to establish that the accused were animated by a common object which was unlawful. The charge of rioting must therefore be held to have been not established by the prosecution in this case. The appeal therefore succeeds. The convictions and sentences of the appellants are set aside and they are acquitted. They are also discharged from their bail bonds.

C.R.K./N.K. *Appeal allowed.*

* A. I. R. 1940 Madras 47

LEACH C. J. AND KUNHI RAMAN J.

B. Veeranna Sha and another — Appellants.

v.

Official Receiver, Secunderabad — Respondent.

Appeal No. 19 of 1938, Decided on 4th September 1939, from order of Gentle J., D/- 17th December 1937.

*** Insolvency—Adjudication by foreign Court —Effect—Adjudication of judgment-debtor by foreign Court—Decree-holders attaching moveable property of judgment-debtor in British India—Attachments before and after adjudication — Decree-holder attaching before adjudication remains entitled to benefit of attachment but decree-holder attaching after adjudication is entitled to nothing under his attachment.**

Adjudication by a foreign Court operates as a private transfer within the meaning of S. 64, Civil P. C. When a foreign Court adjudicates a person insolvent the only property in British India which vests in the receiver is the moveable property which the insolvent was free to assign at the date of the adjudication, and such property vests by virtue of private international law. Having regard to S. 64 the adjudication does not affect the rights of a creditor who has attached before the adjudication. He remains entitled to the benefit of his attachment. But the creditor who attaches after adjudication is not entitled to anything by reason of his attachment and he is left merely with the right to prove his debt in insolvency. S. 64 read with S. 73, Civil P. C., does not affect this conclusion : *A I R 1933 P C 134 and (1910) 2 A C 508, Rel. on.* [P 48 C 1, 2; P 49 C 1]

K. Krishnaswami Ayyangar, A. Seshachariar, P. Chakrapani and T. G. Raghavachari — *for Appellants.*

C. Vasudevan — *for Respondent.*

Leach C. J.—This appeal raises a question of private international law. In C. S. No. 420 of 1922 of the Original Side of this Court, three members of a joint Hindu family sued for partition of the family estate. One of the plaintiffs died and the other two were adjudicated insolvents by an order of the District Judge of Secunderabad, dated 15th October 1928, on an application filed on 27th August 1928. Secunderabad is not part of British India and the adjudication was therefore in law an adjudication by a foreign Court. On 5th December 1922 a preliminary decree was passed in the partition suit. On 15th June 1926, a Bombay creditor of the plaintiffs obtained a decree against them in the Bombay High Court and the decree was transferred to this Court for execution. In the execution proceedings which followed, the Bombay creditor on 20th December 1926 attached the preliminary decree which the plaintiffs had obtained in the partition suit. Other creditors of the plaintiffs obtained decrees against them and nine of them also attached the preliminary decree before the order of adjudication was passed. Three of the creditors obtained orders of attachment after the adjudication. Two of the creditors who attached after adjudication are the appellants in the present appeal.

On 18th April 1937 the partition suit was compromised and in pursuance of the compromise the amount of Rs. 1,31,231-9-0 in cash and Government securities was paid into Court. The Official Receiver of Secunderabad settled with seven of the creditors who had attached before the adjudication for the sum of Rs. 66,926-1-0. We are told that two of the creditors who attached before judgment allowed their claims to become barred by the law of limitation and one proved in the insolvency. After settling with the seven creditors there remained a balance of Rs. 64,305-8-0. The Official Receiver asked that this amount should be paid out to him. The application was opposed by the appellants, but was granted. Under the compromise decree in the partition suit a sum representing 50,000 sicca rupees had to be paid into Court in addition to the Rs. 1,31,231-9-0. It was paid in and after reserving sufficient to meet the claim of the appellants which amounted to some Rs. 21,000, and the claim of the other creditor who had also attached after the order of adjudication all the moneys were withdrawn by the Official Receiver. The appeal concerns the right claimed by the appellants to withdraw the Rs. 21,000.

The appellants' case is that they are entitled in law to rateable distribution with the creditors who attached before adjudication and as there is sufficient money to pay all the creditors they are entitled to be paid the full amount of their claim out of the moneys in Court. In the course of the arguments the appellants' counsel put forward an alternative claim which was not advanced before Gentle J. who heard the application. The aggregate amount claimed by the seven creditors with whom the Official Receiver settled was Rs. 98,000. It is said that even if the appellants are not entitled to withdraw the whole of the Rs. 21,000 they are entitled to receive out of the moneys in Court a sum representing the amount they would have received if the Rs. 98,000 had been rateably distributed between them and the seven creditors. In rejecting the claim made by the appellants before Gentle J. the learned Judge relied on the judgments in 56 Mad 405[1] and (1910) 2 A C 508.[2] In 56 Mad 405[1] an appeal arising out of this very insolvency, the Privy Council held that the adjudication by a foreign Court operated as a private transfer within the meaning of S. 64, Civil P. C. When a foreign Court adjudicates a person insolvent the only property in British India which vests in the receiver is the moveable property which the insolvent was free to assign at the date of the adjudication and such property vests by virtue of private international law. Having regard to S. 64, Civil P. C., the adjudication did not however affect the rights of a creditor who had attached before the adjudication. The creditor was the Bombay creditor to whom I have already referred. S. 64, Civil P. C., reads as follows :

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment shall be void as against all claims enforceable under the attachment.
>
> *Explanation.*—For the purposes of this Section, claims enforceable under an attachment include claims for the rateable distribution of assets.

By virtue of the provisions of S. 73 of the Code where assets are held by a Court and more persons than one have, before the receipt of assets, applied to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction, the assets, after deducting the costs of realization, shall be rateably distributed among them all. There are provisos to the Section, but they do not call for mention here. The appellants contend that inasmuch as S. 64 states that a private transfer of property which has been attached shall be void as against all claims enforceable under the attachment and as the Section expressly declares that "claims enforceable under attachment" include claims for rateable distribution, they are entitled by virtue of S. 73 to be treated in the same way as the creditors who attached before the adjudication are treated.

Under the Municipal law a creditor who has attached before adjudication but has not received payment is not a secured creditor. The adjudication puts an end to the execution proceedings and the only course open to him is to prove in the insolvency. The law of British India is the same as the law of England in this respect. An adjudication by a foreign Court, being a private transfer within the meaning of S. 64, Civil P. C., does not affect the position of a creditor who before the adjudication has attached moveable property of the insolvent. He remains entitled to the benefit of his attachment. In deciding the appeal in 56 Mad 405[1] the Judicial Committee applied principles laid down by the House of Lords in (1910) 2 A C 508.[2] In that case the adjudication was in Scotland, but before adjudication a creditor had attached personalty in England. It was held that the attachment was effective. Lord Thankerton who delivered the judgment of the Board quoted the following passage from the speech of Lord Dunedin in (1910) 2 A C 508.[2]

> Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be doctrine at the bottom of the cases of which (1874) 2 R 150[3] is only one example.

Lord Thankerton then went on to say :

> This means that, after the date of the foreign adjudication order, it will be recognized as effective but it is equally clear from the opinions expressed in *Galbraith' case*[2] that it will not be allowed to interfere with any process, at the instance of a creditor, already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject matter of the process to the receiver.

But an attachment after adjudication by a foreign Court is entirely a different matter. The receiver of the foreign Court is entitled to what Lord Macnaghten described in (1910) 2 A C 508[2] as the free assets of the bankrupt. I consider that, the free assets must include assets which are not required to meet a charge or an attachment in existence at the time of the adjudication. It is said on behalf of the appellants that S. 64, Civil P. C., read with S. 73 puts the Indian law on a different basis. I am unable to accept this contention. The Legislature could not have intended the provisions of these Sections to override this rule of private international law. By reason of the rule the appellants were not in a position to attach after adjudication. On behalf of the appellants, Mr. Krishnaswami Iyengar has laid stress on the following passage in Lord Thankerton's judgment in 56 Mad 405 :[1]

---

[1] Ananthapadmanabhaswami v. Official Receiver, Secunderabad, (1933) 20 A I R P C 134=142 I C 552=60 I A 167=56 Mad 405 (P C).

[2] Galbraith v. Grimshaw, (1910) 2 A C 508=79 L J K B 1011=103 L T 294=17 Manson 183 =54 S J 634.

[3] Goetze v. Aders, (1874) 2 R 150.

> In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby ear-marked for the purpose of answering the Bombay money decree, and that inchoate right would have ripened into execution and sale ; it is no matter that under S. 73, Civil P. C., the appellant would have to share the proceeds of sale with other decree-holders ; it would still be a valuable right.

It appears to me that Lord Thankerton must here have had in mind decree-holders who had also attached before adjudication. The position of a creditor attaching after adjudication was not under consideration. As the foreign receiver is entitled to all the moveable assets of the insolvent which were free at the date of the adjudication and as I hold that the free assets must be deemed to be the moneys left over after the satisfaction of the claims of the creditors who had attached before the adjudication it follows that in my opinion the appellants are not entitled to anything by reason of their attachment. The adjudication prevented the attachment having any validity and they were left merely with the right to prove in the insolvency. This disposes of both the points raised by the appellants. The appeal fails and must be dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

---

* A. I. R. 1940 Madras 49

LEACH C. J. AND KUNHI RAMAN J.

Messrs. Ahmad Bux Alla Jovaya — Appellant.

v.

Fazal Karim — Respondent.

Original Side Appeal No. 48 of 1938, Decided on 8th August 1939, from judgment and order of Gentle J., D/- 22nd April 1938.

*** Letters Patent (Madras), Cl. 12 — Posting of offer or despatch by telegram of offer from particular place cannot be regarded as part of cause of action — Similarly notice of rejection must be taken to have been given in place where letter is received.**

The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of the cause of action. The offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor. Similarly, the notice of rejection must be taken to have been given in the place where the letter was received. The place of rejection is not material : *A I R 1933 Mad 764, Foll.* ; *A I R 1931 Cal 659, Expl.* [P 51 C 2]

B. Pocker — *for Appellant.*

K. Narasimha Iyer for K. N. Viswanathan — *for Respondent.*

1940 M/7 & 8

Leach C. J.—The question raised in this appeal is whether a cause of action arose in part within the original civil jurisdiction of this Court. The appellants are a firm of hide merchants carrying on business in Hyderabad Sind. On 21st April 1937 the appellants telegraphed to the respondent, who is a merchant carrying on business at Madras and at Madhavaram, offering to sell him 5000 sheep hides of a certain quality at the price of Rs. 128 per 100 skins, delivery to be given at the railway station in Hyderabad. The respondent by a telegram of the same date made a counter offer. He informed the appellants that he was prepared to accept the hides at the price of Rs. 125 per 100 skins. This counter-offer was accepted by the appellants by telegram the next day. On 4th May 1937 the appellants made an offer to the respondent in respect of another parcel of hides but of a different quality at the price of Rs. 80 per 100 skins. Here again, the respondent made a counter-offer. On the 5th May he telegraphed saying that he was prepared to buy at the price of Rs. 75 per 100 skins. This counter-offer was accepted by the appellants by a telegram despatched from Hyderabad on 7th May. The prices given were F.O.R., Hyderabad railway station and therefore the respondent under the terms of the contract was bound to take delivery at Hyderabad. This was not convenient and at the respondent's request the goods were forwarded to Madras via Karachi through a firm of forwarding agents. The arrangements in this connexion must be taken to be the arrangements of the respondent. Both consignments duly arrived in Madras and were taken by the respondent to his tannery at Madhavaram, where they were unpacked and inspected. The respondent considered that the goods were of inferior quality and he decided to reject them, which he did by a letter posted from Madras. The appellants denied that the goods were of inferior quality and refused to take them back. The result was that a suit was filed on the original side of this Court by the respondent for damages for breach of contract.

In the plaint the respondent averred that part of the cause of action arose in Madras "where the offers were made, wherefrom the sum of Rs. 7500 was remitted to the defendants and the breach of the condition of the goods was ascertained and the goods were rejected." Under Cl. 12 of the Letters Patent the Court has jurisdiction to try a suit in which the cause of action partly arises within the local limits of the ordinary civil jurisdiction of the Court, provided leave is first obtained. The respondent applied for and obtained leave to file the suit. The appellants, having been served with the summons, asked for the revocation of the order granting leave. The application was heard by Gentle J. who rejected it. The appeal now before us is from that order. The learned Judge held that the case fell within the decision of the Calcutta High Court in 58 Cal 539[1] which he considered was not in conflict with the decisions of this Court in 65 M L J 455[2] and 27 Mad 355.[3] As I do not share the opinion that the decisions of the two Courts are in harmony it will be necessary to examine these cases, but before doing so, I consider it desirable to refer to two English decisions which have bearing on the appeal.

The first of these cases is (1889) 58 L J Q B 120[4] in which the Court of appeal (Lord Esher, and Fry and Lopes L. JJ.) defined "cause of action" as comprising every fact, which if traversed, it is necessary for a plaintiff to prove to entitle him to succeed. This definition has found general acceptance. The second case is (1918) 1 K B 128[5] in which it was held that where a contract is made by an offer and acceptance sent through the post between parties residing in different county Court districts the posting of the offer is not part of the cause of action within the meaning of S. 74, County Courts Act. That Section corresponds with Cl. 12 of the Letters Patent of this Court. Under it an action or matter may be commenced by leave of the Judge or Registrar in the Court in the district of which the action or claim "wholly or in part arose." In that case the plaintiffs, who carried on business at West Hartlepool, bought from the defendant, who carried on business at Croydon, a quantity of glass and scrap wire. The contract was made entirely by correspondence through the post. The defendant failed to deliver the goods and the plaintiffs instituted a suit in the West Hartlepool County Court having first obtained leave under S. 74, County Courts Act. It was contended by the plaintiffs that inasmuch as their offer which the defendant accepted was made in a letter posted in West Hartlepool part of the cause of action arose there. Lawrence and Lush JJ. were emphatic in their opinion that the posting of the offer was no part of the cause of action. Lawrence J. said :

> The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon.

The words of Lush J. were :

> The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received.

I will now turn to the decisions of this Court referred to by Gentle J. In 65 M L J 455[2] the question for decision was whether a contract of insurance had been effected in Madras or in Calcutta. The proposal for a policy was made in Madras through a local agent who had no power to accept it. It could only be accepted at the office of the insurance company in Calcutta. The proposal for the policy was posted from Madras and it was contended that the contract must therefore be deemed to have been made here. The Court negatived this contention and relying on (1918) 1 K B 128[5] held that an offer made through post is made in the place where the offer is received. The case in 27 Mad 355[3] was one under the Code of Civil Procedure, 1882, and is not really in point. Under that Code a suit had to be filed in the Court within whose jurisdiction the cause of action arose; or, all the defendants at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain; or any of the defendants, at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain; provided that in the last case the leave of the Court was given; or the defendants who did not reside, or carry on business or personally work for gain, acquiesced in the institution of the suit. There were three explanations to the Section. The third explanation stated that in suits arising out of contract, the cause of action arose within the meaning of the Section at the place where the contract was made, or the place where the contract was to be performed or performance thereof completed, or the place wherein performance of the contract any money to which the suit related was expressly or impliedly

---

1. Engineering Supplies, Ltd. v. Dhandhania and Co., (1931) 18 A I R Cal 659=134 I C 65 = 58 Cal 539.
2. The National Insurance Co. Ltd. of Calcutta v. Seethammal, (1933) 20 A I R Mad 764 = 145 I C 998=65 M L J 455.
3. Kamisetti Subbiah v. Venkataswamy, (1904) 27 Mad 355.
4. Read v. Brown, (1889) 22 Q B D 128=58 L J Q B 120=60 L T 250=37 W R 131.
5. Clarke Brothers v. Knowles, (1918) 1 K B 128 =87 L J K B 189=118 L T 253.

payable. The corresponding Section in the present Code, S. 20, follows the lines of the Letters Patent and says that a suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It was held in 27 Mad 355[3] that the contract was made in Madras, where the plaintiff's proposal, sent by post, came to the knowledge of the defendants and where the defendants' acceptance was posted. What the Court had to decide was where the cause of action arose, not whether it arose partly in one place and partly in the other, and on the facts of the case it came to the conclusion that it must be deemed to have arisen in Madras.

The question in 58 Cal 539[1] was whether the Calcutta High Court had jurisdiction to try a suit for breach of contract made between a Calcutta merchant and an English company for the supply of goods. The offer was made by cablegram to London from Calcutta and accepted by cablegram from London. In accordance with the terms of the contract the goods were sent to Calcutta, but they were rejected because they were said not to be of the specified quality. It was held by Rankin C. J. and Ghose J. that the Calcutta High Court had jurisdiction to try the suit as part of the cause of action arose therein. The respondent in the present case has laid great stress on the following passage in the judgment of Rankin C. J.:

> There remain two matters on which the plaintiff can rely in contending that a part of the cause of action took place in Calcutta. One is that his offer was sent from Calcutta by a cable to London, and the other is that he rejected the goods which he did by sending the defendants a communication from Calcutta or by informing their representative in Calcutta.

The learned Chief Justice did regard the making of the offer by cable from Calcutta as part of the cause of action and the rejection of the goods in Calcutta as also a part of the cause of action. There is only one common factor in that case and the case now before us and that is that the suit was instituted in the place from which the accepted offer was sent. The other facts are very different. The contract in the Calcutta case was a C. I. F. contract under which the goods had to be delivered in Calcutta. In the present case the contract is a F. O. R. contract under which the sellers were bound to deliver only at the Hyderabad railway station. I may say in passing that in the present case we have only been asked to hold that the Court has jurisdiction because the offers were made from here and the goods were rejected from here. No point has been made of the fact that money was remitted from here to Hyderabad in payment of the goods. With the greatest respect for what was said in 58 Cal 539,[1] I am unable to agree that the posting of an offer or the despatch by telegram of an offer from a particular place can be regarded as part of the cause of action. The making of the offer has to be proved in order to entitle a plaintiff to succeed in such a case as this, but the offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor. The case in (1918) 1 K B 128[5] apparently was not considered in 58 Cal 539.[1] As I have indicated it was considered and accepted in 65 M L J 455[3] and that being a decision of a Bench of this Court is binding on us. For the reasons indicated I hold that part of the cause of action in this case did not arise in Madras by reason of the fact that the respondent sent from here his offers by telegram.

The only other point to be considered is that with regard to the rejection of the goods. The rejection does undoubtedly form part of the cause of action, but if the place of rejection is material it was not at Madras. It was at Madhavaram where the goods were sent for examination. The respondent had to communicate his decision to the appellants, but the fact that he did so through a letter posted in Madras did not make Madras the place of rejection. The notice of rejection must on the authority in (1918) 1 K B 128[5] be taken to have been given in Hyderabad where the letter was received. In my opinion the place of rejection was not material. In order to succeed the respondent has not to show where he rejected the goods, but that he was entitled to reject them because they were not of contract quality. It follows that in my judgment the cause of action did not arise even in part in Madras and consequently the Court has no jurisdiction to try the suit. In these circumstances the appeal must be allowed and the permission to sue in this Court revoked. The plaint will accordingly be taken off the file of the Original Side. The appellants are entitled to their costs here and below.

Kunhi Raman J.—I agree with my Lord.

C.R.K./D.S. *Appeal allowed.*

* A. I. R. 1940 Madras 52

PANDRANG ROW J.

Anandam by Official Trustee, Madras — Petitioner.

v.

T. S. Muthukumaraswami Mudali — Respondent.

Civil Revn. Petn. No. 596 of 1939, D/- 10th August 1939, to revise order of Dist. Munsif, Tiruvannamalai, D/- 4th October 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8 — Debt incurred under promissory note should not be regarded as different from other debts.

There is no reason to suppose that it was the intention of the new Act to make a difference in the matter of scaling down of debts between cases where the original debt was, as it were borrowed on a negotiable instrument and cases of other debts. [P 53 C 1]

*** (b) Negotiable Instruments Act (1881), Ss. 120 and 121—Words "suit thereon" denote proceeding by promisee or payee to recover money due on negotiable instrument—They do not apply to proceeding initiated by promisor for relief under S. 19, Madras Agriculturists' Relief Act.**

The words "suit thereon" in Ss. 120 and 121, Negotiable Instruments Act, clearly show that the proceeding intended to be denoted by these words is a proceeding initiated by some one who was entitled to sue or take legal steps to recover the money due on a negotiable instrument, that is to say by the promisee or payee, and they cannot apply to proceedings initiated by the maker or promisor for relief under S. 19, Madras Agriculturists' Relief Act. [P 53 C 1, 2]

V. T. Rangaswami Iyengar & S. Krishnaswami — *for Petitioner*.

M. S. Venkatarama Iyer — *for Respondent*.

Order.—This is a petition by the Official Trustee of Madras on behalf of a minor who is the judgment-debtor in the decree in O. S. No. 65 of 1936 on the file of the District Munsif of Tiruvannamalai. That decree was obtained by the respondent on the strength of a promissory note executed on 19th February 1933 and the decree itself is dated 2nd May 1936. The petition is to revise the order of the District Munsif on an application under S. 19, Madras Agriculturists' Relief Act, 4 of 1938, praying to amend the decree after scaling down the debt. It is not disputed that the petitioner is an agriculturist entitled to the benefits conferred upon agriculturist debtors by the new Act, and the Court below has actually amended the decree by scaling down the debt in accordance with the provisions of S. 9 of the Act treating the debt as one incurred after 1st October 1932, the suit promissory note being itself subsequent in date to 1st October 1932.

The petitioner's contention was and is that the suit promissory note was merely a renewal of a former promissory note of the year 1930 and that therefore the debt must be deemed to be one which was incurred prior to 1st October 1932, and that the scaling down should be in accordance with the provisions of S. 8 of the Act. The point therefore for decision in this petition is whether the petitioner is entitled to claim to have the debt scaled down in accordance with the provisions of S. 8; in other words, whether the debt which ripened into a decree in 1936 to use the language in S. 8 of the Act, was a debt incurred before 1st October 1932. On the facts the petitioner succeeded in the Court below in showing that the subsequent promissory note of 1933 was really a renewal of the original promissory note of 1930, but though the truth of the case was on the side of the petitioner, the lower Court did not give him the benefit of the truth of his case on the ground that he was really precluded from establishing the truth of the case by reason of a special rule of law applicable to promissory notes which precluded him from contending that the renewal was taken in the name of the respondent's indorser by her husband who was the payee under the original note. The arguments therefore before me have more or less been confined to this aspect of the case, namely whether there is this estoppel standing in the way of the petitioner which prevents him from establishing that as a matter of fact the note of 1933 was a renewal of the note of 1930. On the side of the respondent, reliance is placed on the Full Bench decision in 30 Mad 88,[1] and on the petitioner's side reliance is placed on certain observations including comments on the decision in 30 Mad 88[1] in the later Full Bench decision in 58 Mad 693.[2] Apart from these decisions, the Sections which are relied upon on behalf of the respondent, namely Ss. 120 and 121, Negotiable Instruments Act, make it clear that the exclusion or estoppel is only in suits on the negotiable instrument, the material words being, "No maker of the promissory note shall in a suit thereon be permitted to deny."

---

[1] Subba Narayana Vathiar v. Ramaswami Iyer, (1907) 30 Mad 88=16 M L J 508 (F B).

[2] Venkatarama Reddiar v. Valli Akkal, (1935) 22 A I R Mad 181=153 I C 944=58 Mad 693=68 M L J 81 (F B).

It is not a general exclusion or estoppel applicable to all proceedings, whether based on the negotiable instrument or not. The provisions of the English Act do not contain these qualifying words, "in a suit thereon" which are found in the Indian enactment and it does not seem useful to examine the English decisions in order to find out what these words which are found in the Indian enactment actually mean. It seems to me that, the words being themselves simple and clear, there ought not to be any difficulty in ascertaining their meaning. The meaning of the words "suit thereon" is fairly clear to my mind. They mean some legal proceeding or other the object of which is to enforce the claim on the basis of the negotiable instrument. The proceeding need not be actually registered in the Court as an original suit or any other kind of suit, but it is clear that it must be some legal proceeding based on a negotiable instrument the object of which proceeding is to recover the money due thereon, and these words cannot, in my judgment, be extended so as to cover applications the object of which is not to recover the amount due on the instrument, but to get relief which the Legislature has thought fit to grant to debtors of a particular description who were considered to be deserving of such relief for reasons which obviously have nothing to do with the peculiar character of negotiable instruments. The object of the new Act was to give relief to agriculturist debtors and it did not matter for the purpose of granting that relief whether the original debt was incurred under a negotiable instrument or otherwise. There is no reason to suppose that it was the intention of the new Act to make a difference in the matter of scaling down of debts in cases where the original debt was, as it were, borrowed on a negotiable instrument.

It is thus clear that so far as the new Act is concerned, there is no justification for regarding a debt incurred under a promissory note in a different way from other debts, and so far as the Negotiable Instruments Act is concerned, the provisions therein do not, in my opinion, apply to applications under S. 19 of the new Act for relief of debts. The words "suit thereon" clearly show that the proceeding intended to be denoted by these words was a proceeding initiated by some one who was entitled to sue or take legal steps to recover the money due on a negotiable instrument, that is to say, by the promisee or payee, and they cannot, in my opinion, apply to proceedings initiated by the maker or promisor for relief under a special enactment like the Madras Agriculturists' Relief Act. I am therefore of opinion that the view of the learned District Munsif on this point is wrong and that there is no estoppel in the way of the petitioner which prevents him from establishing that, as a matter of fact, the debt in this case was incurred in 1930, that is to say before 1st October 1932. It follows from this that the petition must be allowed to this extent, namely, that the debt should be scaled down in accordance with the provisions of S. 8 of Madras Act 4 of 1938, and not under S. 9 thereof. The order of the Court below is amended accordingly and the lower Court is directed to amend its decree accordingly. The petitioner is entitled to have his costs in this Court and his costs of the application in the Court below from the respondent.

C.R.K./D.S. *Order amended.*

A. I. R. 1940 Madras 53

BURN J.

Natesa Ayyar — Appellant.

v.

Venkalakshmi Ammal and others — Respondents.

Appeal No. 444 of 1937, Decided on 1st September 1938, against order of Sub-Judge, Tanjore, D/- 8th October 1937.

Civil P. C. (1908), O. 41, R. 21—"Prevented by sufficient cause from appearing"—Appellant served with notice not appearing—Appeal transferred to Sub-Judge—Omission of Sub-Judge to give notice of transfer to appellant is not sufficient cause for absence.

An applicant under O. 41, R. 21, who admits receipt of notice is obliged like an applicant under O. 9, R. 13 to show that he was prevented by sufficient cause from appearing. [P 54 C 1]

Where an applicant is served with a notice in the appeal and he omits to put in an appearance and chooses to let the appeal be decided ex parte and the appeal is transferred to the Sub-Judge from the District Judge, it cannot be said that by the Sub-Judge's omission to give notice to him of the transfer of the appeal from the District Court, he was prevented by sufficient cause from appearing. [P 53 C 2; P 54 C 1]

R. Krishnaswamy Iyengar — *for Appellant.*

S. Kuppuswamy and P. S. Ramaswamy Iyengar — *for Respondents.*

Judgment. — I cannot agree that the omission of the learned Subordinate Judge to give notice to the appellant of the transfer of the appeal from the District Court was a sufficient cause for him to absent himself when the appeal was heard. He was served with a notice in the appeal and he omitted to put in an appearance. If he had done so, he would have known that the case had been transferred to the Subordinate Judge. An applicant under O. 41, R. 21, Civil P. C., who admits receipt of notice is obliged like an applicant under O. 9, R. 13, to show that he was "prevented by sufficient cause from appearing." On the facts in this case, it cannot be said that the appellant was prevented; he simply chose to let the appeal be decided ex parte. This appeal is dismissed with costs of respondent 1.

C.R.K./N.K. *Appeal dismissed.*

A. I. R. 1940 Madras 54

WADSWORTH J.

Namasivaya Mudaliar and others — Appellants.

v.

A. Srinivasa Iyengar and others — Respondents.

Appeal No. 100 of 1938 and Civil Misc. Petn. No. 2492 of 1939, Decided on 17th August 1939, against order of Dist. Court, Chingleput, D/- 5th April 1938.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 66 —At stage of settling terms of proclamation, parties putting into issue question affecting their relative rights with regard to execution—Matter heard and decided—Parties will not be allowed in course of execution to canvass same matter again.

It is true that the mere settlement of the terms of a proclamation, when no dispute between the parties as to their rights or liabilities is decided judicially, cannot be deemed to be an order under S. 47, from which an appeal would lie. But when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided, that decision is a judicial decision and the parties will not be allowed in the course of execution to canvass the same matter again: *A I R 1924 Mad 865, Rel. on.* [P 55 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 4 (d) — "House property" includes compound or yard attached to building site.

The term "house property" will normally include the site on which the building stands and the garden, compound or yard attached thereto: *A I R 1939 Mad 789, Disting.* [P 55 C 2]

P. R. Ganapathi Iyer and K. S. Ramabhadra Iyer — *for Appellants.*

K. E. Rajagopalachariar — *for Respondents.*

Judgment.—This is an appeal against an order in execution of a mortgage decree. The mortgage covered three houses with ground attached thereto and in the property the present appellants were entitled to a half-share. The appellate decree made the half-share of the appellants liable only to the extent of a portion of the mortgage amount with interest thereon, the half-share of the other defendants being liable for the full amount of the mortgage decree. In execution of the decree, the decree-holder sought to bring to sale the hypotheca and asked for leave to sell the whole property in one lot owing to the difficulty of selling an undivided share. Notice of this application was sent to the appellants and they filed a counter affidavit in which they pleaded that the whole property could not be brought to sale for the total liability of all the defendants together, but that only their half-share in the property should be brought to sale to recover the limited amount for which the appellants were liable under the decree. There was also a contention that the three houses should be sold in separate lots. After a Commissioner had been appointed, the Court passed an order on 17th January 1936 in which it observes, "in order to avoid further disputes it is better that the properties are sold as one lot," and after considering the question of the value the order concludes, "the properties will be sold as one lot." The appellants thereafter asked for time to discharge the decree, waiving fresh proclamation. But on the date to which the sale was adjourned, they filed an application in which they in effect renewed the prayer put forward in their counter affidavit to the notice to settle the terms of proclamation, pointing out that the proposal to sell the entire property for the amount due under the decree would throw a greater burden upon the half-share of the appellants. In fact the object of the executing Court in approving this arrangement was to get the best price possible and to adjust the relative liabilities of the different sets of defendants out of the sale proceeds instead of taking the risk of a piecemeal sale. Though the order may be attacked as not being in accordance with the letter of the decree, it is, in my opinion, in accordance with the spirit of the decree. However that may be, the application which the appellants put forward after they had taken time to discharge the debt, has been rejected on the ground that it was barred on the principle of res judicata.

It is strenuously contended that the former order was not an order under S. 47, Civil P. C., determining the rights of the parties but a mere administrative order prescribing the manner of sale, against which there would be no appeal. Therefore it is contended that the order cannot operate as a bar to a subsequent application to adjudicate upon the right of the appellants to have their share sold only for a portion of the decree amount for which they have been held liable. It seems to me that if the order dated 17th January 1936 is not an order falling under S. 47, Civil P. C., then the later order on the application of the appellants to agitate once more the contention which they had put forward at an earlier stage, must equally be held to be one not falling under S. 47 and no appeal against it would lie. I am however definitely of opinion that the order dated 17th January 1936 is one which falls under S. 47, Civil P. C. It is well established that the mere settlement of the terms of a proclamation, when no dispute between the parties as to their rights or liabilities is decided judicially cannot be deemed to be an order under S. 47, Civil P. C. from which an appeal would lie. But it is equally well settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided that decision is a judicial decision and the parties will not be allowed in the course of execution to canvass the same matter again. The point is covered by the authority in 45 M L J 478,[1] and subsequent decisions to the same effect.

Now, in the present case, the decree-holder proposed to bring to sale the whole of the rights of the defendants in one lot and, dividing the sale proceeds into two shares, to adjust the relative liabilities of the defendants under the decree against those shares. The appellants filed a counter-affidavit contesting the right of the decree-holder to sell the properties in this way and asking for an adjudication on the question whether their share should not be sold separately and their several liabilities realized by these separate sales. On this counter-affidavit, there was a definite judicial decision as to the way in which the decree should be worked out by sale of the properties. That was clearly a determination of the liability of the interests of the judgment-debtors to be sold collectively, so that their liability under the decree could be worked out by a division not of the property itself, but of the sale proceeds after the property had been sold. Assuming that that decision was a wrong decision and it went against the letter of the decree, the appellants should have taken it up in appeal and not having done so they cannot be heard to raise the matter at a later stage. It follows therefore that the appeal must be dismissed with costs. (Leave to appeal is refused.)

There is also an application filed under the Madras Act 4 of 1938 (C. M. P. No. 2492 of 1939) based on certain passages in a judgment of my own in 1939 M W N 731.[2] In that case I was dealing with the position in which there was a mortgage covering two quite separate plots of land, one of which contained buildings and the other did not and I held that the mere fact that the unoccupied site was destined to be built upon at some future date would not bring it within the term "house property" used in S. 4 (d) of the Act. It seems to me that this decision has no bearing whatever on the facts of the present case, for, it is apparent from the Commissioner's report and plan that the vacant ground included in the present mortgage is a part of the compound of the house property which the mortgage covers. There is a compound wall round the vacant ground and the well serving the houses is included in it. The mere fact that this land originally bore two paimash numbers does not suffice to separate the compound from the houses to which it is attached; and as I observed in the case quoted, the term "house property" will normally include the site on which the building stands and the garden, compound or yard attached thereto. In this view it must be held that this mortgage is a debt contracted on the security of house property alone and therefore it is saved from the operation of Act 4 of 1938 by the provisions of S. 4 (d) of that Act. The petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 55

LAKSHMANA RAO J.

In re Maddukuri Subba Rao and others
Petitioners.

Criminal Revision Case No. 677 and Petition No. 645 of 1938, Decided on 9th September 1938, from judgment of Joint Magistrate, Bezwada, D/- 30th May 1938.

---

[1] Veda Vyasa Iyer v. Madura Hindu Sabha Nidhi, Ltd., (1924) 11 A I R Mad 365 = 77 I C 148=45 M L J 478.

[2] Ponnambalam Chetti v. Ambalam Raman Chetti, (1939) 26 A I R Mad 789 = (1939) 2 M L J 233=1939 M W N 731.

Criminal P. C. (1898), S. 106—Order under S. 106 made in respect of offence under S. 426, Penal Code, cannot be sustained.

An offence under S. 426, Penal Code, does not involve a breach of the peace and the order under S. 106, Criminal P. C., cannot be sustained. [P 56 C 1]

P. Satyanarayana Rao—*for Petitioners.*
Public Prosecutor — *for the Crown.*

Order. — The evidence justifies the conviction of the petitioners under Sec. 426, Penal Code, and the fines are not excessive. But the offence under S. 426, Penal Code, does not involve a breach of the peace and the order under S. 106, Criminal P. C., cannot be sustained. The order under S. 106, Criminal P. C., is therefore set aside and otherwise this petition is dismissed.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 56

PATANJALI SASTRI J.

Kuniyil Chandu — Appellant.

v.

Mathiledath Sankaran and another — Respondents.

Second Appeal No. 261 of 1938, Decided on 30th August 1939 against decree of Sub-Judge, South Malabar at Calicut in A. S. No. 67 of 1936.

Malabar Tenancy Act (24 of 1930), S. 20 — S. 20 prohibits any suit for eviction of kanamdar, except on grounds specified therein, irrespective of any contract entered into between parties before passing of Act.

Reading Ss. 16, 17, 18 and 22 with Sec. 20, cls. (3), (5) and (6), it is clear that no eviction can take place unless the statutory right of obtaining a renewal has not been availed of on the expiry of the term and if *ex concesso* the right to obtain such renewal cannot be controlled by a contract made before the Act the disability to sue for eviction if such a renewal is obtained cannot also be controlled by such a contract. In other words, S. 20 quite clearly prohibits any suit being brought for eviction of a kanamdar except on any of the grounds specified therein, quite irrespective of any contract or bargain between the parties entered into before passing of the Act : *AIR 1915 Mad 93 and 33 Cal 136, Expl., and Disting.* [P 57 C 1, 2]

P. Govinda Menon — *for Appellant.*
S. R. Subramaniam and K. Raghuramayya — *for Respondents.*

Judgment.— The plaintiff has preferred this appeal against the decree of the Subordinate Judge of South Malabar at Calicut dismissing his suit for redemption and recovery of a paramba with arrears of rent according to the terms of a kana kychit executed on 31st May 1927 by respondent 1 in his favour. It was provided in the kychit marked as Ex. A in the case that if the kanamdar, i.e., respondent 1, kept the rent in arrears or did any act prejudicial to the appellant or if he quarried stones from the plot without the appellant's written consent thereto respondent 1 should, on demand by the appellant, surrender the plot to him without raising any dispute or any plea with reference to the stipulated term of 12 years on receiving the kanam amount the value of the kuzhikur chamayams as estimated then and the fee for the unexpired period of the term. The appellant's case was that respondent 1 quarried stones from the plot in question without his written consent and that he was therefore entitled to demand the surrender of the plot according to the terms of the kychit set out above even before the expiry of the terms fixed. Respondent 1 denied that he quarried any stones from the plot and pleaded inter alia that, in any case, by virtue of the provisions of the Malabar Tenancy Act, 24 of 1930, the appellant had no right to recover the property before the expiry of the term. The trial Court found that respondent 1 did quarry stones from the paramba contrary to the terms of the kychit, Ex. A and was therefore bound to surrender the plot as stipulated in Ex. A. He accordingly passed a decree for redemption and recovery of the paramba on the plaintiff depositing the kanam and other amounts as provided in the kychit. There was no discussion of the provisions of the Malabar Tenancy Act invoked by respondent 1 in bar of the suit. On appeal the learned Subordinate Judge while confirming the finding of the trial Court as to respondent 1 having quarried stones from the paramba contrary to the terms of the kychit held that after the enactment of Sec. 20, Malabar Tenancy Act, a kanamdar could not be evicted except on one of the grounds specified therein, and as no such ground was made out by the appellant his suit failed.

The learned counsel for the appellant has conceded before me that none of the grounds specified in S. 20, Malabar Tenancy Act, exists in this case and that no claim for eviction under that Section can be sustained. But he contends that the kychit Ex. A having been executed long before the Malabar Tenancy Act was passed, the appellant's right to evict respondent 1 must be determined with reference to the terms of the kychit and such right cannot be controlled or affected by Sec. 20 of the Act. I am unable to accept this contention. S. 20 of the Act enacts :

> No suit for eviction of a customary verumpattamdar, kuzhikanamdar or kanamdar shall lie at the instance of the landlord except on the following grounds, etc.

It seems to me that the terms of the Section quite clearly prohibit any suit being brought for eviction of a kanamdar except on any of the grounds specified therein quite irrespective of any contract or bargain between the parties and this conclusion is reinforced by an examination of the object underlying the Act and of the provisions of Secs. 16, 17, 18 and 22. The Act deliberately sets out:

> to alter and amend the law relating to landlord and tenant in the District of Malabar to the extent, in the manner and for the purposes hereinafter appearing,

and it is clear that it was intended to supersede the customary and contractual rights, liabilities and incidents pertaining to the various forms of land tenure prevailing in the district to the extent to which such rights, liabilities and incidents run counter to the provisions enacted therein. Ss. 16, 17 and 18, for example, confer a right of renewal on a customary verumpattamdar, a kanamdar and kuzhikanamdar respectively on the expiry of the veerumpatam, kanam and kuzhikanam as the case may be and specify the renewal fee payable in each case by the tenant. Though there are no words in these Sections to show that the provisions are intended to control and override bargains between the parties, the terms of S. 22 (1) make it clear that that was the intention of the Legislature. To my mind, the opening words of S. 22 (1), namely "notwithstanding any contract to the contrary, whether made before or after the commencement of the Act," could have more appropriately found place in Ss. 16, 17 and 18 as these are the provisions that confer the new rights, while S. 22 only prescribes the procedure for the enforcement of those rights. However that may be, reading these four Sections together, I am clear that the Legislature intended that stipulations between the parties made either before or after the Act contrary to these provisions should be superseded. Indeed, the appellant's learned counsel conceded that the respondents would be entitled to have the kanam renewed notwithstanding the terms of Ex. A and the present suit was bound to fail if S. 17 applied to this case, but he urged that it was inapplicable because the paramba in question is a dry land and is excepted as such from the operation of that Section by clause c (ii) thereof. But apart from the question whether the suit paramba falls within the exception or not, I am referring, in this connexion, to the concession of the appellant's learned counsel as to the effect of S. 17, to show that S. 20 being one of the same fasciculus of Sections must be understood as part of the same scheme of statutory supersession of stipulations between the parties which are inconsistent with those provisions.

The learned counsel for the appellant stressed the absence of words in S. 20 similar to the opening words of S. 22 (1). Having regard to the fact that S. 20 is couched in the language of absolute prohibition, it might perhaps have been supposed that it was unnecessary to insert a similar clause in that Section. However that may be, reading Ss. 16, 17, 18 and 22 with S. 20, cls. (3), (5) and (6), it is clear to my mind that no eviction can take place unless the statutary right of obtaining a renewal has not been availed of on the expiry of the term, and if *ex concesso*, the right to obtain such renewal cannot be controlled by a contract made before the Act, the disability to sue for eviction if such a renewal is obtained cannot also be controlled by such a contract. The learned counsel for the appellant placed reliance upon the decision of this Court in 23 M L J 352[1] on S. 151, Madras Estates Land Act, which is somewhat analogous to S. 20, Malabar Tenancy Act. It was held in that case that a contract made before the passing of that Act between a landlord and a tenant, authorizing the latter to use the holding in a manner which might impair the value of the land for agricultural purposes was not rendered inoperative by that Section read with cl. (g) of S. 187. S. 151, Madras Estates Land Act, enacts that a landholder may institute a suit before the Collector to eject a ryot from his holding

> only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes,

and S. 187 (g) lays down that

> nothing in any contract between a landholder and a ryot made before or after passing of the Act shall entitle a landholder to eject a ryot otherwise than in accordance with the provisions of this Act.

It is argued that these provisions are closely analogous to the provisions of S. 20, Malabar Tenancy Act, and that therefore a similar conclusion must be reached in this case. I cannot accede to this contention. That S. 151, Madras Estates Land Act, is somewhat analogous to Sec. 20, Malabar Tenancy Act, may be granted. But the ground of decision in that case was that S. 151 was only intended to restrict the right of the landlord to eject a ryot by limiting it to the ground mentioned in that provision. That being so, it was held, there was nothing in that Section to preclude the enforcement of a contract which had the effect of restricting still further the landlord's right to eject. In other words, the contract that was allowed to be enforced in that case was not one inconsistent with S. 151 which was clearly enacted to protect the tenant. The decision therefore does not support the appellant's contention. The learned counsel referred me also to 33 Cal 136[2] which turned on the construction of S. 178, Ben. Ten. Act. It was there held that a contract between a landlord and his tenant made before the passing of the Act did not fall within the prohibitory terms of sub-s. (3), cl. (a) of that Section as it purported to affect only contracts made "after the passing of this Act." I cannot see how this decision assists the appellant.

---

[1] Murakasim Rowther v. Foulkes, (1915) 2 A I R Mad 93=16 I C 220=37 Mad 432=23 M L J 352.

For all the above reasons I am of opinion that S. 20 of the Act bars the appellant's suit for eviction. The learned counsel for the respondents has also urged that apart from the plea based on S. 20 of the Act, no decree can be passed for the eviction of respondent 1 as the latter will under S. 17 be entitled to obtain a renewal of the kanam notwithstanding the terms of the kychit, Ex. A. As I have stated before, the appellant's learned counsel has conceded that no decree could be passed for eviction in this suit if the respondent would be entitled to get a renewal. But he asserts that defendant 1 is not so entitled, as the paramba in question is dry land as defined by the Act. There is however no evidence in the case to show whether the land is dry land or garden land though it is agreed that it is not wet land, and the point has not been considered by the Courts below. I do not think that this question can be properly decided on the materials now on record. Nor is it necessary to do so, in view of my decisions on the other point. The appeal is dismissed with costs. (Leave granted.)

C.R.K./D.S. *Appeal dismissed.*

---

[2] Baul Chandra v. Nistarini Debi, (1906) 33 Cal 136=10 C W N 533.

A. I. R. 1940 Madras 58

SOMAYYA J.

In re Ramaswami Chettiar — Petitioner.

Civil Revn. Petn. No. 671 of 1939, Decided on 4th September 1939, from order of Dist. Munsif, Karur, D/- 13th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Explanation—Renewing debt or including it in fresh document must be by the same debtor —*B* taking over debt due by *A* and executing document — Explanation does not apply.

The scaling down provision applies in cases where the person renewing the debt or including in a fresh document the sum due under the old document is the debtor himself. [P 59 C 1]

In a case where *B* takes over a debt due by *A*, the document executed by him in favour of the creditor is not a fresh document, so far as he is concerned. He is executing a document for the first time. The old debt is extinguished and new debt and a new debtor come into existence. Therefore *B* cannot claim relief under the Explanation to Section 8. [P 58 C 2; P 59 C 1]

C. A. Seshagiri Sastri —*for Petitioner.*

Order. — There was a mortgage decree against a third party and before the sale of the hypotheca, the petitioner's father and some others purchased the property mortgaged. They then executed the suit promissory note in satisfaction of the mortgage decree. The petitioner claimed relief under the Explanation to S. 8 of Madras Act, 4 of 1938. The lower Court rejected his petition and this civil revision petition is filed against the said order. The question is whether the case comes within the Explanation to S. 8.

The Explanation runs thus : "Where a debt is renewed or included in a fresh document in favour of the same creditor," the Explanation speaks first of a renewal which is obviously by the same debtor. Then come the words "or included in a fresh document." This is obviously to provide for a case where a debtor instead of merely executing a new document for the exact sum owing under the previous one, takes a fresh loan, and executes the document both for the sum due under the original document and for the sum taken at the time of the new document. The juxtaposition of the words "renewed" — "included in a fresh document" leaves no room for doubt. Inclusion in a fresh document must be obviously by the same debtor. In a case where *B* takes over a debt due by *A* the document executed by him is not a "fresh document" so far as he is concerned. He is executing a document for the first time. The old debt is extinguished and new debt and a new debtor comes into existence. Advantage is sought to be taken of the absence of the words "by the same debtor," but obvious meaning of the Explanation is that where the debtor merely renews the debt or includes in a fresh document the sum due under the old document, the scaling down provision applies. This revision petition is dismissed.

C.R.K./N.K. *Petition dismissed.*

A. I. R. 1940 Madras 59

WADSWORTH J.

Karankattil Haji Thambilava Ismal Rowthen's son Chinnappayan and others — Appellants.

v.

Karumanasseri Gramom Parasurama Pattar's son Narayana Pattar — Respondent.

Appeals Nos. 121 and 122 of 1937, Decided on 27th July 1939, against appellate orders of Sub-Judge, South Malabar at Palghat, in A. S. Nos. 32 and 31 of 1937, respectively.

(a) Civil P. C. (1908), O. 34, R. 14 — Lease by mortgagee back to mortgagor part of mortgage transaction and merely machinery for realizing interest on mortgage—Suit for rent under lease—Under decree in such suit equity of redemption cannot be sold unless suit is framed as suit on mortgage.

When a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption cannot be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and mortgage form part of the same transaction. Nor the fact that an advance by way of security for rent was paid necessarily makes the lease something separable from the mortgage. Similarly, the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is a clear indication that both the deeds form part of one and the same transaction. [P 60 C 1, 2]

(b) Civil P. C. (1908), S. 11—Decision of issue between parties in prior execution petition under different and anterior decree— Attempt to raise similar matter at similar stage of proceedings in subsequent suit between same parties would be barred.

The decision of an issue between the same parties in a prior execution petition under a different and anterior decree is the decision of a question arising in part of the proceedings in one suit and attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit will be barred under principle of S. 11. [P 60 C 2]

K. Kuttikrishna Menon and K. V. Gopalakrishna Nair — *for Appellants.*

P. S. Narayanaswami Iyer and P. R. Narayana Iyer — *for Respondent.*

Judgment. — These appeals arise out of an order allowing the execution of a decree for arrears of rent obtained by a usufructuary mortgagee against his mortgagor who is the lessee of the hypotheca. In the execution petition the mortgagee sought to bring to sale the equity of redemption in the mortgaged property in order to realize the decree for arrears of rent. An objection which was disallowed in the lower Appellate Court, was based on O. 34, R. 14, Civil P. C., to the effect that the decree was in fact a decree for payment of money in satisfaction of a claim arising under the mortgage and that therefore the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by a suit for sale in enforcement of the mortgage.

The appellant (mortgagor-lessee) mortgaged his property usufructuarily to the respondent by a deed dated 30th November 1930 and by another deed dated 1st December 1930 the mortgagee leased the property back to the mortgagor. The mortgage itself provides for redemption on 1st Kumbham 1107 or any date up to the 30th of that month or during the same period in successive years. The lease is for a period of one year ending on 1st Kumbham 1107 on which date the lessee undertakes to surrender the property. The liabilities undertaken by the mortgagee in respect of Government revenue, michavaram, etc., under the mortgage deed are the subject of special covenants in the lease deed. The question of the relation between the lease and this mortgage has come up for consideration in a previous litigation arising out of the lease. The rent due under the lease deed was not paid and the lessor-mortgagee filed a small cause suit for the arrears and got a decree which was executed on the original side of the Sub-Court. In execution the decree-holder sought to bring to sale the equity of redemption in the mortgaged property. An objection was preferred on the strength of O. 34, R. 14, Civil P. C. On this petition the Subordinate Judge passed orders holding that the application for sale was barred under O. 34, R. 14, and allowed the objection petition. The judgment in this matter is Ex. A. The execution with which we are now concerned was under the decree in a later suit, O. S.

No. 215 of 1934, the arrears in question being arrears of rent for years subsequent to the year actually covered by the lease. The execution petition was filed in the Court of the District Munsif and the same objection under O. 34, R. 14 was taken to the application to bring to sale the equity of redemption. It was also objected that the application was barred by res judicata by reason of the former order Ex. A. The trial Court upheld the objection but the learned Subordinate Judge has allowed the execution to proceed.

It is, I think, well established that when a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. It is however contended that this lease must not be regarded as part of the mortgage transaction and that it is an entirely separate transaction on a different date with features which indicate an intention that it should not be merely a portion of the mortgage transaction. The differences upon which the learned Subordinate Judge relies are as follows: Firstly there is an interval of one day between the two deeds. Secondly, there is the difference in the period of the lease which is for one year only, whereas the mortgage is redeemable at the end of the same period or at subsequent dates. Thirdly there is the fact that the lease provides for the payment of what is called Kattakanam which, I am informed, means an advance paid as security for future rents. It seems to me that the fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction, more especially in the circumstances of the present case wherein the standing crops on the land were to be reaped by the mortgagor, so that both the full possession of the property and the actual effect of the lease were to begin at a subsequent date when the standing crops were harvested. Nor do I think the fact that an advance by way of security for rent was paid necessarily makes the lease something separable from the mortgage. And as to the difference in the term the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is to my mind a clear indication that both the deeds form part of one and the same transaction. Reading these two documents together I have no doubt in fact that they are both part of the same bargain and that the lease was intended to implement the undertakings of the mortgage. Instead of providing for a simple mortgage with payment of interest in cash, the common device was employed of drafting the mortgage as a usufructuary mortgage and making the mortgagor a tenant paying rent. The transaction was in its essence a mortgage in which the interest was collected in the shape of rent.

Moreover, it seems to me that it is not open to the respondent to contest the identity of the transaction of lease with the transaction of mortgage. The matter was thrashed out at length between the same parties in connexion with the same transaction in the execution petition in a former suit for rent. It is contended that though the principle of res judicata applies to successive execution petitions in the same suit under the same decree, there is no res judicata in respect of a decision in an execution petition under a former decree when the same matter arises for decision in an execution petition under a subsequent decree. This contention seems to me to overlook the essential basis of the rulings with reference to the applicability of the principle of res judicata to proceedings in execution. The difficulty which arose in applying the principle of res judicata to execution proceedings arose from the fact that successive execution petitions in the same suit could not be regarded strictly speaking as decisions in successive suits between the same parties. Therefore, in terms, S. 11, Civil P. C., had no application. But it was held that though the precise rule embodied in Sec. 11 did not apply, the parties were governed by the principle that when in one stage of a suit a matter had been finally decided, the same matter could not be agitated again in a subsequent stage of the same suit. But when we are concerned with the decision of an issue between the same parties in a prior execution petition under a different and anterior decree, this difficulty does not arise. What we have is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit. The principle of S. 11 applies directly and it is unnecessary to call in aid the reasoning of the Privy Council in 6 All 269[1] and subsequent cases as to the application of the same rule by analogy to successive stages of the same suit.

The most that can be said for the decree-holder is that the order Ex. A, in the former proceedings only decided that the lease in this case was part of the transaction of mortgage and that in execution of the decree for arrears under that lease the hypotheca could not be brought to sale; whereas now we are concerned with the execution of the decree for arrears due from the tenant holding over after the expiry of the lease. So that the question is not precisely the same. But in so far as it involves a decision as to the oneness of the transaction of lease with the transaction of mortgage, the matter cannot in my opinion be re-opened between the parties. I do not think that it makes any difference to the applicability of O. 34, R. 14 that we are now concerned with arrears of rent due from a tenant holding over after the expiry of the term of the lease. The relation between the parties is still governed by the terms of this lease even though the original period fixed has expired. The rent claimed is still in its essence a sum of money due under the mortgage. Therefore, O. 34, R. 14, still applies.

It is however argued that in so far as the decree is a decree for costs this Rule will have no application and the respondent quotes the case in 35 All 518.[2] That case is not quite an authority for the position which the respondent takes up. It was a case of a usufructuary mortgagee who was not given possession of the hypotheca and sued for possession and incidentally got a decree both for possession and for costs. It was held that the decree so far as it related to costs was not a decree for money due under the mortgage and that therefore O. 34, R. 14 did not bar its execution by the sale of the hypotheca. The position however is somewhat different here. It is true that the mortgagee is suing for possession but his substantial claim is for arrears of rent and those arrears are, in the view I have taken, an essential part of the mortgage amount. By the analogy of O. 34, R. 10 the decree in so far as it is a decree for costs must be deemed to be added to the claim under the mortgage even though the suit is not in terms a suit based on the mortgage. I do not think that there are any grounds for separating the costs on the relief for possession from the costs in the rest of the suit. The essential thing which the mortgagee wishes to recover is the money due from his tenant which is in effect the interest due on his mortgage. This he cannot recover by sale of the equity of redemption otherwise than under a mortgage decree. In this view I allow the appeal, set aside the order of the lower Appellate Court and restore the order of the District Munsif dismissing the execution petition and allowing the objection with costs throughout (in A. A. A. O. No. 121 of 1937 only). Leave granted.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 61

NEWSAM J.

S. Narayanachari — Petitioner.

v.

T. V. A. K. T. Annamalai Chettiar — Respondent.

Civil Revn. Petn. No. 662 of 1939, Decided on 28th April 1939, to revise order of Dist. Munsif, Tirupathi, D/- 24th January 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 3 (iii) and 20 — Suit by first mortgagee — Puisne mortgagee asked to free his own security —He is not debtor.

Where in a suit by first mortgagee, the puisne mortgagee is given merely the privilege of freeing his own security and preserving his possession, he is not a debtor. He, therefore, is not entitled to apply under S. 20. [P 61 C 2]

T. S. Narasinga Rao — *for Petitioner.*

K. Rajah Ayyar — *for Respondent.*

Order. — The petitioner was a puisne usufructuary mortgagee. In a suit by the first mortgagee he was impleaded and the suit was decreed. Petitioner, though in terms directed to redeem, i. e., to discharge the first mortgage, was in reality merely granted a privilege—the privilege of freeing his own security and preserving his possession. In no sense of the word is he a debtor. The decree is not against him for a debt payable by him, but in his favour allowing him a right in equity to redeem the first mortgage. To use the language of S. 3 (iii), Debt Relief Act, petitioner is under no liability under the decree. His is not a debt. The learned District Munsif of Tirupathi has in my judgment, rightly dismissed his petition under S. 20, Debt Relief Act. I dismiss the revision petition with costs.

C.R.K./D.S. *Petition dismissed.*

---

[1] Ram Kirpal v. Rup Kuari, (1884) 6 All 269=11 I A 37=4 Sar 489 (P C).

[2] Haribans Rai v. Sriniwasa, (1913) 35 All 518=20 I C 896=11 A L J 841.

* A. I. R. 1940 Madras 62

ABDUR RAHMAN J.

Krushnacharana Padhi — Appellant.

v.

Gourochandro Dyano Sumanto — Respondent.

Second Appeal No. 457 of 1936, Decided on 2nd August 1939, against decree of Dist. Court, Ganjam, in A. S. No. 84 of 1935.

***(a) Negotiable Instruments Act (1881), S. 87 — What is material alteration stated — Alteration in dates of execution of promissory note and of endorsement of payment is material alteration irrespective of fact whether alteration is to prejudice of promisor or not.**

The motive of the person making the alterations is to a large extent immaterial. In order to decide the material character of the alteration one will have to confine himself to the alteration and the effect it is shown to have produced on the document itself. If the legal identity of the character of the instrument has been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not. If the integrity of a contract has been broken and its identity changed either by a party to the contract or by one who is entitled to sue on it or with their connivance and possibly even when their negligence has contributed to the alteration, the instrument incorporating such a contract must be held to have been vitiated. Hence, the alteration in the dates of execution of promissory note and endorsement of payment is material alteration : *(1844) 13 M & W 343; (1855) 5 El & Bl 83; 1 Sm L C 803 and 7 Cal 616, Rel. on.* [P 63 C 1, 2; P 64 C 1]

(b) Interpretation of Statutes — Language of statute in its grammatical meaning leading to absurdity and injustice—Construction modifying meaning of words and sentence may be put upon it.

When the language of a statute in its ordinary meaning and grammatical construction leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. [P 65 C 1]

***(c) Negotiable Instruments Act (1881), S. 87 — Alteration referred to in S. 87 is alteration by party to instrument and not by stranger.**

The alteration referred to in S. 87 refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger particularly when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity, laches or negligence may be inferred. [P 66 C 1]

***(d) Negotiable Instruments Act (1881), S. 87 — Promissory note altered materially by stranger though may be void under S. 87 does not become inadmissible in evidence—Promisee or his representative can bring action based on original consideration.**

Even if a promissory note which has been altered materially by a stranger may be declared to be void under S. 87, Negotiable Instruments Act, it does not become inadmissible in evidence as would have been the case if the document were not duly stamped. A subsequent alteration in the document by a stranger would not deprive the person, who had advanced the money or to whom the money had become payable subsequently on account of the promisee's death of his remedy to bring a suit for the money advanced to the defendant by way of loan. In other words, the drawee or promisee or their representatives-in-interest can maintain an action on the original consideration. The promissory note having become void, the defendant who had received an advantage under the instrument is bound to restore it or make compensation for it on principle embodied in S. 65, Contract Act : *A I R 1938 Mad 785 (F B), Disting.* [P 66 C 1; P 67 C 1]

B. V. Ramanarasu — *for Appellant.*

B. Jagannadha Das — *for Respondent.*

Judgment. — This appeal arises out of a suit instituted on the basis of a promissory note dated 15th October 1928 executed by the defendant-respondent in favour of one Borojo Padhi who died shortly after its execution leaving him surviving an adopted minor son, the plaintiff-appellant in this case. A sum of Rs. 10 seems to have been paid by the defendant on 12th October 1931. This payment was endorsed on the back of the promissory note and the endorsement was duly signed by the defendant. The suit was instituted on 22nd October 1934, while the plaintiff-appellant was a minor. It appears however that two dates in the promissory note were altered before the suit was brought. The first alteration was that the figure "1" in 15, i. e., the date on which the promissory note was executed was altered into 2 and thus the promissory note would now read as if it was executed on 25th October 1928 and not on 15th October. The second alteration was that the figure "1" in 12 was substituted by 2 and thus the endorsement by the defendant of the payment of Rs. 10 would appear to have been made on 22nd October 1931 and not on 12th October 1931, the date on which the endorsement was actually made by the defendant. The District Munsif passed a decree against the defendant as the plaintiff was held to have been unaware of these alterations but the learned District Judge accepted the appeal on the ground that having regard to the provisions of Sec. 87, Negotiable Instruments Act, it was not possible to found an action on a promissory note which was proved to have been altered in material respects. The plaintiff now appeals.

In support of his appeal the first contention raised by the learned counsel for the appellant is that the alteration in the promissory note was not material in character and the motive with which the alteration might have been made was wholly irrelevant. His second contention is that even if the alterations are held to be material, his client who was, as stated above, a minor at the time when the suit was instituted, did not know anything about them and could not in the absence of any conduct of his, either fraudulent or negligent, be held to be debarred from suing on the basis of the promissory note — particularly when the dates of the promissory note and of the endorsement of payment were correctly stated in the plaint and no advantage was attempted to have been taken on account of these alterations. The third contention raised on behalf of the appellant is that even if his first two contentions do not prevail, he should at all events be allowed to fall back on the original consideration as although the promissory note might have to be declared void and unenforceable on account of the alternations, yet it does not become inadmissible in evidence and the debt could not in any case be held to have been extinguished. It was admitted that the suit, as framed, was not based on the original consideration but this defect should be, it was alleged, cured by a formal amendment which might be allowed by the Court even at this stage. Lastly it was urged that a decree should have been passed against that defendant on the admission made by him as a witness to the effect that the money in regard to the promissory note in suit had not been paid and was still outstanding.

The first question to decide is whether the alterations made in the promissory note were material in character. Since it was conceded on behalf of the respondent that the suit could have been instituted, on account of the plaintiff's minority, not only on the date on which it was actually brought but even later, it was vehemently argued on behalf of the appellant that the alterations could not be regarded as material. I am not however impressed by this argument although it must be admitted that the motive of the person making the alterations is to a large extent immaterial. In order to decide the material character of the alteration one will have to obviously confine himself to the alteration and the effect it is shown to have produced on the document itself. If the legal identity of the character of the instrument have been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not. The reason behind the rule is based on sound sense and is intended to prevent persons from tampering with valuable securities under the penalty of not being able to found their claims on them if the alterations are to be found material. If the integrity of a contract has been broken and its identity changed either by a party to the contract or by one who is entitled to sue on it or with their connivance and possibly even when their negligence has contributed to the alteration, the instrument incorporating such a contract must be held to have been vitiated. This rule can be deduced from a number of cases cited at the Bar. It is unnecessary however to refer to all of them and it would be sufficient to refer to three English and one old Calcutta case on which reliance was placed by learned counsel for the respondent: *see* (1844) 13 M & W 343,[1] (1855) 5 E & B 83,[2] 1 Sm L C 803[3] and 7 Cal 616.[4] It was held in the first case, (1844) 13 M & W 343,[1]

> that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state, and that any material alteration will vitiate the instrument.

Lord Denman C. J. in delivering his judgment laid down as a test for determining the materiality of the alteration whether the addition gave a different legal character to the writing and whether it would change the nature of the relation of the parties towards each other and their remedies upon it. In the second case the promissory note had been altered by adding another party to it. The alteration was apparently of no disadvantage to the defendant and yet the promissory note was held to be invalid as against the defendant. Lord Campbell C. J. observed:

> We conceive that the defendant is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice.

The same rule was stated in 1 Sm L C 803.[3] A study of these cases would show that the rule has now been well established

---

1. Davidson v. Cooper, (1844) 13 M & W 343 = 13 L J Ex 276=1 Dowl & L 377=67 R R 638.
2. Gardner v. Walsh, (1855) 5 El & Bl 83=24 L J Q B 285=1 Jur (N S) 828 = 3 W R 460 = 103 R R 377.
3. Master v. Miller, 1 Sm L C 803.
4. Gogum Chander Ghose v. Dhuroni Dhur Mondal, (1881) 7 Cal 616=9 C L R 257.

that any alteration or change in an instrument which "causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it" is a material change. It might not be out of place to mention that an alteration in the date of a bill of exchange has been stated by the corresponding Section of the Bills of Exchange Act, to be material. Although the Indian Act does not clearly say so yet I do not think that there is any reason to hold that what would be regarded as a material alteration in England should not be held to be so in India. I am for the above reasons, of opinion that the alteration of dates was a material alteration.

As for the second contention it was conceded on behalf of the respondent that the alterations in the promissory note were not made either by the minor or by his adoptive father who had died shortly after the execution of the promissory note in his favour. There was no suggestion that they were made by or with the knowledge of his next friend either who is no other than his adoptive mother and with whom the minor was living. It was however alleged that the alterations were effected by the plaintiff's natural father who had appeared as a witness on behalf of the plaintiff. There is no evidence on the record from which it could be concluded that the promissory note was altered by him although the learned District Judge has on account of certain circumstances hazarded that guess. I have considered these circumstances carefully. They are inconclusive in my opinion and the expression of opinion by the lower Appellate Court must be regarded to be in the nature of a surmise. There is no evidence on the record that these alterations were made by the plaintiff's natural father. That is why the trial Court abstained from giving a definite finding in regard to the person who had effected them. The learned District Judge refused to believe the statement made by P. W. 1 and since as a natural father he was to some extent interested in the plaintiff, and he was the last person who had admitted to be in possession of the promissory note before the suit was brought, the conclusion was drawn that these must have been made by him.

I have already said that it would not be safe to draw this conclusion; but even assuming this to be correct, would this be enough to debar the plaintiff from maintaining his suit? Learned counsel for the respondent contends that this would be so and urges that the question whether these alterations were made with the knowledge of the minor plaintiff or with that of his next friend is wholly immaterial. The language of S. 87, Negotiable Instruments Act, does, if literally construed, seems to support his contention but in view of the fact that this construction would lead to most undesirable and absurd results, the question is whether one should not have a little measure of freedom in construing this Section somewhat liberally. But before interpreting the language of this Section in the light of certain decided cases, it is essential to ascertain whether there is anything in evidence which would show whether these alterations were made either with the knowledge or complicity of the plaintiff or even with that of his next friend. The plaintiff, as observed before, was a minor at the time when the suit was instituted and there is nothing on the record which would suggest his knowledge or complicity. The same must be said, although it is not perhaps necessary, of his adoptive mother, who was the plaintiff's next friend when the suit was instituted. Moreover, there is nothing to show that they, that is the plaintiff and his adoptive mother, were guilty of laches or negligence in permitting the promissory note to go out of their custody. The plaintiff was a minor and the next friend was an old Indian lady who would have found it difficult to look after the estate left by her deceased husband without the help of servants and persons who took an interest in their affairs.

The question to decide is whether the plaintiff should be held to be debarred from suing on the basis of the promissory note which had been proved to have been materially altered although without his or even his next friend's knowledge or complicity. It must be remembered in this connexion that no advantage was taken of these alterations when the suit was instituted and the dates on which the promissory note was executed or the endorsement made were correctly stated. The cause of action was also stated to have arisen on the dates when the promissory note had actually come into existence and when interest had been paid and endorsed by the defendant. It is thus clear that nothing has been done either by or on behalf of the plaintiff which would induce the Court to withhold the relief asked for on the ground that he had not come to Court with clean hands. It may be however contended that this is not a case where it is discretionary with the Court to grant or refuse the relief asked for or in other words the Court was not being asked to dismiss the suit on any equitable grounds but on account of a clear bar created by the statute. This takes me to the language employed in S. 87, Negotiable Instruments Act. A careful study of the words used in this Section leads me to the conclusion that the obvious intention of the Legislature was to render the negotiable instruments to be void which were materially altered either by the party in whose favour the document was executed or the person on whom its ownership had devolved on account of a contract or by operation of law. The Legislature intended or may be presumed to have intended to take both the parties to the instrument or their representatives in interest into consideration and was providing a penalty for the unauthorized alterations effected by one of them without the consent of the other. The Section did not obviously relate to an alteration by a stranger or contemplate a consent to the alteration by both the parties but only by one of them for the act of the other. Moreover, "when the language of a statute" as observed by Maxwell on the Interpretation of Statutes at p. 198 in Ch. 9, Edn. 7,

> in its ordinary meaning and grammatical construction leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar by giving unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt of an irresistible conviction that the Legislature could not possibly have intended what its words signify and the modifications thus made are mere corrections of careless language and really give the true meaning .... The rules of grammar yield readily in such cases to those of commonsense.

This is however not all. When the corresponding Section of the Bill of Exchange Act where the language was almost identical with S. 87, Negotiable Instruments Act, came up for construction before their Lordships of the Judicial Committee in (1928) A C 181,[5] it was held by their Lordships that the words of the Section related only to alterations effected by the will of the person by whom or under whose directions they were made and that they did not apply to a change due to a pure accident such as the document being mutilated and defaced by the wash and ironing of the garment in which it was left or by the ravages of the white ants or the seal of a deed being torn off by a child or eaten off by rats or burnt by the hot end of a cigarette. If cases of pure accident were not found to fall within the terms of the corresponding Section of the Bill of Exchange Act, is there any reason to interpret S. 87, Negotiable Instruments Act, in such a manner as to debar an innocent person from maintaining an action simply because the promissory note was taken away without the knowledge or consent of its owner by a stranger who made some alterations in the instrument either knavishly or foolishly. In 150 E R 984[6] Anderson B, remarked:

> It is difficult to understand why an alteration by a stranger should in any case avoid the deed, why the tortious act or a third person should affect the two parties to it unless the alteration goes the length of making it doubtful what the deed originally was or what the parties meant.

The question "suppose the stranger destroyed it instead of altering it" put by Lord Abinger during the course of the arguments in the above case, discloses the view the noble Lord was taking of the case. There is no doubt that an action would lie on a destroyed bill both at common law and under the Indian Act. The rule has been stated thus in para. 287 of Halsbury's Laws of England (Halsbury's edition):

> If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance however is not ab initio, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who has made or authorized the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made (h). A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed (i), or reduces to certainty some provision which was originally unascertained and as such void (k), or may otherwise prejudice the party bound by the deed as originally executed (l). The effect of

---

[5] Hongkong and Shanghai Banking Corporation v. Lo Lee Shi, (1928) 15 A I R P C 116=110 I C 127=(1928) A C 181=97 L J P C 35=138 L T 529=72 S J 68=44 T L R 233.

[6] Hutchins v. Scott, 150 E R 984.

making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed (m). The avoidance of the deed is not retrospective, and does not revest or reconvey any estate or interest in property which passed by the deed (n). And the deed may be put in evidence to prove that such estate or interest so passed, or for any other purpose than to maintain an action to enforce some agreement therein contained (o).

For the above reasons I would hold that the alteration referred to in S. 87, Negotiable Instruments Act, refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger particularly when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity, laches or negligence may be inferred. The third contention raised on behalf of the appellant was that he might be permitted to fall back on the original consideration. It must be remembered in this connexion that the promissory note, even if my interpretation of S. 87, Negotiable Instruments Act, be assumed to be incorrect can only be declared to be void under S. 87, Negotiable Instruments Act, but does not become inadmissible in evidence as would have been the case if the document were not duly stamped. It is unnecessary to say what the effect would have been if the alteration had been made fraudulently by the plaintiff himself but in the absence of fraud it does not seem to me possible to hold that not only the note but the original debt is also destroyed. He could in my opinion fall back on the original consideration since the promissory note was a valid document and remained so for a long time after it came into existence. A subsequent alteration in the document by a stranger would not deprive the person, who had advanced the money or to whom the money had become payable subsequently on account of the promisee's death of his remedy to bring a suit for the money advanced to the defendant by way of loan. As already observed, it might be remembered in this connexion that the dates mentioned in the plaint both of execution and in regard to the payment made by the defendant towards interest were the original dates and not those which were subsequently altered and the cause of action also was stated to have arisen on the dates on which it would have been stated if no alteration had taken place. If therefore no claim was made on behalf of the plaintiff upon the promissory note as altered, there is no reason to hold that the document would not be admissible in evidence in proof of the original right which had come into existence at the time when the money was paid.

108 E R 778[7] may be referred to in this connexion with advantage. It has been argued that since S. 87, Negotiable Instruments Act, appears in Chap. 7 which relates to discharge from liability on notes, bills and cheques it must not be taken to have rendered the document void only but also to have discharged the liability which arose at the time when the promissory note was executed. The argument is not correct in my opinion for two reasons. First of all the chapter relates to discharge from liability on notes, etc. and not to discharge from liability altogether. The suggestion that after a note has been avoided on account of a fraudulent conduct of a party the party will not be entitled to sue on it may be plausible but this does not mean that the party has no right to bring a suit on the original cause of action also. Moreover, in this very Section the second part states that an endorser's liability would be discharged if his indorsee made an alteration. If the alteration was meant to discharge the liability of every person under the negotiable instrument, where was the necessity of referring to an indorser's liability in para. 2 of the Section? Why did not the Section, it may well be asked, clearly provide that the liability of every person under the instrument would be discharged if that was the intention of the Legislature? The case decided by the Full Bench reported in (1938) 2 M L J 189[8] on which reliance was placed on behalf of the respondent has no application to this case for the simple reason that the promissory note which had been materially altered has not been declared by law to be inadmissible in evidence. It may have become unenforceable by operation of law—this being all that could be said—and thus incapable of forming the basis of a suit but it would not entail the penalty of depriving the drawee or promisee or their representatives-in-interest from maintaining an action on the original consideration unless specifically declared to be so by the Legislature. One may not be able to enforce the terms contained in the instrument but there can be no objection to the Court looking at it and granting the relief on the basis

---

7. Sutton v. Turner, 108 E R 778.
8. Perumal Chettiar v. Kamakshi Ammal, (1938) 25 A I R Mad 785=177 I C 236=I L R (1938) Mad 983=(1938) 2 M L J 189 (F B).

as if the document had not come into existence. The promissory note having become void, the defendant who had received an advantage under the instrument is bound to restore it or to make compensation for it. There seems to be no reason why the Courts should not act in such a case on the principle embodied in S. 65, Contract Act.

Section 87 would not therefore in my opinion stand in the plaintiff's way of getting the relief on the original cause of action. The application for amendment, made in this Court would have to be determined therefore on the ordinary principles contained in O. 6, R. 17, Civil P. C., and there is no reason why in the circumstances of this kind the plaintiff should not have been permitted to amend the plaint so as to fall back upon the original consideration if the second contention had not been decided in his favour. In view of the interpretation I have placed on S. 87; it is unnecessary to order the amendment and grant relief on the basis as if no promissory note had come into existence.

The third position taken up on behalf of the appellant was that a decree should have been passed by the lower Appellate Court on the admission made by the defendant. As I stated above, I am not concerned in this case with what would have happened if the plaintiff had been guilty of fraud or had come into Court with unclean hands. But in this particular case nothing has been or can be said either against the plaintiff or his next friend which would show that he was not entitled to the relief when the defendant had admitted it in his statement before the Court as a witness that the debt due under the promissory note was still outstanding. For these reasons, I set aside the decree of the lower Appellate Court and pass a decree in favour of the plaintiff for the amount claimed by him with costs in this and in the lower Courts. Leave granted.

C.R.K./D.S. *Decree set aside.*

A. I. R. 1940 Madras 67

SOMAYYA J.

Marakkarkandi Krishnan and others— Appellants.

v.

Messrs. P. R. N. Ramanatha Iyer and Co. — Respondent.

Appeal No. 60 of 1938, Decided on 20th April 1939, against decree of Dist. Court, South Malabar, in A. S. No. 208 of 1935.

Malabar Law — Joint property — Thiyyas of Calicut Taluk — Incident of impartibility must be proved by party setting it.

The presumption must be that all joint property is partible that being the rule of equity recognized in the absence of any usage to the contrary and hence the rule of partibility must prevail unless displaced by evidence that some other rule is recognized by the community as binding upon it. It cannot be said that the incident of impartibility has been recognized among Thiyyas of Calicut Taluk in judicial decisions so as to dispense with proof. It must be proved by the party setting up the incident of impartibility that it exists in the community or in the families in question. [P 69 C 1]

K. Kuttikrishna Menon and K. N. Kumaran — *for Appellants.*

T. S. Anantharaman — *for Respondent.*

Judgment. — The question involved in this appeal is whether the property of the debtors is impartible and if so whether the debt due to the decree-holder is recoverable from that property. The respondent in this appeal obtained a money decree against one Baputty who died in April 1926 leaving two brothers Velukutty and Choyi. The first of them died in 1926 and the second is still alive. In the execution petition filed by the respondent herein to execute his decree, the sons of the judgment-debtor Baputty were impleaded as his legal representatives. They are the appellants in this appeal. Objection was taken that the property of the family consisting of the deceased Baputty, his brothers and sons is impartible and that according to the customary law applicable to the Thiyyas of Calicut Taluk, such an impartible estate cannot be proceeded against in execution of a decree obtained against the deceased Baputty. By 'impartible' it is said that the property is not partible unless all the parties consent. It is urged that as it is not partible at the instance of one member against the wishes of the others, the property is such that it cannot be proceeded against in execution of a money decree obtained against that member.

The Subordinate Judge held that the effect of the decisions of the Madras High Court is that laid down in the decision in 53 M L J 368,[1] that the Thiyyas of Calicut are governed by the Makkatayan law of inheritance and that they are governed by customary law. If no evidence is forthcoming as to what is the rule of customary law on a particular point, the rule of Hindu law on that point must be adopted as the customary law obtained in the community on that point. If a person alleges that the rule of customary law on any particular point is something different from the Hindu law, the evidence which he adduces in support of his allegation ought not to be subjected to those well-known tests which are applied to the case of an alleged custom contrary to or in derogation of the law and should be viewed simply as evidence adduced to show what is the rule of customary law itself. Applying this principle, the Subordinate Judge discussed the evidence adduced by either party and came to the conclusion that it was proved by the objectors that the property was impartible and that it cannot be proceeded against in execution of a money decree obtained against Baputty. On appeal the learned District Judge of South Malabar came to the opposite conclusion. The learned District Judge applied the same test as the Subordinate Judge and weighed the evidence according to that standard. He came to the conclusion that the evidence on record was not such as to justify a finding in favour of the objectors. He reversed the order of the Subordinate Judge and directed execution to proceed. Against this decision the present appeal is filed by the sons of Baputty. They urge that the decision of the District Judge is wrong.

---

[1] Chakkutti v. Chandukutti, (1927) 14 A I R Mad 877=105 I C 55=53 M L J 368.

It is argued by the appellants' learned advocate that according to the decision of this Court the incident of impartibility in the sense in which that expression is used as stated above is applicable to all cases of Thiyyas of Calicut Taluk. It is said that the law was laid down correctly in 17 Mad 184[2] and that this incident has been judicially recognized so well as to dispense with actual proof of it in this case. This and the later decisions were all referred to at length and discussed by Waller and Madhavan Nair JJ. in the decision reported in 53 M L J 368.[1] As is pointed there when the matter came up before the High Court on the first occasion in 17 Mad 184[2] the pleadings and the evidence were all vague and unsatisfactory, the issue that was raised was vague, the evidence that was adduced inconclusive, the witnesses were not even asked about the real questions at issue and the Subordinate Judge arrived at the conclusion that the ordinary rule of Marumakkathayam against compulsory partition was applicable to the Thiyyas of Calicut on the authority of two unreported decisions. When the matter came before the High Court in second appeal the High Court observed that it should not have been decided in that way and they framed an issue whether according to the customary law followed by the parties to the suit, compulsory partition can be effected according to the wish of one member of the tarwad. When the matter went back, the Subordinate Judge based his finding upon the ground that there was no presumption of partibility of family property in the case of Thiyyas and that the evidence adduced before him was not sufficient to support the custom of partibility. Starting from that standpoint he examined the evidence adduced before him and held that the incident of partibility was not proved.

When the matter came after the return of the finding, the High Court did no more than accept the finding. The Subordinate Judge really went too far in laying down that there was no presumption of partibility. In the first place the presumption must be that all joint property is partible, that being the rule of equity recognized in the absence of any usage to the contrary and secondly the Hindu rule of partibility is also the same and hence the rule of partibility must prevail unless displaced by evidence that some other rule is recognized by the community as binding upon it. When the question came up with respect to another community who were also Thiyyas but belonged to Palghat, this Court refused to extend the rule laid down in the decision in 17 Mad 184[2] and confined the case to the Thiyyas of Calicut: 22 Mad 297.[3] In Second Appeal No. 580 of 1917, Phillips and Krishnan JJ. observed that it was questionable whether a single decision in 17 Mad 184[2] can be said to be a final decision binding on all Thiyyas of Calicut. The question came before Waller and Madhavan Nair JJ. in 53 M L J 368.[1] There the learned Judges went into the matter at great length and came to the conclusion that the decision in 17 Mad 184[2] must be confined to the facts and circumstances of that case and held that among the Thiyyas of Calicut there was no rule that the rule of impartibility was applicable unless it was proved to be so by evidence adduced in any given case. The question again came before this Court in A I R 1929 Mad 508[4] before Wallace and Srinivasa

---

[2] Raman Menon v. Chathunni, (1894) 17 Mad 184.

[3] Velu v. Chamu, (1899) 22 Mad 297.

[4] Vysyam Kandiyal v. Neelambalatha Andi, (1929) 16 A I R Mad 508=114 I C 338.

Iyengar JJ. Wallace J. followed without any reserve the decision of Waller and Madhavan Nair JJ. and laid down the rule in the same terms. Srinivasa Iyengar J. though he was inclined to doubt whether the observations of Waller and Madhavan Nair JJ. were correct, applied the law as laid down by them and held that the evidence adduced in case before him proved a custom of impartibility. This being the state of authorities it cannot be said that the incident of impartibility has been recognized in judicial decisions so as to dispense with proof. It must be proved by the party setting up the incident of impartibility that it exists in the community or in the families in question. As is pointed out at p. 239 of Sundara Iyer's Malabar Law, partibility is a rule that is incidental to common ownership; it is a rule of equity applicable to joint status and it is upon the person setting up that the property is impartible to allege and prove it. (His Lordship after discussing the evidence proceeded.) I therefore hold that the question of impartibility has not been established by the evidence on record. On the other hand, the evidence referred to proves the contrary. The appeal therefore fails and is dismissed with costs. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 69

PATANJALI SASTRI J.

Vanjiappa Goundan — Petitioner.

v.

N. P. V. L. R. Annamalai Chettiar and others — Respondents.

Civil Revn. Petn. No. 371 of 1939, Decided on 2nd May 1939, to revise order of District Munsif, Palni, D/- 13th December 1938.

(a) Civil P. C. (1908), O. 1, R. 10 (2)—Person purchasing right to recover certain amount instituting suit to recover it by adding seller as co-plaintiff — Seller claiming adversely to purchaser—Seller's name as co-plaintiff should be struck off and he should be transposed as defendant.

Where a person who has purchased right to recover certain sum has instituted a suit to recover it by impleading the seller as co-plaintiff and the seller sets up a claim to the amount in suit adversely to the purchaser, it will be highly expedient, if not necessary, to strike out the seller's name as plaintiff 2. But as he is clearly a person whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the proper order would be to direct the seller to be transposed as a defendant in the suit: *(1905) 2 Ch 460, Rel. on.* [P 70 C 1, 2]

(b) Civil P. C. (1908), O. 1, R. 10 (2) — "Questions involved in the suit"—Scope.

The "questions involved in the suit" referred to in O. 1, R. 10 (2) mean not merely the questions which are involved in the suit as originally framed between the parties to the suit. The object of the provision is that where several disputes arise out of one subject-matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in the action: *A I R 1929 Mad 443, Rel. on.* [P 70 C 2]

C. V. Seshagiri Sastri and T. R. Srinivasa Iyer — *for Petitioner.*

K. S. Ramamurthy — *for Respondents.*

Order. — This revision petition is filed against the order of the Court below refusing to strike out the petitioner's name from the plaint. The petitioner, who is plaintiff 2 in the suit, sold to plaintiff 1, respondent 1 herein, a certain village called Puducottah which, along with certain other villages belonging to the defendants in the suit, some of whom are the other respondents here, was charged with the payment of a certain annuity. In execution of a decree obtained for the recovery of such annuity, the petitioner's village was sold but the sale was set aside under O. 21, R. 89 on the petitioner depositing Rs. 2976-9-6 in Court. The petitioner alone having thus paid the entire amount which was payable from out of all the villages charged with such payment, he claimed to be entitled to recover Rs. 2514 by way of contribution from the owners of the other villages. Subsequently, the petitioner sold the village of Puducottah to respondent 1 with all rights appurtenant thereto. The sale deed purports to convey also the petitioner's right to recover this sum of Rs. 2514 and the present suit was accordingly brought by respondent 1 impleading the petitioner as plaintiff 2 for recovering this sum from the defendants who are the owners of the other villages charged with the payment of the annuity. In the application filed by the petitioner in the Court below however he alleged, that the sale by him to respondent 1 was never intended to convey his right to recover the amount in question, that the clause purporting to convey this sum also was included in the sale deed by respondent 1 fraudulently, advantage being taken of his ignorance and illiteracy and that he was impleaded as plaintiff 2 in the suit without his knowledge. The lower Court however found that the petitioner did sign the plaint and also the vakalath executed to respondent 1's pleader in the Court below and the petitioner's learned advocate has not attacked that finding before me.

He contends that inasmuch as there is no prayer in the plaint for any relief being awarded to the petitioner, either primarily or in the alternative, he could not be regarded as a plaintiff at all in the proper sense of the term, and his joinder as plaintiff 2 was improper, and the Court below should therefore have struck out his name under O. 1, R. 10 (2), Civil P. C. Respondent 1 objects on the ground that the petitioner's application was vexatious and inspired by defendant 1 (respondent 2 herein) who wants to defeat his right to recover the amount in question under the sale from the petitioner, and that the striking out of the latter's name from the suit would be highly prejudicial to him. Respondent 2 has no objection to the petitioner's name being struck off as plaintiff 2, provided he is added as a defendant but insists that the petitioner should remain on the record, as his presence is necessary for a complete and effectual adjudication of all the matters in controversy between the parties.

The Court below held that the joinder of the petitioner as plaintiff 2 was not shown to be improper and that he had no absolute right of withdrawing from the suit under O. 23, R. 1, Civil P. C., without the consent of respondent 1 and therefore dismissed the application. The petitioner's learned advocate conceded that the view of the lower Court is right so far as O. 23, R. 1 is concerned, in view of the decision of this Court reported in A I R 1933 Mad 824,[1] but he urged that the petitioner's joinder as a plaintiff was improper and that, in any case, as he now claims the amount in dispute adversely to respondent 1, he cannot continue to be a co-plaintiff with the latter but should be transposed as a defendant, if he could not be removed from the suit altogether. I see considerable force in this contention. The joinder of the petitioner as plaintiff 2 is not authorized by the terms of O. 1, R. 1, Civil P. C., as no right to relief is alleged to exist in the petitioner jointly, severally or in the alternative, and when the petitioner begins to set up a claim to the amount in suit adversely to respondent 1, it will be highly expedient, if not necessary, to strike out his name as plaintiff 2, as desired by him. But as he is clearly a person whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the proper order, in my opinion, would be to direct the petitioner to be transposed as a defendant in the suit: *see* (1905) 2 Ch 460,[2] where it was observed:

> The general rule is that where co-plaintiffs disagree, the name of one is struck out as plaintiff and added as defendant.

The Court below has taken the view, relying upon 59 Cal 329,[3] that the "questions involved in the suit" referred to in O. 1, R. 10 (2) must mean the questions which are involved in the suit as originally framed between the parties to the suit. But this High Court has placed a wider interpretation on those words and has held that the object of the provision is that where several disputes arise out of one subject-matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in the action: *see* 29 M L W 753.[4] Further, the Court below has not considered the question from the point of view of the rights of the parties. Assuming that the petitioner's allegation that the right to recover the amount in question was never intended to be conveyed by him to respondent 1 is true—as to which I express no opinion—the effect of the order of the lower Court would clearly be to nullify that right by precluding him from suing the defendants again for the recovery of the amount, while in this suit he cannot obviously get that relief. Respondent 1's learned advocate suggested that the petitioner might, if his allegation is true, sue respondent 1 later on for the recovery of any sum that might be decreed to the latter in this suit. But apart from possible technical objections to which such a suit might be open by reason of the petitioner having signed the plaint in this suit, it would be a suit to enforce a cause of action which the Court would have helped to bring into existence by enabling respondent 1 to commit, under its own ægis, what undoubtedly would be a wrongful act on the hypothesis assumed. Having regard to all these considerations, I set aside the order of the Court below and direct the name of the petitioner to be struck out as plaintiff and added as a defendant in the suit. Each party will bear his own costs here and below.

---

[1] Ramaswami Chettiar v. Rengan Chettiar, (1933) 20 AIR Mad 824=147 I C 203=57 Mad 299=65 M L J 693.

[2] Mathews In re; Oates v. Mooney, (1905) 2 Ch 460=74 L J Ch 656=93 L T 158=54 W R 75.

[3] Banbihari Mukherji v. Bhejnath Singh, (1932) 19 A I R Cal 448=138 I C 104=59 Cal 329.

[4] Secy. of State v. Murugesa Mudaliar, (1929) 16 A I R Mad 443=118 I C 780=29 M L W 753.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 71

PATANJALI SASTRI J.

P. V. Karuppanan Ambalam — Appellant.

v.

Pandari Sundara Raja Ayyar — Respondent.

Second Appeal No. 674 of 1936, Decided on 8th August 1939, against decree of Dist. Court, Madura, in A. S. No. 95 of 1934.

Practice—Relief—Suit based on title—Plaintiff can claim relief on strength of anterior possession alternatively as independent ground of claim — Such relief can be granted even if not specifically asked for in plaint if other party is not prejudiced thereby.

When a plaintiff bases his suit on title, he can claim relief on the strength of his mere anterior possession alternatively as an independent ground of claim by itself. A decree can be passed on the strength of plaintiff's possession even if such possession is not specifically made the ground of relief in the plaint if the opposite party is not prejudiced to any extent by the new case being sprung upon him without any previous indication thereof in the plaint: *A I R 1936 Bom 201, Expl.* [P 71 C 2; P 72 C 1]

K. Rajah Ayyar — *for Appellant.*

P. S. Narayanaswami Ayyar — *for Respondent.*

Judgment. — This appeal arises out of a suit brought by the respondent for a permanent injunction restraining the appellant from interfering with his enjoyment of the suit property and, in case it was found that the respondent was not in possession, for delivery of possession free from the obstruction of the appellant. The respondent claimed title under an inam grant alleged to have been made to his predecessors-in-title by the Carnatic rulers for the supply of Tulasi to the Kallalagar Devasthanam in the Madura District. The respondent also alleged that in or about the year 1918 the trustees of Ramalingaswami Mutt falsely set up title to the suit properties and at the instance of some mediators, the dispute with them was settled by the trustees giving what is described as a release sale deed relinquishing all their interest in the suit properties, and recognizing the respondent's title thereto. Since then, the respondent claimed to have been in possession and enjoyment of the suit properties down to the year 1933 when the appellant disturbed his possession under colour of a sale deed obtained by him from one Singaram Pillai. The appellant denied the title as well as the possession put forward by the respondent and pleaded that the property originally belonged to one Narayana Paradesi from whose successor-in-title he obtained the property by sale deed dated 14th February 1933. The trial Court found that the inam grant put forward by the respondent related only to the melwaram interest in the land but that he acquired the right to the land itself by virtue of the release deed executed by the trustees of Ramalingaswami Mutt and thus became the full owner of the suit property. As regards the respondent's possession, he held that the evidence on record was not sufficient to establish an acquisition of title by the respondent by adverse possession if the respondent was held to have no title otherwise.

On appeal the learned District Judge confirmed the finding of the District Munsif that the inam grant was only of the melwaram but disagreed with him on the question of the respondent's title. He held that the release deed Ex. B could not confer a valid title on the respondent because only two out of the four trustees of the mutt executed it, and besides it was not shown to have been executed for any necessary purpose binding on the mutt. He however held that the respondent got possession of the properties under Ex. B and continued in possession till he was disturbed in such possession by the appellant in 1933 and that the respondent was entitled to a decree on the basis of his possession irrespective of any question of title. As the mutt was not a party to the suit, the learned Judge thought it was unnecessary to decide whether the respondent had acquired title by adverse possession against the mutt.

The learned counsel for the appellant raised two contentions before me. First he urged that when a plaintiff bases his suit on title, he cannot claim relief on the strength of his mere anterior possession even alternatively; he could rely upon possession only as evidence of the title put forward by him but not as an independent ground of claim by itself. For this somewhat startling proposition, he relied upon a decision of the Bombay High Court, A I R 1936 Bom 201.[1] There the trial Court found that the plaintiff in that case had more or less a precarious possession for a short period and it was with reference to that finding which the learned Judges described as tentative that they made their observations at p. 208 of the report. I do not understand that decision as laying down what in effect would be a new rule of misjoinder not warranted by the provisions of the Civil Procedure Code.

---

[1] Govindabhai v. Dhayabhai, (1936) 23 A I R Bom 201=163 I C 632=38 Bom L R 175.

The learned counsel next contended that even if it is permissible to put forward mere previous possession as a ground of claim in the alternative in a suit based primarily upon title, no such case having been expressly set up by the respondent in this case in his plaint, the learned District Judge erred in law in granting the respondent a decree on the basis of his prior possession after negativing the title that was specifically set up. The learned counsel cited in support of his proposition 1914 M W N 784,[2] 31 Mad 531,[3] (1916) 1 M W N 110[4] and 66 M L J 358[5] and certain other decisions more or less to the same effect. In some of these cases the suits were no doubt dismissed on the ground that the title set up by the plaintiff was not established and that no decree could be granted on the strength of mere possession as no possessory title had been put forward in the plaint. But I do not regard these decisions as laying down an inflexible rule that under no circumstances can a decree be passed on the strength of plaintiff's possession unless such possession is specifically made the ground of relief in the plaint. I regard them merely as illustrations of the salutary principle that parties should ordinarily be confined to the case raised by them in their pleadings and that no relief should be awarded on the basis of a new case not disclosed in the pleadings. The underlying principle is of course that no party should be taken by surprise but should have a fair and adequate opportunity to meet the case of his opponent. Judged by this principle, it cannot be said in this case that the appellant was prejudiced to any extent by any new case being sprung upon him without any previous indication thereof in the plaint. In paras. 7 and 8 of the plaint, after referring to the release deed by the trustees of the Mutt and delivery of possession by them, the respondent definitely and clearly alleged:

> From that time till this day the plaintiff himself is enjoying the suit land and is paying the kist, etc. due thereon. The patta also has been registered in his name. Nobody else had, at any time, any right to, or enjoyment of, the said land,

and the appellant in para. 8 of his written statement traversed these allegations and issue 5 and the additional issue, relating to the respondent's acquisition of title by adverse possession and his having been in possession within 12 years before the suit also clearly raised the question of the respondent's possession of the suit property. Evidence was let in by both the parties on these issues and the matter also was elaborately considered by both the Courts below. In these circumstances, I am unable to see any ground for complaint that the appellant was prejudiced by the decree having been passed on a new case which the appellant had no sufficient opportunity to meet. The respondent's learned counsel has drawn my attention to a decision of the Privy Council in 20 Cal 834[6] where also as far as could be seen from the summary of the plaintiff's case in their Lordships' judgment the suit had been based upon the plaintiff's title and no mere possessory title had been specifically put forward as such. But allegations of possession by the plaintiff and his predecessors-in-interest had, of course, been made. The High Court refused to declare the plaintiff's title under Sec. 42, Specific Relief Act, though they found that the plaintiff was actually in possession for over six years prior to the suit. But their Lordships reversed the decision of the High Court and granted a declaration of the plaintiff's title on the strength of his possession alone leaving the question of the plaintiff's title undecided. I am therefore of opinion that the decree of the lower Court was rightly made and this appeal should be dismissed with costs. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

---

[2] **Maikel Servai v. Thumbuswami Servai, (1915) 2 AIR Mad 74=25 I C 934=1914 MWN 784.**

[3] **Somasundaram Chetty v. Vadivelu Pillai, (1908) 31 Mad 531.**

[4] **Venkatasami Naick v. Kali Samatan, (1917) 4 A I R Mad 533=33 I C 167=(1916) 1 M W N 110.**

[5] **Ramalinga Pandaram v. Anthonimuthu Vathiar, (1934) 21 A I R Mad 274 = 148 I.C 631=66 M L J 358.**

[6] **Ismail Ariff v. Mahomed Ghouse, (1893) 20 Cal 834=20 I A 99=6 Sar 305 (P C).**

A. I. R. 1940 Madras 73

VARADACHARIAR AND ABDUR RAHMAN JJ.

Govindaswami Naicker and others — Appellants.

v.

K. N. Srinivasa Rao and others — Respondents.

Appeals Nos. 119 of 1933 and 12 of 1934 and Civil Misc. Petn. No. 4797 of 1937, Decided on 27th September 1938, against decrees of Sub-Judge, Chingleput, D/- 30th September 1932.

Lunacy — Old man suffering from senile dementia on certain date — Presumption is in favour of its continuance — Onus to uphold transactions subsequent to this date will be on persons who say that they were not vitiated on ground of his incapacity.

In the case of senile dementia in an old man on certain date, it is reasonable to presume its continuance than its discontinuance and onus will be upon persons who wish the Court to uphold transactions entered into by the patient subsequent to this date to prove that the transactions were not vitiated on the ground of his incapacity. The fact that in spite of his mental incapacity such lunatic continued a habit which he presumably must have formed in his better days is not inconsistent with the continuance of that kind of incapacity. [P 74 C 2]

K. K. Sridharan — *for Appellants.*

G. N. Thirumalachariar, A. Narasimhachariar and K. Subbarayan — *for Respondents.*

Varadachariar J.—*Appeal No. 119 of 1933*:—This appeal arises out of a suit instituted for obtaining a declaration that certain transactions entered into by plaintiff 1 were void and for incidental reliefs. In the Court below, plaintiffs attacked three transactions evidenced by Exs. H, J and I. The lower Court dismissed the plaintiff's suit. Plaintiff 1 died pending the suit and the other two plaintiffs filed this appeal against the decree of dismissal. In the appeal the attack had been confined to Exs. H and I. Plaintiff 2 died during the pendency of the appeal and his legal representatives who were in the first instance added as respondents have since been transposed as appellants to continue the appeal along with plaintiff 3.

Plaintiff 1 was the father and plaintiffs 2 and 3 were his sons. Starting with little or no means, plaintiff 1 seems to have earned substantial sum by working for a number of years in Rangoon and he acquired some immovable properties both in Rangoon and in the Chingleput District here. About the middle of 1927, when he was about 58 years old, plaintiff 1 is said to have developed symptoms of unsoundness of mind. The exact nature of his malady will be discussed presently ; but, notwithstanding this state of health and mind, he does seem to have taken part in some transactions in the latter part of 1927 and in the first part of 1928. Amongst them are Exs. H and J, two sale deeds dated 19th December 1927 and 5th May 1928 executed by defendants 1 and 2 respectively in favour of plaintiff 1. On 26th April 1928 plaintiff 1 executed a deed of settlement (Ex. I) in favour of defendant 4 who is his daughter. This suit was instituted in March 1929 by plaintiff 1 represented by plaintiff 2 as his next friend and by the two sons as plaintiffs 2 and 3. The father died a few months after the institution of the suit. The case made in the plaint was that from about the middle of 1927 plaintiff 1 who was an old man was suffering from senile dementia and was as such incapable of managing his affairs, that, taking advantage of that condition defendants 1 and 2 who took moneys from plaintiff 1 purported to sell their properties to him partly in repayment of the moneys thus taken and also in consideration of a promissory note executed by plaintiff 1 for the balance of the purchase money. As regards Ex. H, the plaint prayed that defendant 1 should be directed to repay the sums of money which he had received from plaintiff 1 and that the promissory note executed for the balance of the consideration should be declared void. As regards the settlement deed (Ex. I), it was alleged in para. 14 of the plaint that defendant 4 and her husband, defendant 3, had managed with the help of certain other persons to benefit themselves at the expense of the plaintiffs' family and got the settlement deed executed by the demented plaintiff 1. It was also contended that the property thus settled was joint family property and that plaintiff 1 was on this ground also incompetent to make the settlement.

The defendants denied the alleged incapacity of plaintiff 1. They also denied that the properties settled by Ex. I on the daughter were joint family properties. Defendant 1 in his turn instituted a suit (out of which the connected appeal arises) for recovery of the amount due under the promissory note which had been executed by plaintiff 1 for the balance of the consideration. The two suits were tried together and the learned Subordinate Judge dismissed the suit to set aside the transactions and passed a decree in plaintiff's favour in the promissory note suit. The learned Subordinate Judge was of opinion that though plaintiff 1's mental condition was probably not quite all right in or about July 1927, there could be no presumption that the lunacy continued ; and in view of the evidence furnished by other transactions alleged to have been entered into by plaintiff 1 after this date, he held that the evidence was not sufficient to hold that Exs. H and I were brought into existence at a time when plaintiff 1 was actually of unsound mind.

It was also alleged in the plaint that the price fixed for the sale under Ex. H was extravagant and this was itself evidence of the advantage taken by defendant 1 of plaintiff 1's condition. On this part of the case, the learned Judge was inclined to think that perhaps the price was a bit high but he was not prepared to say that it was so disproportionately high as to lead one to think that defendant 1 took advantage of the mental condition of plaintiff 1 and brought about the sale on very advantageous terms to defendant 1. The evidence bearing on the question of price is to the effect that about three years before the sale, defendant 1 purchased the lands for Rs. 1500 and retaining 10 cents of the lands for himself, he sold the remainder under Ex. H for Rs. 2375. As we propose to rest our decision in this appeal on the evidence as to plaintiff 1's mental capacity, we do not propose to pursue further the question of the fairness or otherwise of the price fixed for Exhibit H.

Dealing with the question of plaintiff 1's mental capacity, we would observe at the outset that one remark of the learned Judge in para. 31 of his judgment is open to question, i. e. the statement that assuming that plaintiff 1 was of unsound mind in July, August 1927 "there could be no presumption that the lunacy continued." It was contended on behalf of the appellants that this was opposed to the decision in 40 Mad 660.[1] That case is perhaps capable of being distinguished on the facts, on the ground that it was a case of a person found lunatic by inquisition, whereas here all that happened was that certain proceedings were taken under Ss. 13 and 14, Lunacy Act, with a view to avoid danger from the lunatic to himself and to others. Whether the presumption laid down in 40 Mad 660[1] should be limited to cases of lunacy found by inquisition need not be dealt with as an abstract question. Having regard to the nature of the mental incapacity proved in this case, namely senile dementia in the case of an old man, we think it more reasonable to presume its continuance than its discontinuance and the onus will be upon persons who wish the Court to uphold transactions entered into by the patient subsequent to this date to prove that the transactions were not vitiated on the ground of his incapacity.

There is some evidence in the case consisting not merely of oral testimony but of at least one document (Ex. B) suggesting that plaintiff 1 was even violent and dangerous; but as P. W. 2, the Sub-Inspector who made the report Ex. B, admits that the statements in Ex. B relating to acts of violence committed by plaintiff 1 cannot be vouched by him on his own personal knowledge, but were merely inserted on the strength of statements made before him by others, we are not prepared to accept the oral evidence relating to such acts as reliable, particularly in view of what is contained in the certificate (Ex. A) given by P. W. 1. P. W. 1 was the District Medical Officer in Chingleput in August 1927. On receipt of the report (Ex. B), he was asked by the Joint Magistrate to examine plaintiff 1 and report on his mental condition and Ex. A is a certificate given by him on 4th August 1927. It says that after keeping plaintiff 1 under observation for some days P. W. 1 came to the conclusion that plaintiff 1 was a lunatic and a proper person to be taken charge of and detained under care; but it was added that he could be taken care of by his relatives. It is stated in the certificate itself that the patient was "not inclined to be violent or boisterous," that he is quite rational in his talk but when one talks to him about his wealth, he goes at a tangent and "says that he has thousands of acres of lands and hundreds of houses." On this certificate, orders were passed by the Joint Magistrate (Ex. T) directing plaintiff 1 to be entrusted to the care of his son, plaintiff 2, who executed a bond Ex. D.

A suggestion has been made by the learned counsel for the respondent that these proceedings under the Lunacy Act must in all probability have been put through with some ulterior purpose, namely to avoid criminal proceedings against plaintiff 1 for some criminal acts committed by him. We see no warrant either direct or indirect for this suggestion. P. W. 2 says that he himself saw plaintiff 1 and examined him and that he made the report Ex. B on receipt of a report from the Village Munsif who is himself defendant 1 in this case and has been examined as D. W. 1. Though D. W. 1 denies having made any report and suggests that P. W. 2 is ill-disposed towards himself, we prefer to accept the testimony of P. W. 2. No suggestion of ill-will was put to him during his cross-examination and it was not elicited either from P. W. 2 or from D. W. 1 that there was any danger of criminal proceedings being taken against plaintiff 1 and it was with a view to avoid the same that this device of proceedings under the Lunacy Act was adopted. The Medical Officer who gave the certificate, Ex. A has been examined as P. W. 1 in the case and nothing has been elicited in his cross-examination to suggest that Ex. A is not reliable or that he was a party to any conspiracy to hush up a criminal case. Another medical witness who was examined on commission in Burma speaks also to the fact that in his opinion plaintiff 1 was suffering from senile dementia. It is true that his evidence is not very full and he has not been asked to state the grounds of his opinion or the symptoms which he saw. The defendants did not appear before the Commissioner to cross-examine him and this is perhaps the reason why his evidence is so short. In view however of the medical certificate Ex. A and the evidence of P. W. 1, we are not left in much doubt about the mental condition of plaintiff 1 in or about July-August 1927.

---

[1] Seshamma v. Padmanabha Rao, (1917) 4 AIR Mad 265=38 I C 578=40 Mad 660.

It is true that even after this period plaintiff 1 was a party to certain transactions, but on close examination it will be found that his part in them is not such as to displace the effect of the medical evidence. For instance, another sale deed similar to Exs. H and J was executed about the same time for a sum of Rs. 4000. But it is significant that this was executed in favour of plaintiff 1's wife and not in favour of plaintiff 1, like Exs. H and J. The contract had no doubt been entered into by plaintiff 1 but it is explained that the other members of the family did not think fit to repudiate it because the bargain was a good one and they preferred to retain it. Again, it is significant, that a promissory note which was taken in July 1927 was taken not in plaintiff 1's name but in favour of his wife. This cannot be a bogus transaction or device because it is attested by defendant 3 who is now contesting the suit on behalf of his wife, defendant 4. When he was questioned in the witness-box about it, he did not seek to explain it away but merely fought shy of it and avoided any questions relating to it. The other transaction of this period which the learned Subordinate Judge has strongly relied is a hypothecation bond executed in Rangoon in favour of a Chettiar; but its value in support of the defendants' case is very much diminished by the fact that it was not merely brought about by the sons, plaintiffs 2 and 3, but that they also joined in its execution. It is nothing strange if to satisfy the creditor they also got their father to join in executing it. Some point has been made of the fact that plaintiff 1 was a careful business man and kept a notebook in which his money transactions were entered and he even had the good sense to take the signatures in the book of persons to whom he lent moneys. This no doubt proves that in spite of his mental incapacity he continued a habit which he presumably must have formed in his better days; but having regard to the nature of the incapacity spoken to by the medical witnesses, this conduct is not inconsistent with the continuance of that kind of incapacity.

We may also point out in this connexion that it is not the case of the contesting defendants that plaintiff 1 was at one stage of unsound mind but that he subsequently recovered his mental capacity. They and their witnesses totally deny that plaintiff 1 was at any time of unsound mind. We are unable to believe that defendant 3 who is the son-in-law of plaintiff 1 would have been ignorant of the proceedings under the Lunacy Act. As regards defendant 1, we have no hesitation in believing that he was not only aware of the proceedings but that it was his report which initiated the proceedings. We may at this stage also refer to an attempt made by the plaintiffs to have defendant 1's report placed on the record. The lower Court denied them an opportunity to do so and a petition has been filed before us in that connexion. In the circumstances disclosed in the affidavit, we think that the learned Subordinate Judge would have done better to have given the opportunity to the plaintiffs. We do not however think it necessary to admit the documents in evidence at this stage because its admission would necessitate a further examination of defendant 1. We are prepared to proceed on the footing that Ex. B substantially represents the contents of the report made by the Village Munsif and this is sufficient for the purpose of this case. There being on record no evidence of the proved incapacity having terminated, we are unable to agree with the learned Subordinate Judge that it was for the plaintiffs to prove that on the dates of Exs. H and I, plaintiff 1 was not of sound mind. We may however add that there is some evidence on record even to that effect. If it merely depended upon the evidence of plaintiff 2 we should have hesitated to act upon it. But both the medical witnesses state that having regard to the nature of the infirmity, it would, in all probability, have continued during the rest of the patient's lifetime.

We have not had the benefit of any argument before us on behalf of defendant 1. His counsel has reported no instructions. It has been argued by the learned counsel for defendants 3 and 4 that on the medical evidence, there is not enough to invalidate Ex. I. In view of the finding of the lower Court that the properties settled under Ex. I were the self-acquired properties of plaintiff 1 it was contended that except on the ground of mental incapacity, the transaction could not be impeached ; it was also argued that unless it is shown that the mental incapacity was such as to affect the particular transaction, Ex. I should be upheld. Reliance was in this connexion placed upon the observations in (1880) 14 Ch D 674.[2] That judgment does not seem upon careful examination to lay down any general rule applicable to all cases. The Court of Appeal was more concerned with the question whether there had been a misdirection and they merely affirmed the correctness of the direction which had been given at the trial by Lindley L. J. who had referred the question to the jury as a practical question,

> whether the party was so insane as to be incompetent to manage his own affairs in the sense of disposing of his property and even of property believed by him to be full of sulphur.

The test applicable to a case like the present is, in our opinion, sufficiently indicated in S. 12, Contract Act, which requires that the person whose act is challenged should be capable of understanding it and of forming a rational judgment as to its effect upon his interests. If, as Ex. A states, plaintiff 1 was under a delusion in the sense that he thought that he possessed thousands of acres of land when in fact he had about 100 acres of land at Rangoon and about 15 or 20 acres in India, we find it difficult to say that he could have formed a rational judgment as to the effect of the gift deed Ex. I upon his interests. The evidence of D. Ws. 3, 4 and 5 is not of much help to defendant 4 because, as explained by P. W. 1, plaintiff 1's malady was not such as could have been detected by laymen in the course of an ordinary conversation. We are free to confess that we would have gladly upheld Ex. I as a reasonable transaction, reasonable even if the property dealt with had been the ancestral property of the family; but dealing with the question not as one of reasonableness, but of the mental capacity of the settlor we regret we are unable to uphold it in spite of our view that it is not an unreasonable transaction.

As regards defendant 1, we may add that his knowledge of plaintiff 1's condition is proved not merely by the report which he is said to have signed but by Ex. F a notice sent by him about the end of August 1927 wherein he was specifically warned against entering into any transaction with plaintiff 1. In the reply Ex. F-1 he preferred to deny the charge and it is after Ex. F-1 that he entered into the sale deed Ex. H. The learned Subordinate Judge has laid some stress upon the fact that the plaintiffs are in possession of the property conveyed under Ex. H. The transfer of pattah is more or less a matter of course once a sale deed is registered, and, as defendant 1 was the Village Munsif, it is not unlikely that the other village records were so prepared as to be in conformity with Ex. H. Even assuming that the taking of possession by plaintiff 1 was a voluntary act, it cannot improve the validity of the transaction having regard to the grounds on which we have set aside the transaction.

The result is that Appeal No. 119 of 1933 must be allowed and the sale deed Ex. H, and the settlement deed Ex. I, declared void and inoperative. Out of the sale price under Ex. H, Rs. 850 has admittedly been paid to defendant 1. This money is liable to be returned to the appellants and there will be a decree against defendant 1 for the same. It was brought to our notice that a small cause suit for the recovery of a sum of Rs. 450 out of this Rs. 850 had been dismissed for default. If the subsequent sale had not come about, that dismissal would no doubt bar any further suit on the original promissory note. But the dismissal is explained by the execution of the sale deed and after that date the amount was no longer claimable as a debt due under the promissory note. The refund now ordered is only on the principle of S. 65, Contract Act. Before the plaintiffs can recover this sum of Rs. 850, they must deliver up possession of the land conveyed to them under Ex. H. As they have been in possession, they will not be entitled to claim any interest. From the time that they notify defendant 1 of their abandonment of possession of the land they will be entitled to interest on this sum of Rs. 850 at 6 per cent. per annum till date of payment. As regards the properties covered by Ex. I, we were informed that during the pendency of the suit in the lower Court the plaintiffs themselves had been appointed receivers and had taken possession of the land. But we are also told that at a subsequent date defendant 4 has taken back possession of these lands. There will accordingly be a decree for possession in plaintiffs' favour. The appellants will be entitled to a decree for mesne profits against defendant 4 at Rs. 75 per annum from 1st July 1936 till date of delivery of possession. As regards the costs of the appeal, we think that in the peculiar circumstances of the case the parties will bear their respective costs. The memorandum of objections filed by respondents 2 and 3 in Appeal No. 119 of 1933 necessarily fails and is dismissed.

---

[2] Jenkins v. Morris, (1880) 14 Ch.D 674=42 L T 817.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 77

WADSWORTH J.

Palanisami Goundar — Appellant.

v.

Kaliappa Goundar — Respondent.

Appeals Nos. 404 and 405 of 1936, Decided on 14th August 1939, against orders of Sub-Judge, Coimbatore, D/- 5th June 1936.

(a) Civil P. C. (1908), S. 95 — Cancellation of attachment prayed for and orders thereon withheld pending adjudication on application for compensation—Applicant under S. 95 cannot be non-suited for want of final order on connected application.

The requirements of an application under S. 95 should be based on the language of the Section and not on rules obtaining in Common law with reference to a similar but no identical Common law remedy. The remedy given by S. 95 should not be hedged round with restrictions which the Section itself does not import. In any case, when the cancellation of the attachment has been prayed for and orders thereon have been withheld pending an adjudication on the application for compensation, it is unfair to non-suit the applicant under S. 95 for want of a final order on the connected application. In such case the setting aside of the order of attachment is not an essential preliminary to the grant of compensation : *A I R 1934 Mad 638, Not foll. ; 1931 M W N 956, Rel. on.* [P 78 C 1]

(b) Civil P. C. (1908), S. 95—To justify order under S. 95 it is not necessary to prove special damage.

There is nothing in the language of Sec. 95 to justify the inference that special damage need be proved in application under S. 95 for damages for wrongful attachment. The words "expense or injury" in S. 95 indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours with difficulty to assess in terms of money, is contemplated by the Section : *Case law referred.* [P 79 C 1]

(c) Civil P. C. (1908), S. 95 — Facts to be proved stated.

It is incumbent upon the defendant, if he wishes to get compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. [P 80 C 1]

S. T. Srinivasagopalachari — *for Appellant.*

N. Somasundaram — *for Respondent.*

Judgment. — C. M. A. No. 404 is an appeal against an order making absolute an attachment before judgment. C. M. A. No. 405 is an appeal against the dismissal of an application under S. 95, Civil P. C., for compensation for wrongful attachment. The trial Court heard together both the application to vacate the ad interim attachment and the application for compensation. In such circumstances it seems hardly fair to apply as against the appellant the rule embodied in 67 M L J 448[1] according to which an application for compensation for wrongful attachment would not lie until the attachment itself has been set aside. The trial Court had before it an application to set aside the attachment and abstained from passing orders on it, until the hearing of the application for compensation was finished. Similarly, in this Court, I have before me both an appeal against the order confirming the attachment and an appeal against the dismissal of the application for compensation. Incidentally, I may observe with reference to the case just quoted that there is another decision of this Court reported in 1931 M W N 956[2] which takes the contrary view and holds that the passing of an absolute order of attachment is no bar to an application under S. 95 and with all respect to the learned Judge who decided the former case, it does seem to me that the requirements of an application under S. 95 should be based on the language of the Section and not on rules obtaining in Common law with reference to a similar but no identical Common law remedy.

---

[1] Rama Mudali v. Marappa Goundan, (1934) 21 A I R Mad 638=151 I C 994=67 M L J 448.

[2] Palaniandi Moopan v. Pachi Palaniandi Mooppan, (1931) M W N 956.

The decision in 67 M L J 448[1] is based on (1878) 7 Ch D 866,[3] which was a case in which damages for the wrongful issue of a writ of *ne exeat* were refused on the ground that the writ had not been set aside. But it seems to me that no such preliminary step has been prescribed in S. 95 which alone governs the procedure in a summary application for compensation for wrongful attachment. I doubt whether one would be justified in hedging this remedy round with restrictions which the Section itself does not import. In any case, as I have already indicated, when the cancellation of the attachment has been prayed for and orders thereon have been withheld pending an adjudication on the application for compensation, it seems to me unfair to non-suit the applicant under S. 95 for want of a final order on the connected application. I assume therefore that the setting aside of the order of attachment is not an essential preliminary to the grant of compensation.

A further question arises whether it is necessary to prove what is commonly known as special damage in order to justify such an order. S. 95 itself uses the words "reasonable compensation to the defendant for the expense or injury caused to him" and it is argued that the addition of the word "injury" to the word "expense" is an indication that the Code contemplates not only what is usually called special damage but also what is usually called general damage. There appears to be some confusion imported into this question by the language of the Bench which decided 35 Mad 598[4] where the learned Judges, while holding that it is not necessary in an action for damages for wrongful attachment to prove pecuniary loss or specific damage to reputation, do seem to treat the general injury caused by unspecific loss of reputation as if it fell within the definition of special damage. I take it that special damage as distinct from general damage means the particular damage which results from the particular circumstances of the case; or when special damage is the gist of the action, it denotes the actual and temporal loss which has in fact occurred. Thus, it would not cover compensation for mental anxiety or for general loss of repute but it would cover the medical expense resulting from an actual injury or the loss of a particular contract owing to damage to reputation. The prevailing view in Madras at any rate appears to be that in a suit for damages for illegal attachment it is not necessary to prove more than general damage, e. g. mental pain, general loss of reputation, etc. For this, authority is found in 45 Mad 527[5] which is later than the apparently conflicting judgments in 35 Mad 598[4] and 39 Mad 952.[6] The Calcutta High Court seems to have taken a different view. I have not been referred to any Madras case regarding the nature of damage to be proved in an application for compensation for wrongful attachment under S. 95, Civil P. C. There are decisions, 3 M L W 30[7] and 24 M L W 252,[8] to the effect that there is no necessity to prove special damage when the application is one for compensation for wrongful arrest. That, of course, is not quite the same thing as an application for damages for wrongful attachment, for, it has always been held that a wrongful arrest from its very nature causes damage and it would therefore be unnecessary on general principles to require proof of particular damage when once it is established that the liberty of the person had been restrained.

In a Calcutta case, 39 C W N 915,[9] it was held that mere allegations of general damage to prestige and general humiliation were not sufficient to support an application under Sec. 95 in the case of an attachment. But one must approach this decision with some caution in view of the difference of attitude taken by this High Court towards suit for damages for malicious attachment from that taken by the Calcutta High Court. If once it is granted that special damage need not be proved in a suit for damages for wrongful attachment, I see nothing in the language of S. 95 to justify the inference that special damage need be proved in application under S. 95 for a similar relief. The remedy being statutory one is entitled to look to the words of the Section itself in order to ascertain whether it is necessary to prove special or particular damage flowing from the attachment. It seems to me that the words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours with difficulty to assess in terms of money, is contemplated by the Section.

---

[3] Lees v. Patterson, (1878) 7 Ch D 866.

[4] Nanjappa Chettiar v. Ganapathi Goundan, (1912) 35 Mad 598 = 12 I C 507 = 21 M L J 1052.

[5] Nicholas v. Sivarama Iyer, (1922) 9 A I R Mad 206 = 66 I C 760 = 45 Mad 527.

[6] Rama Iyer v. Govinda Pillai, (1917) 4 A I R Mad 145 = 32 I C 448 = 39 Mad 952 = 30 M L J 180.

[7] Subraya Devay v. Venkatarama Iyer, (1917) 4 A I R Mad 885=32 I C 592=3 M L W 30.

[8] Arumugam Pillai v. Kadir Mohideen Rowther, (1926) 13 A I R Mad 962 = 97 I C 684 = 24 M L W 252.

[9] Chandulal Siroji v. Purna Chandra Pal, (1935) 164 I C 73=39 C W N 915.

Having decided, therefore, that the present application is not bad for want of a previous cancellation of the order of attachment and that it need not fail for want of any averment of special damage, it remains to consider whether the claim of the appellant is entitled to succeed on the merits. It is necessary for this purpose to summarize the facts very briefly. The suit out of which the attachment arose was based on a mortgage bond given as security for a chit transaction in which the present appellant (defendant 2) was a partner with his cousin defendant 1. They had a joint ticket and, having drawn the chit amount, gave their lands under joint mortgage as security for payment of future instalments. The respondent here sued as assignee of this joint mortgage bond and he filed an application for attachment five days after he had filed his suit. The application was supported by an affidavit, the chief infirmities of which are due to the fact that it clubs together defendants 1 and 2 making joint allegations against them, which allegations, though generally true as regards defendant 1, are to some extent demonstrably inaccurate as regards defendant 2, the appellant here. The affidavit alleges that the hypotheca is worth only Rs. 2000 though the respondent had recently taken an assignment of it for Rs. 7000. It alleges that all the defendants are attempting to bring about alienations with a view to defeat the claim in the suit. No pariculars are given in support of this allegation. It also alleges that after allowing for the value of the hypotheca there will be a balance of Rs. 7450 payable and that as the defendants will alienate their properties it is necessary that the properties should be attached. Further, it gives particulars of a recent sale of properties by defendant 1 and of an attachment under a decree obtained against defendant 2. Then follows the allegation that the defendants have a mortgage debt of Rs. 15,000, and a simple debt of about Rs. 18,000 whereas their properties are worth only Rs. 30,000 and there is an allegation that the property of which attachment is asked has been jointly mortgaged with other properties for more than its value.

Now, the appellant (defendant 2) has been able to show that there is no mortgage over his property other than the suit mortgage and that his debts amount only to Rs. 4500. To this extent therefore, the affidavit in support of this petition, though perhaps not deliberately false, is certainly misleading and there is something objectionable in the procedure of clubbing together in one application the prayer to attach the properties of two separate individuals, even though they were jointly concerned in the transaction which gave rise to the suit and were close relatives. At the same time the respondent (plaintiff) has been able to show that defendant 2's property had once previously been attached before judgment though the attachment was released on his application. He has also been able to show that there is a pending title suit which threatens his interests in the hypotheca of the suit mortgage and other properties. He has not been able to show that there is any actual incumbrance on the appellant's property and there is no disproof of the appellant's assertions that he owns properties which should be ample to cover the claim in the plaint. On the question of the actual intention to alienate properties, the plaintiff in his evidence stated that he was told by one Sellappa Goundan of Alagirichettipalayam that the appellant was proposing to alienate his property to his father-in-law and some significance was attached to this assertion in view of the fact that shortly before the suit defendant 1, the cousin of the appellant, has actually alienated some of his properties to the appellant's father-in-law. This assertion regarding the information received from this Sellappa Goundan was not supported by any other evidence, but it was not rebutted by any evidence on behalf of the appellant.

The learned Subordinate Judge who heard the evidence accepted the statement as true and on the materials before me it would not be proper to reject this conclusion. We must take it, then, as established that though the averments in the plaintiff's affidavit regarding the debts and incumbrances on the appellant's property were inaccurate and misleading, he had information that the appellant had once previously been subjected to an attachment before judgment, though that attachment was set aside, that whatever be the extent of his properties a considerable portion of them was threatened by a pending suit, that the appellant's cousin and partner in the chit transaction had made recent alienations to the appellant's father-in-law and in addition to these facts, that the plaintiff was credibly informed that the appellant was planning a similar alienation with a view to defeat the suit claim. Now it is incumbent upon the appellant, if he wishes to get compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. He must show that the plaintiff was unjustified in suggesting to the Court that defendant 2 was about to defeat the object of the suit by making alienations. On the facts established I am of opinion that the appellant failed to make out the case which it was necessary for him to establish and that the plaintiff (respondent) did succeed in establishing that his application was not made on insufficient grounds. It is true that the affidavit supporting the application was disfigured by inaccuracies and by a vagueness resulting from combining together the financial condition of two separate defendants. At the same time I am not convinced that the respondent had no grounds for making the application and I therefore dismiss both the appeals with costs in C. M. A. No. 405 of 1936.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1940 Madras 80

WADSWORTH J.

Mammili Kunhi Raman Kitavu, Karnavan and Manager of Thavazhi — Appellant.

v.

Vengileri Thanancheri Kunhi Karnavan Kitavu — Respondent.

Appeal No. 114 of 1937, Decided on 17th August 1939, against remand order of Dist. Court, North Malabar, D/- 25th July 1936.

Malabar Law—Family property—New acquisition by manager—Presumption.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property. The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family : *A I R 1938 Mad 841, Rel. on.*

[P 80 C 2]

K. Kuttikrishna Menon — *for Appellant.*

Facts.—The suit is to recover possession of two items of property from the defendant held by him under registered marupat, Ex. A, dated 17th January 1919 executed by him in favour of one *R*, the then karnavan of the plaintiff's tavazhi, on the ground that they belong to the tavazhi and was demised under Ex. A to the defendant. The defendant set up a gift in his favour by the previous karnavan, Ex. B of 1922. The trial Court decreed the suit. In appeal, the lower Appellate Court held on the evidence that item 2 was tavazhi property and decreed possession. As regards item (1), the evidence was that it was purchased by *R* in his name, and there was no evidence that when *R* purchased the property there was sufficient income from the tavazhi out of which he could have made the purchase. The only evidence contra was that *R* clubbed this item with the tavazhi property in the transaction Ex. A. On this evidence the lower Appellate Court held that item (1) was the private property of *R* and the gift in favour of the defendant was valid, and that the plaintiff could not recover it and remanded the suit to the trial Court for disposal. Against this decision the plaintiff preferred this appeal.

Judgment.—In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property : 48 M L W 628.[1] The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family. On both these points the evidence is lacking. The appeal has therefore to be dismissed.

C.R.K./D.S. *Appeal dismissed.*

---

[1] Vythinatha Ayyar v. Varadaraja Ayyar, (1938) 25 A I R Mad 841=179 I C 344=I L R (1938) Mad 696=(1938) 1 M L J 216=48 M L W 628.

* A. I. R. 1940 Madras 81

PATANJALI SASTRI J.

Sri Veerabhadraswami at Samayanallur through Subramania Ayyar and another — Appellants.

v.

Maya Kone and others — Respondents.

Second Appeal No. 526 of 1936, Decided on 17th August 1939, against decree of Sub-Judge, Madura, in A. S. No. 74 of 1935.

(a) Civil P. C. (1908), S. 92—Suit by certain persons on behalf of villagers for declaration that alienations of temple property by pujaries thereof are void and not binding on temple is maintainable apart from S. 92.

A suit by certain persons on behalf of all the villagers for a declaration that the suit property belongs to the temple in that village; that certain alienations thereof by the pujaries are void and not binding on the institution is maintainable apart from the provisions of S. 92. Even if such suit is but an indirect attempt by the alienating pujaries themselves to get round their own alienation, it is not open to the Court to take into consideration the motives by which the plaintiffs are actuated in bringing the suit. Moreover the existence of a more effective remedy can obviously be no answer to this suit and cannot therefore justify its dismissal : *A I R 1917 Mad 112 and AIR 1928 P C 16, Rel. on.* [P 81 C 2]

*** (b) Limitation Act (1908), Art. 134-A — Representative suit on behalf of general body of worshippers of village— Word "plaintiff" in such case refers only to plaintiffs en nomine on record.**

The word "plaintiff" in col. 3 of Art. 134-A must, in the case of a representative suit brought on behalf of the general body of worshippers in a village, be understood to refer only to the plaintiff en nomine on record, and not to every individual member of the community. [P 82 C 2]

T. S. Vaithyanatha Iyer — *for Appellants.*

G. S. Venkatarama Iyer — *for Respondents.*

Judgment.—The appellants brought the suit out of which this appeal arises on behalf of all the villagers of Samayanallur for a declaration that the suit property is Devadayam Inam land belonging to the temple of Veerabhadra Swami in that village, that certain othis thereof by the pujaries, defendants 3 to 10, in favour of defendant 2, another pujari, and a sub-mortgage by the latter in favour of defendant 1 are void and not binding on the institution, for a permanent injunction restraining defendant 1 from executing the decree obtained by him on foot of the sub-mortgage and bringing the suit property to sale and for other incidental reliefs. The suit was decreed by the trial Court, but on appeal, though the learned Subordinate Judge found that the suit property belonged to the temple in question and that therefore the pujaries, defendants 3 to 10, had no right to alienate the property as if it was their own private property, he held that the suit as framed was not maintainable and dismissed it. Hence the second appeal.

The learned counsel for the appellants contends that this view of the learned Subordinate Judge is erroneous. It is unnecessary to refer to the several cases cited by him in support of his contention, as the decision of the Full Bench in 40 Mad 212,[1] clearly shows that a suit like the present can be maintained against an alienee of temple property from the trustees or managers thereof apart from the provisions of Sec. 92, Civil P. C.: *cf. also* 55 Cal 519.[2] These decisions were apparently not brought to the notice of the learned Subordinate Judge and it is by no means clear on what legal grounds he held that the suit is not maintainable. In more than one place in his judgment, he seems to think that the present suit is but an indirect attempt by the alienating pujaries themselves to get round their own alienation. But even if this suspicion—for, it is no more—is well founded, it is not open to the Court to take into consideration the motives by which the plaintiffs are actuated in bringing the suit. In another place the learned Subordinate Judge seems to suggest that a suit for the removal of the pujaries under S. 92, Civil P. C., would be a more effective remedy if the plaintiffs were really anxious to protect and safeguard the interests of the temple. This, again, is entirely beside the point as the existence of a more effective remedy can obviously be no answer to this suit and cannot therefore justify its dismissal. The learned Judge also appears to have thought that a prayer for possession was necessary. It is however difficult to see how the appellants could have asked for possession of the properties in this suit in the circumstances of the case. The suit temple is clearly one of those numerous small village temples where the pujaries or archakas are also the managers of the temple and its properties with the tacit consent of the villagers, and unless defendants 2 to 10 are removed from the management and fresh managers are appointed in appropriate proceedings in Court or otherwise, there would be no means of recovering possession of the properties from defendant 2 who is now in possession and is himself a pujari. On the other hand, the immediate injury to the temple which this suit is brought to avert is the impending Court sale of the temple properties in execution of the mortgage decree obtained by defendant 1 and there is no reason why relief by way of injunction with the appropriate declarations should not be awarded if the circumstances otherwise warrant such award.

---

[1] Venkataramana Ayyangar v. Kasturi Ranga Ayyangar, (1917) 4 A I R Mad 112=38 I C 73 =40 Mad 212=31 M L J 777 (F B).

[2] Abdur Rahim v. Abu Muhamed Barkat Ali, (1928) 15 A I R P C 16= 108 I C 361=55 I A 96=55 Cal 519 (P C).

The learned counsel for the respondents attempted to support the decree of the Court below on another ground also, namely that the suit is barred by limitation. An issue was raised in this point, being issue 3 in the case, but the learned Subordinate Judge did not deal with it as being unnecessary. The trial Court disposed of it merely with the remark that it was not shown by the contesting defendant how the suit was barred by limitation. The learned counsel for the respondent now relies upon Art. 134-A, Limitation Act, which provides for a period of 12 years for a suit to set aside an alienation of property comprised in a Hindu charitable endowment. The allegations in favour of defendant 2 by defendants 3 to 10 were of years 1911 and 1914 and the alienation by defendant 2 was in 1915, and the suit having been brought only in 1933 the learned counsel for the respondents contends that it is out of time. According to this Article, the starting point of limitation is "when the transfer becomes known to the plaintiff." The respondents' counsel points to a sentence in para. 12 of the learned Subordinate Judge's judgment where he says:

> There can therefore be no doubt that the pujaries have been creating othies all along to the knowledge of the mahajanams;

and contends that, according to this finding, the villagers who must be regarded as the plaintiffs in this case have had knowledge of these alienations all along and that therefore the period of 12 years must be taken to have expired before the suit was brought. Though the passage referred to above in the learned Subordinate Judge's judgment is quite general, it cannot be supposed that he intended to find that every individual "mahajan" in the village actually knew of these allegations, and it is conceded by the respondents' counsel that there is no evidence on record to show that the two plaintiffs who brought the suit on behalf of all the villagers had knowledge of these alienations for more than 12 years before the suit. In my view the word "plaintiff" in col. 3 of Art. 134-A must, in the case of a representative suit like the present, brought on behalf of the general body of worshippers in a village, be understood to refer only to the plaintiffs en nomine on record. Otherwise, the Article would become unworkable; for, if "plaintiff" be taken to mean every individual member of the community which is the only alternative view possible, it would be practically impossible to prove knowledge on the part of such a large number of persons. Nor would that view assist the respondents in this case; for, it is admitted, as already stated, that at least two of the mahajans, i. e., the appellant herein, are not proved to have had knowledge of these alienations before 12 years prior to the suit. I am therefore of opinion that there is no bar of limitation under that Article.

The respondents' learned counsel has not challenged the finding of the Court below that the lands in suit are Devadayam Inam lands and that the alienations are invalid and not binding on the temple. A contention to the contrary would clearly be unsustainable. The appeal therefore succeeds and the decree of the learned Subordinate Judge is set aside and that of the District Munsif restored. The appellants will have their own costs here and in the Court below. Leave refused.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 82

BURN AND STODART JJ.

Rukmani Ammal — Appellant.

v.

Subramania Sastrigal and another — Respondents.

Appeal No. 6 of 1938, Decided on 31st August 1939, against order of Sub-Judge, Trichinopoly, D/- 16th December 1937.

(a) Civil P. C. (1908), O. 41, R. 6 (2)— Appeal against decree for sale pending — Sale shall, on application by judgment-debtor, be stayed—Court failing to stay and proceeding to sell—This amounts to illegality.

Sub-rule 2 of R. 6 of O. 41 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms, as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. There is no limit to the discretion of the Court in imposing terms and the Court is not without power to deal with a vexatious judgment-debtor if the Court is obliged to stay a sale when such an application is made. If the Court does not stay but proceeds to sell, the Court commits what is more than an irregularity. It amounts clearly to an illegality. [P 83 C 2; P 84 C 1]

(b) Civil P. C. (1908), O. 21, R. 66 (2) (e) — Misdescriptions of items of land to be sold are irregularities likely to affect prices realized.

The duty of drawing up the proclamation is the duty of the Court. Therefore it is no answer to the objections regarding misdescription of items of land to say that the decree-holder is free from blame or has acted bona fide. These misdescriptions are clearly irregularities which would be very likely to affect the prices realized. They come within O. 21, R. 66 (2) (e) being matters which the Court should bring to the notice of possible purchasers in order to enable them to judge the probable value of the property. [P 85 C 1]

B. Sitarama Rao, R. Gopalaswami Ayyangar and G. Thyagaraja Sastri — *for Appellant.*

T. M. Krishnaswami Iyer and A. Balasubramania Ayyar — *for Respondents.*

Burn J. — This appeal is from an order of the learned Subordinate Judge of Trichinopoly in E. A. No. 8 of 1935 dismissing the appellant's application under O. 21, R. 90 and S. 47, Civil P. C., to set aside a sale held in execution of the decree in O. S. No. 6 of 1927. The final decree in the suit was passed on 23rd February 1933 and the sale was held on 28th November 1934. Several irregularities were alleged on behalf of the judgment-debtor. The learned Subordinate Judge held that no irregularities had been made out and also held that the lands had been sold for reasonable prices and that therefore no substantial loss had been caused. He therefore dismissed the petition.

In appeal Mr. Sitarama Rao for the appellant has pressed before us strongly the contention that the sale was illegal. The sale was fixed for 21st November 1934. On 21st November 1934 the judgment-debtor put in an application under O. 41, R. 6, sub-r. (2) praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The learned Subordinate Judge dismissed this petition on 28th November 1934 and the sale was held on the same day. Mr. Sitarama Rao referring to the wording of O. 41, R. 6, sub-r. (2) contends that the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit. We think that this contention is well founded. Mr. Krishnaswami Iyer for the respondent has referred us to a decision reported in A I R 1932 All 551.[1] In that case Kendall J. expressed the opinion that sub-rule 2 of R. 6 does not impose on the Court which ordered the sale an obligation to stay the same merely because the property which is to be sold is immovable property. With all respect to the learned Judge, we are unable to agree. Sub-r. 2 of R. 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor, to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. We can see no justification for supposing that this rule means anything else than what it says.

Mr. Krishnaswami Iyer points out the danger that the judgment-debtor will be in a position to paralyze the executing Court, that he will be able to lie by until the last moment, then come up just when the sale is going to take place and get it stopped. We think there is sufficient answer to this in the provision that the Court may impose such terms as to giving security or otherwise as it thinks fit. If the Court thinks that the application has been designedly delayed, the Court can deal with it by precribing conditions. If the judgment-debtor appears only on the morning to which the sale is posted, the Court has a discretion to say, for example, that the sale will be stayed if the judgment-debtor produces the amount for which the sale is going to be held within half an hour or one hour. There is no limit to the discretion of the Court in imposing terms and that the Court is not without power to deal with a vexatious judgment-debtor in this way if the Court is obliged to stay a sale when such an application is made is quite clear from the terms of O. 41, R. 6, sub-rule (2). The learned Judge was therefore wrong when on 28th November 1934 he thought he had discretion to stay or refuse to stay the sale. When the Code says the executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed in our opinion, what is more than an irregularity. It amounts clearly to an illegality. The learned Subordinate Judge ought to have imposed whatever terms he thought fit and if those terms were not complied with he could then have directed the sale to proceed. On this ground alone we think that this appeal must succeed.

---

[1] Harnarain Sahi v. Sadhu Govind Rai, (1932) 19 A I R All 551=138 I C 847=54 All 874 = 1932 A L J 603.

Moreover, we are of opinion that the learned Subordinate Judge acted unreasonably in declining any postponement of the sale. It was shown that the judgment-debtor had been appealing against earlier orders passed by the executing Court and had been applying to this Court to stay the sale and that her last application for stay had been dismissed on 20th November 1934. In those circumstances it appears to us that the learned Subordinate Judge ought to have realized that there was no chance of selling this property to the best advantage since there must have been considerable uncertainty as to whether the sale would or would not be held at all. It would have been quite easy for the learned Subordinate Judge to prescribe conditions which would have been satisfactory to the decree-holder. It was shown that after the decree was passed, the decree-holder realized Rs. 14,000 towards the amount of the decree by consenting to sales by the judgment-debtor to third parties. The learned Subordinate Judge might for example have prescribed that the judgment-debtor should pay, say, Rs. 20,000 within a month and there seems to be no reason to believe that the judgment-debtor would not have been able to comply with some such condition as that. The learned Subordinate Judge was not we think, justified in holding that the application to stay the sale was devoid of bona fides and was designed merely to cause delay.

Another irregularity which undoubtedly occurred in the proclamation of the sale was that the proclamation for the sale of lands in Athikudi was affixed to survey No. 131/1, which was not an item of land proposed to be sold. In the circumstances of this case we do not consider that it was a material irregularity since there was another sub-division of the same survey number that was intended to be sold, and we do not think that any intending bidder could have been misled by the mere affixing of the proclamation to a pole planted in survey No. 131/1. A more serious objection that Mr. Sitarama Rao has pressed before us is that the lower Court failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The extent sold was 67 acres in the village of Peruvalanallur (53.12 acres of nanja and 13.93 acres of punja) and 29 acres in Athikudi (21.95 acres of nanja and 7.26 acres of punja). The whole of the land in Peruvalanallur was sold as one lot and realized Rs. 60,000. The whole of the land in Athikudi was sold in another lot and realized Rs. 30,600. The judgment-debtor was contending from the beginning of the execution proceedings that the sale ought to be in small parcels and it appears that in April 1934 the learned Subordinate Judge directed the decree-holder to put in an estimate of the value of each item of the lands to be sold "in case the properties have to be sold in various lots." But when the proclamation came on to be settled in September 1934 the learned Subordinate Judge has recorded that the only point for determination was whether the prices given by the decree-holder should be accepted. This of course was incorrect because he had also to determine the other point which was still pressed by defendant 1 that the properties ought to be sold in small parcels. We think this is a matter of importance because it is obvious that there are not many persons likely to bid for 67 acres of land at a time or for 29 acres. There must be a much larger number of persons who are in a position to bid for parcels consisting of 1, 2, 3, 4 or 5 acres.

Mr. Krishnaswami Iyer for the respondent has endeavoured to persuade us that the learned Subordinate Judge had considered this point but we think it is quite clear from the terms of the order on 18th September 1934 that he did not consider it at all. If he had considered it, it would be difficult to say that the sale in two lots instead of a large number of lots by itself constituted an irregularity. But we think there is good reason to believe that the sale in two lots has caused the prices realized to be less, considerably less, than they otherwise would have been. It is no doubt the case that the value of land was declining between 1929 and 1934. But we do not see reason to believe that it declined by so much as 50 per cent. There was very good evidence to show that nanja lands of similar situation and quality to those sold fetched over Rs. 2000 per acre in 1929. There was some evidence about the sales of nanja lands both in Peruvalanallur and Athikudi even up to 1933 in which prices of nearly Rs. 2000 per acre were realized. The prices actually fetched at the sale are approximately Rs. 1000 per acre. It seems probable that if sold in small lots better prices could have been obtained.

Another objection taken by Mr. Sitarama Rao for the appellant was with regard to the misdescription of certain items of dry lands. For example survey No. 140/1 in Athikudi was described as punja but as a matter of fact it consisted of a tope containing a large number of mango and cocoanut trees. Survey No. 249/21 was a similar tope. It was alleged that both these topes were close to house sites and could have been sold as building sites for a great deal more than their value as mere dry lands. Survey No. 22/3 it was shown contained a large number of clusters of bamboos. The attention of the executing Court was invited to these matters in April 1934 and in September when the terms of the proclamation were being drawn up the judgment-debtor reiterated the contentions raised by her in April. It has often been pointed out that the duty of drawing up the proclamation is the duty of the Court. Therefore it is no answer to these objections to say that the decree-holder is free from blame or has acted bona fide. These misdescriptions are clearly irregularities which would be very likely to affect the prices realized. They come within O. 21, R. 66 (2) (e) being matters which the Court should bring to the notice of possible purchasers in order to enable them to judge the probable value of the property.

For these reasons we think this appeal must be allowed and the sale must be set aside. The appellant will recover her costs from the respondent. In reselling the property we desire to invite the attention of the executing Court, in particular to O. 21, R. 64 from which it is clear that no more of the judgment-debtor's property ought to be sold than is sufficient to realize the amount due under the decree. This has a bearing upon the desirability of selling the property in small parcels, a subject we have already dealt with.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 85

KUNHI RAMAN J.

Kanujnakkal Thayikkandiyil Moossan Kunhi Kalandan — Petitioner.

v.

Kaniyarakkal Thayikkandiyil Kunhi Kattyali and others — Respondents.

Civil Revn. Petn. No. 1355 of 1936, D/- 3rd August 1939, to revise decree of Dist. Court of Munsif, Cannanore, in S. C. S. No. 25 of 1936.

(a) Promissory Note — Liability of endorser arises only on date of endorsement.

The liability of the endorser of a promissory note arises only on the date of endorsement. Hence, a suit within period of limitation from the date of endorsement is not barred by limitation as against the endorser: *A I R 1925 Mad 132, Rel. on.* [P 86 C 1]

(b) Negotiable Instruments Act (1881), S. 98 —Payee of promissory note endorsing it after it became barred and with fabricated endorsement of payment — It is not necessary to give notice of dishonour to him.

Where the payee has endorsed the promissory note to another person after it became barred by limitation and with a fabricated endorsement of payment, there is no necessity to give notice of dishonour to the endorser: *(1875) 10 C P 689 and 112 E R 192, Rel. on.* [P 86 C 1]

O. T. G. Nambiar and C. K. Kerla Varma — *for Petitioner.*

A. Achutha Nambiar and K. Govindan — *for Respondents.*

Order.—Defendant 3 is the petitioner. He was the payee of the suit promissory note and he had endorsed the note to the plaintiff. The suit note was executed by defendants 1 and 2 in favour of defendant 3 on 22nd September 1932. An endorsement of payment of Rs. 5 which appears on the suit promissory note and which bears date 15th September 1935 was relied on for saving limitation as against defendants 1 and 2. The date of endorsement of the suit promissory note by defendant 3 to the plaintiff was 9th December 1935. The learned District Munsif who tried the case has held that the endorsement of payment of Rs. 5 which was relied on for saving limitation was fabricated by defendant 3 and that the suit was barred by limitation as against defendants 1 and 2. Regarding defendant 3 the trial Court has held that he is liable because he has admittedly endorsed the promissory note to the plaintiff and it was not shown at the trial how he could escape liability. The learned advocate for defendant 3 petitioner puts forward the following contentions: (1) that the trial Court should have held that the suit was barred by limitation against defendant 3 also, because it is Art. 73, Limitation Act, that applies to the case, and (2) that the suit against defendant 3 should have been dismissed, because there was no evidence of notice of dishonour.

In my view both these contentions are not well founded. As pointed out in the decision reported in 47 M L J 475[1] the liability of the endorser of a promissory note arises only on the date of endorsement. In the present case the date of endorsement was clearly a few months prior to the date of the institution of the suit. Therefore the suit as against defendant 3 was not barred by limitation. Regarding the contention that defendant 3 was entitled to notice of dishonour, as argued by the learned advocate for the plaintiff-respondent, in view of the fraud practised by the payee in endorsing the promissory note to the plaintiff after it became barred by limitation and with a fabricated endorsement of payment of Rs. 5, there was no necessity to give notice of dishonour to defendant 3. (*See* S. 98, Negotiable Instruments Act and (1875) 10 C P 689[2] and 112 E R 192.[3]) In these circumstances I hold that the view taken by the trial Court is correct and dismiss this Civil Revision Petition with costs of the plaintiff-respondent.

C.R.K./D.S. *Petition dismissed.*

---

[1] Jagannadhá Reddiar v. Lakshmana Reddiar, (1925) 12 A I R Mad 132=80 I C 932=47 M L J 475.

[2] Wirth v. Austin, (1875) 10 C P 689=32 L T 669.

[3] Terry v. Parker, 112 E R 192.

A. I. R. 1940 Madras 86

VENKATARAMANA RAO J.

Sree Rajah Mallapudi Venkatarayudu Garu — Appellant.

v.

Thathiraju Venkataramana Rao and another — Respondents.

Second Appeals Nos. 960 to 1002 of 1936, Decided on 26th September 1938, against decrees of Sub-Judge, Ellore, in A. S. Nos. 174 to 216 of 1935.

Easement—Artificial stream of water caused by owner of land on higher level flowing from his land to that lying on lower level—Water so flowing not confined in channel belonging to owner of upper land — Owner of lower land can appropriate such water to his own use — Upper owner cannot claim compensation for it.

Though according to the lie of the land a person owning lands in a lower level is bound to receive water coming in its natural course from a higher level, the same cannot be said with reference to water in an artificial stream flowing on the land of the party by whom it was caused. If the stream is made to flow upon the land of another without his consent, it is a wrong, though the discharge of such water for a considerable number of years may create a right in favour of the upper owner by subjecting the land of the lower owner to the servitude of being bound to receive the water. But the upper owner cannot claim the water so discharged as his unless it is confined in a channel belonging to him because if it is so confined, the rights of persons owning land adjacent thereto would depend upon several considerations, i. e. whether they have acquired any right by contract or grant or by prescription. But if it is not so confined, the owner of the land on which such water falls is entitled to appropriate for his own use and the upper owner cannot claim to take advantage of his own wrong by discharging the water which ordinarily he could not do but for the prescriptive right he had acquired under the law. He cannot claim compensation for use of water from the owner of land on lower level : *(1849) 3 Ex 748, Rel. on.* [P 88 C 2; P 89 C 1]

Ch. Raghava Rao — *for Appellant.*

P. Satyanarayana Rao—*for Respondents.*

Judgment.—This is a batch of 43 second appeals which arise out of suits filed by the plaintiff as the proprietor of Tyajampudi estate for the recovery of compensation for the use of water taken from a channel called Kurukuru Yeti Kalwa by the defendants who are tenants in occupation of lands in the village of Ammepalli Agraharam. The said Agraharam is owned by the deities of Pattisem. The facts necessary for the disposal of these appeals lie in a narrow compass. The villages of Tyajampudi and Kurukuru, which adjoin each other, belong to the plaintiff. The village of Ammepalli adjoins the village of Kurukuru on the east. There is a tank by the name of Ava tank in Tyajampudi and from it there runs a channel which is called Kurukuru Yeti Kalwa. The water is laid down into the channel from the Ava tank by means of sluices. There are two dams erected during the course of the channel in Kurukuru, one at the point marked A and the other at the point marked B in the plan Ex. W-37. The object of erecting these dams is to divert the water for the purpose of irrigation to the lands of Kurukuru which are on a higher level. Up to the point B the control of this channel is with the plaintiff and it is in evidence that he has been effecting repairs to this channel up to that point. From the point B water is let down or excess water flows down in a course straight from the point B until it joins a stream called Barla Vagu within Ammepalli limits. Over the course of the water from the point B or at any rate within the Ammepalli limits, the plaintiff does not purport to exercise any control. The drain water from the fields of Kurukuru irrigated by the Kurukuru Yeti Kalwa also flows into Ammepalli limits. Also excess in the Kurukuru Yeti Kalwa flows into Ammepalli limits and water is also let down at the point B after the needs for the irrigation of the Kurukuru village are satisfied.

The water reaching Ammepalli village in the various ways mentioned above is utilized by the persons in occupation of Ammepalli lands for the purposes of irrigation by means of bodis constructed within the limits of Ammepalli. Ava tank itself is fed by three natural streams and there is always a perpetual supply from these natural streams. There is another natural stream called Barla Vagu which runs almost parallel to Kurukuru Yeti Kalwa more or less forming a boundary on the northern side of the villages of Tyajampudi and Kurukuru and then passes through the village of Ammepalli and empties itself into Yerra Kalwa. Yerra Kalwa is another stream which runs on the southern side of the villages of Tyajampudi and Kurukuru and passes through the village of Ammepalli. The stream Barla Vagu during its course receives excess supply of water from the Ava tank and also drainage from the irrigated fields of Kurukuru. The villages are so situated that the lie of the lands in the various villages slopes towards Ammepalli so that the village of Ammepalli is on a lower level than Kurukuru or at any rate many of its lands are on a lower level than those of Kurukuru at the point where water flows down from Kurukuru village into the limits of Ammepalli village. This is the topographical feature which is prevailing and has been prevailing from time beyond living memory. There is absolutely no evidence as to the origin of the Ava tank or Kurukuru Yeti Kalwa or various bodis in Ammepalli limits.

It is the contention of the plaintiff that the Ava tank and Kurukuru Yeti Kalwa are artificial streams, and therefore water flowing from it into the Ammepalli limits must be deemed to be water belonging to him. The defendants having used it without his permission were bound to compensate him for such user. Even with reference to the land drained by Barla Vagu, his case is that water from Kurukuru Yeti Kalwa gets into it either by drainage from the Kurukuru fields or the excess water from the Kurukuru Yeti Kalwa flowing into it and he is entitled to demand compensation for using the water because during most of the time Barla Vagu will never have water supply and the lands of the defendants must substantially be deemed to be irrigated by the use of the Kurukuru Yeti Kalwa water. The case of the defendants is that Ava tank is a natural depression, that the watercourse which runs from the Ava tank to Barla Vagu is also a natural water course and that the defendants are entitled to appropriate the use of the water which runs into their lands by virtue of their natural right as incidental to the ownership of the soil. They also plead that this system of irrigation is prevailing from time beyond living memory, that no water rate was charged at any time and that they must be deemed to have acquired the right to use the water, free from any liability to compensate the plaintiff, either by prescription or by lost grant. A question was also incidentally raised by the plaintiff with reference to the lands which are irrigated exclusively by the use of Barla Vagu water within Ammepalli limits and also with reference to certain lands which are irrigated by Kurukuru Yeti Kalwa that the defendants in occupation of those lands are bound by certain compromise decrees in prior litigations in and by which the liability to pay water cess to the plaintiff was declared and established. The following facts are concurrently found by both the Courts :

(1) Barla Vagu is a natural water course ; (2) water from Kurukuru Yeti Kalwa reaches Ammepalli village in three ways : (a) the surplus drainage water from the irrigated fields of Kurukuru ; (b) the excess water flowing from the Kurukuru channel from the point B and (c) the water let down at the point B when it is not wanted for the purpose of irrigating Kurukuru fields. It was also admitted by the plaintiff and found by both the Courts that the land slopes from Tyajampudi Ava to Ammepalli side, that the suit lands form the badava or low lying lands and that water must naturally be let down and that Ammepalli ryots cannot prevent the same. It is also found that the defendants do not go into the plaintiff's land to take water and they have never at any time meddled with the course of the water of Kurukuru Yeti Kalwa within Kurukuru limits. It is admitted by the plaintiff's witnesses that all the drainage water from Kurukuru flows into Ammepalli

limits and that if its flow is blocked by the defendants Kurukuru lands will be damaged. The learned District Munsif negatived the claim of the plaintiff so far as the lands irrigated by the use of the water of Barla Vagu are concerned. He gave a decree in respect of the lands irrigated by either the drain water from the irrigated fields of Kurukuru or the channel water from Kurukuru Yeti Kalwa. The learned Subordinate Judge on appeal dismissed the plaintiff's suits holding that the plaintiff is not the owner of the water with which the lands of Ammepalli village are irrigated and that the defendants must be deemed to have acquired a right by lost grant and by prescription. Both the Courts found in regard to the suits where the question was raised as to the liability of the defendants based on a compromise in a prior litigation that the compromise was never acted on, that no tax was collected from the date of the compromise decrees from any of the tenants in pursuance thereof and that no liability could be fastened on the defendants on the strength of such decrees. It is against this decision the above appeals are filed by the plaintiff.

Mr. Raghava Rao on behalf of the plaintiff did not question the correctness of the decision so far as the appeals relate to lands irrigated by the use of the water of Barla Vagu. There are 26 second appeals relating thereto and all of them must be dismissed. But in regard to some of them, Mr. Raghava Rao has contended that by reason of the compromise in prior litigation the respondents will be bound to pay his clients the amount agreed to be paid thereunder. In regard to the lands irrigated by the use of Kurukuru Yeti Kalwa, Mr. Raghava Rao was fair enough to concede that so far as the lands irrigated by the drainage water or excess overflow of the water in the channel are concerned for the recovery of the water tax, the plaintiff would have no cause of action but he urged that in regard to the water let down from Kurukuru Yeti Kalwa, his client is entitled to claim compensation on the ground that the said water must be deemed to be his. His contention is that Tyajampudi Ava must be deemed to be an artificial tank and not a natural depression and that Kurukuru Yeti Kalwa must also be deemed to be an artificial watercourse and therefore the defendants cannot claim as incident to the ownership of the soil any right to the water from the said channel unless they are able to establish a grant or have acquired a right thereto by prescription.

It seems to me that this contention is unsustainable. Assuming Kurukuru Yeti Kalwa is not a natural watercourse, in view of the topographical features of the irrigation system now prevailing, it may be open to argument that having regard to the existence of the stream from time beyond living memory the defendants must be deemed to have acquired the same rights in regard to the water from Kurukuru Yeti Kalwa as they would have had if it were a natural watercourse. But it is unnecessary to rest any decision on this ground or express any opinion thereon. Assuming Kurukuru Yeti Kalwa to be artificial, it is clearly established by the evidence that the plaintiff does not exercise any control over the water in the Kurukuru Yeti Kalwa after it is let down at the point B. Though according to the lie of the land a person owning lands in a lower level is bound to receive water coming in its natural course from a higher level, the same cannot be said with reference to water in an artificial stream flowing on the land of the party by whom it was caused. If the stream is made to flow upon the land of another without his consent, it is a wrong though the discharge of such water for a considerable number of years may create a right in favour of the upper owner by subjecting the land of the lower owner to the servitude of being bound to receive the water.

But the upper owner cannot claim the water so discharged as his, unless it is confined in a channel belonging to him because if it is so confined, the rights of persons owning land adjacent thereto would depend upon several considerations, i. e., whether they have acquired any right by contract or grant or by prescription. But if it is not so confined, the owner of the land on which such water falls is entitled to appropriate for his own use and the upper owner cannot claim to take advantage of his own wrong by discharging the water which ordinarily he could not do but for the prescriptive right he had acquired under the law. So far as the water that is let down from Kurukuru Yeti Kalwa from the point B is concerned, it is in evidence that it is unwanted water, that is water not wanted for the purpose of irrigation and for which the owners of Kurukuru village have no use. The water is thus discharged for the convenience of the Kurukuru village people. It is open to an upper owner to discontinue the letting of water if he can, but it is another thing to claim compensation for the use of water which could no longer be said to be his. The right of the lower owner to the flow of water or to have the water discharged on his land is distinct from his right to appropriate it when it flows or is discharged. If the upper owner has not retained the water under his control by confining it in a channel of his own, the lower owner can take it and use it in any way he likes: *vide* (1849) 3 Ex 748[1] at p. 779. The plaintiff has therefore no cause of action to claim any compensation even in respect of lands irrigated by the use of the water let down at the point B and allowed to flow into Ammepalli limits.

The only question remaining and which was argued with considerable emphasis by Mr. Raghava Rao is that both in respect of the lands irrigated by the use of the water of Barla Vagu and also by the use of the water of Kurukuru Yeti Kalwa there were compromise decrees to which the defendants who own those lands or their predecessors-in-title were parties and at any rate, in regard to those lands, his clients are entitled to a decree. As I have already said, the plaintiff's claim was disallowed by the learned District Munsif even in regard to those lands because the compromise was never acted on. The learned Subordinate Judge has not given a definite finding in regard thereto but instead of remanding the case for such a finding, I have heard counsel on both sides and they have taken me through the evidence. In regard to the claim of the plaintiff based on the compromise, the main defence of the defendants was that not only was the compromise not acted on but that contracts were entered into in ignorance of their legal rights. So far as the water from Barla Vagu is concerned, there could certainly be no doubt that the compromise must have been entered into under a clear misapprehension of the rights of the parties. Barla Vagu is a natural stream and the fact that the drainage water or other water from Kurukuru Yeti Kalwa joins Barla Vagu in its course cannot make Barla Vagu any the less a natural watercourse.

The defendants as owners of land abutting the said water course are entitled to utilize the water therefrom for the purpose of irrigation as a natural right incidental to the ownership of such lands. In regard to both classes of lands, the defendants also pleaded that they were induced to enter into the contract by reason of a representation made to them that water for the second crop would be allowed free but it must be said that this plea was not specifically raised in the written statement. Most of the defendants have gone into the witness-box and they have consistently stated that no demand was ever made in pursuance of the compromise decree of any water-tax in respect of the suit lands. It is not possible to understand why no such demand was made; both parties apparently thought that the rights could not be successfully enforced. But for a period of eight years from 1923 to 1931 neither the plaintiff nor his predecessors-in-title collected nor the defendants paid water-tax. Having regard to the facts and circumstances of this case, it is open to the Court to draw an inference that the rights thereunder were abandoned and the contract was treated as at an end. I think the view taken by the learned District Munsif that the compromise was not acted on appears to be correct. In the result, all the second appeals fail and are dismissed with costs. I fix a consolidated vakils' fee of Rs. 500 to be shared by all the respondents in all the appeals. Leave to appeal refused.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1940 Madras 89

BURN AND STODART JJ.

Narayanan Chetti (Minor) and another — Appellants.

v.

Panchanathan Chettiar and others — Respondents.

Appeal No. 31 of 1938, Decided on 1st September 1939, against order of Dist. Court, West Tanjore, D/- 14th April 1937.

Civil P. C. (1908), O. 21, R. 16 — Decree passed in favour of father devolved on his death on his sons — Sons cannot execute decree without recognition by original Court of devolution on them of decree.

Even where a decree passed in favour of father the sole decree-holder has devolved on his sons by operation of law on the death of their father, the sons cannot say that they are decree-holders who can execute the decree without recognition by the Court which passed the decree, of the devolution upon them of the decree: *A I R 1937 Pat 607, Dissent.* [P 90 C 1]

T. R. Venkatarama Sastry and C. A. Seshagiri Sastry — *for Appellants.*

N. Sivaramakrishna Iyer — *for Respondents.*

---

[1] Wood v. Waud, (1849) 3 Ex 748 = 18 L J Ex 305 = 13 Jur 742.

Judgment. — We cannot accept the contention on behalf of the appellants that they are decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. The appellants are not "decree-holders" as defined in S. 2, Civil P. C. Their father was the sole decree-holder, and although the sons may well have been entitled along with him to the benefits of the decree—a thing which has yet to be investigated—it is impossible to say that they were, or are "decree-holders." The decree has been transferred to them by operation of law on the death of their father and O. 21, R. 16, Civil P. C., is applicable. With respect, we are not able to agree with the learned Judge who decided the case in A I R 1937 Pat 607.[1] The decision of the learned District Judge on this point is in our opinion correct. This appeal is accordingly dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

[1] Akhori Ramsewakprasad v. Saran Singh, (1937) 24 A I R Pat 607 = 172 I C 100.

A. I. R. 1940 Madras 90

KUNHI RAMAN J.

Maddali Tirumala Ananta Venkata Veeraraghavaswami — Petitioner.

v.

Srimat Kilambi Mangamma and another — Respondents.

Civil Revn. Petn. No. 1567 of 1938, Decided on 18th August 1939, to revise decree of District Munsif, Razole, in S. C. S. No. 769 of 1935.

Negotiable Instruments Act (1881), S. 78—Discharge can be given only by payee or holder of promissory note—There is no such thing as benami promissory note for this purpose.

Section 78 should be strictly construed and a valid discharge can be given only by the payee of a promissory note or the holder thereof, there being no such thing for this purpose as a benami promissory note taken in the name of one person but really meant for the benefit of another : *30 Mad 88 (F B) and A I R 1935 Mad 312, Rel. on.* [P 90 C 2]

V. Parthasarathy — *for Petitioner.*

V. Viyanna and J. Lakshmayya — *for Respondents.*

Order. — The plaintiff is the petitioner. He claimed to be the beneficial owner of the amount for which a promissory note was executed by defendant 2 in favour of defendant 1. The trial Court has disbelieved the plaintiff's case against defendant 1. The finding of the trial Court is recorded in these terms :

> I find disbelieving the evidence on behalf of plaintiff that the arrangement set up by plaintiff with reference to the suit pro-note Ex. B is not true, that defendant 1 had nothing to do with it, that she was not a trustee in respect thereof, and that she cannot be in any manner made liable for the amount due on the pro note Ex. B.

This finding, so far as defendant 1 is concerned, cannot be seriously questioned, seeing that it is a finding of fact which is based upon the evidence placed before the trial Court. At the trial the plaintiff wanted a decree against defendant 2 on this promissory note. The trial Court has held, following certain decisions of this High Court, that in view of the provisions of Sec. 78, Negotiable Instruments Act, since the plaintiff was neither the payee nor the holder of the promissory note in question, a decree could not be passed in plaintiff's favour and against the maker of the promissory note. This finding of the trial Court is attacked by the learned advocate for the plaintiff-petitioner. He relies upon the decisions reported in 11 Pat 616,[1] 53 All 5[2] and 55 Cal 551[3] and argues that, although a valid discharge in respect of a promissory note can be given only by the payee or the holder thereof, yet when the maker of the note, the holder of the note and the person who alleges that he is beneficially entitled to the amount of the note are all before Court, there is nothing wrong in the Court deciding the question of benami raised by the parties and passing a decree in favour of the beneficial owner, if it is satisfied that his version is really true. It is not possible for me to accept these contentions in view of the observations contained in Full Bench decision of this High Court reported in 30 Mad 88[4] and the decision reported in A I R 1935 Mad 312.[5] This High Court has consistently taken the view that S. 78, Negotiable Instruments Act, should be strictly construed and that a valid discharge can be given only by the payee of a promissory note or the holder thereof, there being no such thing for this purpose as a benami promissory note taken in the name of one person but really meant for the benefit of another. In these circumstances, especially in view of the frame of the suit, I am not satisfied that the decision of the trial Court is wrong. The Civil Revision Petition is accordingly dismissed with costs, one set.

---

[1] Surajman Prasad v. Sadanand, (1932) 19 A I R Pat 346=140 I C 572=11 Pat 616.

[2] Sewa Ram v. Hoti Lal, (1931) 18 A I R All 108 =130 I C 698=53 All 5=1930 A L J 1509.

[3] Brojo Lal Saha v. Budh Nath Pyari Lal & Co., (1928) 15 A I R Cal 148=105 I C 549=55 Cal 551.

[4] Subba Narayana Vathiyar v. Ramaswami Ayyar, (1907) 30 Mad 88=16 M L J 508 (F B).

[5] Chinna Kuzhandai v. Kuzhandai Veeraswami, (1935) 22 A I R Mad 312 = 159 I C 458 = 68 M L J 713.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 91

BURN AND STODART JJ.

Ramachandra Deo — Appellant.

v.

Kamoju Balajee and others — Respondents.

Second Appeal No. 832 of 1935, Decided on 24th August 1939, against decree of Dist. Court, Ganjam, in A. S. No. 80 of 1934.

Madras Estates Land Act (1 of 1908), S. 45 — Ryot encroaching on unoccupied land adjacent to his holding and in possession of it for more than twelve years without paying rent — This does not debar land-holder from claiming rent on such encroachments as soon as he detects them.

There is nothing in the Act which enables the non-occupancy ryot to prescribe for title to hold the land free of rent. For, in the majority of cases, the zamindaries are not surveyed. There is no demarcation of the holdings of the various ryots on the ground. There is no survey map by reference to which the holding can be located. The recorded area of the land in the landholders' books is not based on exact measurements nor calculated with mathematical precision. It is easy therefore for a ryot to encroach gradually on unoccupied land adjacent to his holding and the encroachment may pass unnoticed for years. It would be a vexatious burden on the landholder if he were debarred from claiming rent on such encroachments as soon as he detected them. The mere fact that the ryots believed that they had the full ownership of the land and enjoyed it as such for over the statutory period is not sufficient to give them a title by prescription against the zamindar, because adverse possession in order to become a basis of title must be brought to the notice of the true owner. Similarly by non-payment of rent for more than twelve years they do not prescribe for the right to enjoy the land for ever without paying rent. [P 94 C 2; P 95 C 1]

T. R. Venkatarama Sastry and T. V. Rajagopalan — *for Appellant.*

B. Jagannadha Das — *for Respondents.*

ORDER

Madhavan Nair and Stodart JJ. — Before disposing of this case, we would ask the lower Appellate Court to submit specific findings on the following two questions: (1) Is the plaint land ryoti land within the plaintiff's zamindari? (2) Is it part of the inam of the defendants? The parties are at liberty to adduce fresh evidence if necessary. The findings will be submitted within two months from this date of this order. The parties are at liberty to file their objections to the findings within ten days after notice of the receipt of the findings shall have been posted on the notice board of the High Court.

(This second appeal again came on for final hearing after the return of the findings before Burn and Stodart JJ., and the Court delivered the following judgment:)

Stodart J. — This second appeal arises out of a suit for rent under Section 77, Estates Land Act, by the Zamindar of Bodo Khenidi. The suit proceeded on the footing that the land for which rent was claimed was S. No. 532 of Godogovindpur, a village in the plaintiff's zamindari. The defendants are: (1) a goldsmith of Godogovindpur; (2) a Brahmin describing himself as an inamdar of the neighbouring village on the west called Pattigovindpur which is outside plaintiff's zamindari; and (3) a Komati of Naupada, a village in the plaintiff's zamindari. Defendant 1 filed a written statement, which was adopted by defendants 2 and 3 claiming that the field was an enfranchised pre-settlement inam land, that defendants 1 and 3 had bought separate portions from the inamdars, and that the land formed part of Pattigovindpur village. It was also claimed that defendants had held the land for long over the statutory period without paying rent to the zamindar. Defendant 1 gave evidence slightly at variance with his written statement. He said that defendant 2 had purchased the portion in his possession by the title deed, Ex. II-C. This therefore was a new case, namely that defendant 2 held the land by purchase not by inheritance. Defendant 1 also said that the suit land was surrounded on all sides by inam lands of Pattigovindpur.

The defendants produced title deeds Ex. II series. Ex. II-C, dated 10th August 1913 is alleged to be the title deed of defendant 2 showing that he purchased a certain plot of land called Podoro tope in Pattigovindpur from Nitakaro Pothu. Both vendor and purchaser are described as inamdars of Pattigovindpur. The field is described by boundaries. The description of the eastern boundary is in direct contradiction of defendant 1's statement that the suit land is surrounded on all sides by inam lands of Pattigovindpur. For the eastern boundary in Ex. II-C is "the jerayati Podoro and inam Podoro of Beno Prohlado." Ex. II-D, dated 21st July 1898, is the title deed of defendant 3. It is a sale of inam dry land in

Pattigovindpur. The vendor describes himself as an inamdar of Pattigovindpur. Here too one of the boundaries contradicts defendant 1. The northern boundary is "the boundary limit of jerayati land of Godogovindpur which is known as Budo Thotta." The title deeds of defendant 3 are Ex. 2 dated 15th March 1923, Ex. 2-b dated 4th September 1925 and Ex. 2-a dated 12th July 1927. In Ex. 2 there are three plots of land conveyed. In Ex. 2-b one and in Ex. 2-a two plots. The eastern boundary of one of the plots in Ex. 2 is described as the jerayati field of Krishna Maharana and others.

No attempt was made in the suit to identify the fields as described in those sale deeds with the field in suit. One thing is certain. From the description of the boundaries in Ex. 2 series, the plots of land therein conveyed are not entirely surrounded by inam lands of Pattigovindpur. Some of them are bounded on one side by fields which are described as jerayati. And the only jerayati land in the neighbourhood is the jerayati of the plaintiff's village of Godogovindpur. We start therefore with two facts : (1) that the defendants' title deeds which they say refer to the suit land have not been proved to comprise the suit land; (2) that the plots of land described in those title deeds are not as stated by defendant 1 surrounded by inam lands of Pattigovindpur. A third fact is established by the evidence led on the side of the plaintiff. It is, that the suit land is jerayati land in Godogovindpur village and entirely surrounded by land of that village.

These being the facts of the case, it is somewhat surprising to find that in the course of the various trials which this comparatively simple suit has undergone, a completely new case was set up on behalf of the defendants, namely that although the suit land might be situated within the zamindari village of Godogovindpur and completely surrounded by lands of that village nevertheless it belonged to the whole inam village of Pattigovindpur and had been sold by the inamdars of Pattigovindpur to defendants. Out of whose imagination this theory was evolved we cannot ascertain. We can only say that there is not a vestige of fact to support it. There is not the slightest evidence in its favour. If in fact there was a piece of the whole inam village of Pattigovindpur situated inside the limits of Godogovindpur that would be a very easy thing to prove. No attempt was made to prove it. And as we have already said the case of the defendants as set out in defendant 1's evidence was quite different, namely that the suit land was entirely surrounded by the inam lands of Pattigovindpur. It may be conjectured that what gave this new and unexpected turn to the case was the discovery by defendants on closer inspection of their title deeds that in respect of some of the fields comprised therein the boundaries included jerayati fields, which ex hypothesi do not exist in the whole inam village of Pattigovindpur.

However that may be, the point on which this second appeal has come before us is one of limitation. When the suit was first tried in 1930 the Sub-Collector found (a) that defendants failed to prove that the suit land was part of Pattigovindpur and (b) that plaintiff proved that the suit land formed part of Godogovindpur, was surrounded on all sides by land belonging to Godogovindpur and was jerayati land. On appeal, the District Judge relying on the fact that the plaintiff had not stated in his plaint that defendants had encroached on the suit lands, held that the burden lay on the plaintiff to prove that (a) the suit land formed part of his zamindari and (b) that the defendants were in occupation as tenants. And he remanded the suit for retrial directing that the plaint be amended and the defendants allowed to plead afresh. The remand was clearly unnecessary. Plaintiff in his original plaint had stated (a) that the defendants were in occupation, (b) that they refused to pay rent on demand. Defendants had countered with the claim that the land did not belong to plaintiff at all and that they had been in possession of it for over the statutory period. On these pleadings the parties went to trial. Defendants did not show that the land did not belong to plaintiff and plaintiff proved that it did. Defendants were left therefore with the plea of long possession.

There was sufficient evidence in the case to decide this. The karnam of the village examined for the plaintiff stated that defendants had been in enjoyment of the suit lands for ten years. On defendants' side defendant 1 who was the only witness originally examined deposed the suit land had been occupied by defendants or their predecessors in title for over 12 years before suit. First defendant's title deeds—assuming that they refer to the suit land—date from 1923 only. The title deeds of defendants 2 and 3 date from 1898 and 1913.

But there is nothing to show that these title deeds relate to the suit land. The fact of possession for more than 12 years without paying rent to the plaintiff was certainly not proved. The fact is that this land once formed part of a large tope within the limits of Godogovindpur village and this was believed to be inam, that is to say held on rent-free tenure, but at a special survey and settlement of the estate which took place shortly before suit it was discovered that the tope was not inam but in reality jerayati land. Hence the new demand for rent from the persons in occupation, including these defendants.

At the retrial no new evidence was led except that of defendant 1's son who said merely that the suit land formed part of Pattigovindpur which has been the case of defendants from the beginning and which is demonstrably false. The Sub-Collector framed new issues of which only the first two are relevant, namely whether the suit lands are enfranchised pre-settlement inam or jerayati and whether the plaintiff is debarred from suing owing to adverse possession by the defendants. The Sub-Collector agreeing with his predecessor held that the land was jerayati land. But on issue 2 he made a most surprising assumption. He declared:

> It is in evidence that the inamdars of Pattigovindpur had enjoyed this land for a considerable portion of time as inam and then sold it as such to the defendants.

But there was no evidence at all to that effect. We have pointed out already what defendant 1 said in this connexion. He said that he bought lands in the village of Pattigovindpur which his predecessors had been enjoying for a long time. And he said that the lands he bought were the suit lands, which is of course absurd, because the suit lands are not in Pattigovindpur. He may have bought lands in Pattigovindpur which is a whole inam village and perhaps he has good title to them. But he never claimed to have bought inam lands inside the village of Godogovindpur. The karnam examined as plaintiff's witness 2 said that he wrote Ex. 2-B (1925) and Ex. 2-A (1927). He did not say that these sale deeds relate to the land in suit and this was not proved otherwise. He said also that the lands in suit were sold by the villagers of Pattigovindpur. He did not say that the latter had enjoyed the suit lands as inam lands. There was thus no ground whatever for the Sub-Collector's assumption that there was evidence that

> the inamdars of Pattigovindpur had enjoyed this land (i. e., the suit land) for a considerable time as inam and then sold it as such to the defendants.

The Sub-Collector was wrong in holding as he apparently did that there was evidence—much less proof—that the sale deeds produced by the defendants related to the suit land. On the contrary the Sub-Collector should have held that on the defendant's own evidence these sale deeds did not refer to the suit lands but to lands in the village of Pattigovindpur. However that may be the Sub-Collector held that the defendants had prescribed for title against the zamindar and dismissed the suit. On appeal by plaintiff the learned District Judge held dismissing the appeal that there was evidence that the suit land had always been treated as part and parcel of the whole inam village of Pattigovindpur and enjoyed as such by the predecessors-in-title of the defendants who conveyed it to the defendants. Here again we find the assumptions that: (a) the suit land is comprised in the sale deeds of the defendants and (b) that the defendants claimed to be owners of land within the limits of Godogovindpur. We cannot read this into the evidence led for the defendants. Again the learned District Judge stated:

> It is admitted that the defendants and their predecessors-in-title have been in possession of the suit land for a long number of years without paying any rent to the plaintiff.

But that is not the case. Plaintiff's witness, the Karnam deposed that defendants had been in possession for ten years without paying rent. The learned District Judge however held that plaintiff's suit was barred and the plaintiff files this second appeal against that decision. The learned District Judge did not express any opinion or record any finding as to the location of the suit land. We have explained that both at the first and the second trial the trial Court held that the suit land was within the limits of Godogovindpur. The learned District Judge held that even if it was within those limits it was impossible to resist the plea of adverse possession set up by the defendants, since for more than 12 years these defendants had asserted proprietary title in themselves adverse to the zamindar. He did not however state on what part of the evidence in the case this finding was based. We have carefully gone through the evidence in the case which is indeed of no great volume and we find not the slightest trace of an assertion of a proprietary title adverse to the zamindar. The plain fact is that this land was once part of a tope which was mistakenly thought to be an inam tope and when the inams in Godogovindpur were examined with a view to detect encroachments it was found that the suit land was not inam land. There is no evidence at all that the persons in possession of the tope set up in themselves a proprietary right in the tope adversely to the zamindar.

As it was not clear from the learned Judge's judgment what his opinion was as to the exact location and character of the suit land we called for a finding on that point. The finding is, as found at both trials of the suit, that the land is the jerayati land of the zamindar in the village of Godogovindpur. On appeal three points are urged on behalf of the respondents. First that the suit land although situated inside the limits of Godogovindpur is nevertheless part of the whole inam village of Pattigovindpur. This as we have said was never pleaded much less proved. We have already said more than once that defendants claimed the suit land as lying within the village of Pattigovindpur. Then it is urged that the learned District Judge was right in his finding that the defendants had held the land adversely to the plaintiff for more than 12 years. We have already stated that there is no evidence at all of this. Lastly it is urged that having been in possession for more than 12 years without paying rent the defendants cannot now be called on to pay rent. And this is the only point of law which arises for decision in this appeal. We are not prepared to hold on the evidence that the defendants or their predecessors were in possession for over 12 years without paying rent, but assuming that they were, we think that that did not prevent the zamindar from levying rent when he came to know of the occupation of the land. Jerayati or ryoti land is land in a zamindari in which the tenant has occupancy rights as defined in the Estates Land Act (1 of 1908). A ryot who has been let into possession by the landholder or whose possession is recognized by the landholder is called an occupancy ryot and has large rights the chief of which is that he cannot be evicted except on the ground that he has rendered his holding substantially unfit for agricultural purposes. See Section 151.

A ryot who has not been let into possession by the landholder or who has not acquired the occupancy right by inheritance or transfer is a non-occupancy ryot. And he too has valuable rights and privileges under the Act. He may make improvements on the land without the landholder's consent. (S. 14.) He is not liable to pay rent for the land in excess of the rent fixed on the land or if no rent is fixed then a fair and equitable rent decided by the Collector (S. 45). And finally he can compel the landholder to grant him a permanent right of occupancy on tendering as premium a sum equal to two and a half times the rent of the land and the landholder is debarred for 20 years thereafter from enhancing that rent. (S. 46). It is only when the provisions of Ss. 45 and 46 have not been complied with that the landholder has the right to evict a non-occupancy ryot by a suit in a Civil Court (S. 163).

On the other hand the non-occupancy ryot must of course pay rent (S. 45) and the rent can be recovered from him by suit in the Collector's Court (S. 77) and he can be evicted if he fails to discharge a decree for rent within a certain time by suit filed in the Collector's Court (S. 153). But there is nothing in the Act which enables the non-occupancy ryot to prescribe for title to hold the land free of rent. And having regard to the conditions prevailing in zamindaries it would be surprising if there were any such provision. For in the majority of cases these estates are not surveyed. There is no demarcation of the holdings of the various ryots on the ground. There is no survey map by reference to which the holding can be located. The recorded area of the land in the landholder's books is not based on exact measurements nor calculated with mathematical precision. It is easy therefore for a ryot to encroach gradually on unoccupied land adjacent to his holding and the encroachment may pass unnoticed for years. It would be a vexatious burden on the landholder if he were debarred from claiming rent on such encroachments as soon as he detected them.

It was somewhat faintly argued by learned counsel for the defendants that if defendants believed that they had the full ownership of the land which in itself is a large assumption and enjoyed it as such for over the statutory period that in itself is sufficient to give them a title by prescription against the zamindar. We cannot concur in this argument. Adverse possession in order to become a basis of title must be brought to the notice of the true owner. Here if, for the sake of argument, we grant that the defendants actually were on the land for over 12 years before suit and the evidence of that is not conclusive either — such occupation did not affect the landholder with notice of their claim to be proprietors. For in a zamindari, as it is hardly necessary to point out, the major portion of the land is in the occupation of persons who have the right to occupy it but not the whole proprietary right ; who are in other words occupancy ryots or persons who hold the land in the hope of becoming occupancy ryots. If such persons wish to prescribe for a higher right in the land they must give open and unequivocal notice of their intention to the landholder. Nor does the mere non-payment of rent for a number of years amount to such notice since as we have pointed out, when a land has been encroached upon gradually and secretly the very fact of its being occupied may very well escape notice. In the result we differ from the lower Court. We find that defendants did not prescribe for title as proprietors for the simple reason that they never asserted any such title. And we find that by non-payment of rent for more than 12 years, assuming that such is the fact, they did not prescribe for the right to enjoy the land for ever without paying rent. We allow this appeal and set aside the decrees of the Courts below. The appellant will have his costs of this appeal and of the suit throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 95

PANDRANG ROW J.

T. P. Vasantha Rao Sahib Bhonsle — Petitioner.

v.

O. A. Narayanaswami Ayyar — Receiver — Respondent.

Civil Revn. Petn. No. 1609 of 1938, Decided on 11th August 1939, to revise order of Dist. Court, West Tanjore at Tanjore, D/- 27th October 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 3 (3) and 20—'Debt' includes liability to make restitution—Debt covers case of person liable whether personally or on account of possession of property.

The definition of the word 'debt' found in the Act does include a liability to make restitution. Moreover the definition of 'debt' in the Act cannot be restricted to cases where a person is personally liable and it is wide enough to cover the case of every person who is in any manner liable either because he is personally liable or because he is liable on account of the possession of property, and takes in his heirs, legal representatives or assigns: *A I R 1939 Mad 186, Rel. on; A I R 1940 Mad 61, Expl.* [P 96 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 20—Decree passed against father in respect of family liability must be deemed decree against son also.

A decree passed against the father in respect of a family liability, that is to say, a liability enforceable against the family property must be deemed in law to be a decree passed against the son also. The subsequent insolvency of the father does not make the decree any the less a decree passed against the son. [P 97 C 1]

(c) Cosharers — Relation between co-owners of whom one is in possession of common funds *(Obiter).*

The relationship between co-owners of whom one is in possession of common funds is not that of creditor and debtor: *A I R 1939 Mad 471, Rel. on.* [P 97 C 1]

(d) Madras Agriculturists' Relief Act (4 of 1938), S. 21—Exclusion enacted in S. 21 is limited only to insolvent and debts payable by him—Even if same debt is payable by his son, son cannot be excluded by S. 21.

The exclusion of an insolvent enacted in S. 21 must be limited only to the insolvent, and the debts payable by him, and even if the same debt is payable by another, say, his son, the son cannot be regarded as being virtually excluded by S. 21. Hence, even if a debt is one payable by the father and he is an insolvent in whose insolvency a dividend has been declared long ago, that does not mean that his son who is in possession of the family property is not entitled to claim the benefits of the Act, simply because his father cannot do so by reason of S. 21 of the Act. [P 97 C 2]

S. V. Venugopalachariar—*for Petitioner.*

A. Viswanatha Sastri — *for Respondent.*

Order.—This is an application to revise the order of the District Judge of West Tanjore dated 27th October 1938 on a petition presented under S. 20, Madras Agriculturists' Relief Act, 4 of 1938 praying for stay of execution of the decree in O. S. No. 3 of 1919. The suit was one known as the Tanjore Palace Estate suit which was last dealt with in this Court so far as the present controversy is concerned. In the case reported in 60 M L J 79[1] at p. 80, the facts necessary for understanding the present dispute are stated, at least, most of them. The present application under S. 20 of the new Act was made by the son of defendant 29 in the suit. Defendant 29 belonged to one groud of defendants to whom the preliminary decree in the suit passed on 1st July 1918 (the suit had been originally instituted as O. S. No. 26 of 1912) awarded 3/4th share. In appeal, this share was reduced, but in the interval, defendant 29 as well as others belonging to his group had taken away from Court various sums of money under certain conditions imposed in the order made on a stay petition. Instead of, however, restitution being made as a result of the Appellate Court's modification of the first Court's decree, the partition having been made actually in the interval, the first Court allowed the parties to retain the shares originally allotted to them but imposed a charge in respect of certain amounts or those shares in the case of those who had received more than their proper share according to the Appellate Court's decree. The present execution petition in connexion with which the application for stay was made was for the purpose of enforcing this charge. Defendant 29 became an insolvent long ago and it is conceded that a dividend also has been declared by the Official Receiver.

---

[1] Arunachalam Chettiar v. Pratapasimha Raja Sahib, (1930) 17 A I R Mad 988=129 I C 63 =60 M L J 79.

The application of the petitioner was dismissed by the learned District Judge on several grounds. So far as one of the points is concerned, namely that the petitioner is not an agriculturist, it is clear that this finding that he is not an agriculturist cannot remain as it stands for the simple reason that the parties had no real opportunity to adduce evidence on this point. It would seem as if the petition was posted for hearing on points of law leaving the question of fact, namely whether the petitioner is an agriculturist to be decided later on, if necessary. Unfortunately, however, the learned District Judge happens to have lost sight of this fact and recorded a finding, so to say, on this point against the petitioner by saying that no evidence had been produced on this point and it is not conceded on the other side. It is not as if there is a clear and definite finding on the point, but I wish to make it clear that if there is a definite finding against the petitioner, that finding cannot stand for the reason that the parties had no reasonable opportunity to adduce evidence relating thereto, and if on other grounds, the petitioner succeeds, this point will have to be decided afresh by the Court below after giving an opportunity to both parties to adduce evidence.

It has been argued that there is no debt in this case which whould entitle the petitioner to apply under Sec. 20 of the Act. No doubt the charge does not make the petitioner personally liable nor indeed his father personally liable for the amount charged. But it must be remembered that the charge was, as it were, a substituted liability in place of the original personal liability of the father to make restitution. The definition of the word 'debt' found in the Act does, in my opinion, include a liability to make restitution. All that the definition says is that if there is a liability in cash or kind due from an agriculturist whether payable under a decree or order of a Civil or Revenue Court or otherwise, it constitutes a debt. There was here an undoubted liability on the part of defendant 29 to pay in cash as restitution whatever amounts he had drawn from Court in excess of what he was ultimately found to be entitled to under the decree of the Appellate Court. Moreover, as pointed out by the petitioner's advocate, it has been held in (1938) 2 M L J 1068,[2] by a Bench that the definition of 'debt' in the Act cannot be restricted to cases where a person is personally liable and that it is wide enough to cover the case of every person who is in any manner liable either because he is personally liable or because he is liable on account of the possession of property, and takes in his heirs, legal representatives or assigns. On the other side, the decision of a single Judge reported in (1939) 2 M L J 225,[3] has been brought to my notice. That is to the effect that a puisne usufructuary mortgagee who is made a party to a suit by the first mortgagee which is decreed, is not a debtor within the meaning of the new Act. The judgment in that case is a very short one and the reason there given is that a usufructuary mortgagee is not a debtor, because in no sense of the word he is a debtor. That is so because *qua* mortgagee he could not be regarded as a debtor but only as a creditor. There is also a sentence following to the effect that the decree is not against him for a debt payable by him but in his favour allowing him a right in equity to redeem the first mortgage and therefore he was under no liability under the decree. In other words, the decree in that case was one which gave him an opportunity to do something but which did not make him liable to pay anything in cash or in kind.

That being the case, that decision cannot support the respondent's contention in this case where there is undoubtedly an attempt made by him to execute a decree, by enforcing the charge allowed by the decree against properties which are in the possession of the judgment-debtor's son. I have little doubt in my mind that this is a case in which so far as S. 20 of the Act is concerned, assuming that the petitioner is an agriculturist, there is a debt in respect of which he is entitled to get relief; but at the last moment, so to say, it has been contended by Mr. Viswanatha Sastri on behalf of the respondent, abandoning for the time being the contention that there is no debt, that S. 20 can be availed of only if there is a decree passed against a person entitled to the benefits of the Act, and that the petitioner is not such a person because there is no decree passed against him even assuming that he is entitled to the benefits of the Act. This contention can be shortly met by the remark that a decree passed against the father in respect of a family liability, that is to say, a liability enforceable against the family property must be deemed in law to be a decree passed against the son also. The subsequent insolvency of the father does not make the decree any the less a decree passed against the son. Whether the effect of the insolvency deprives the son of any of the benefits which he would otherwise be entitled to is not a question that falls to be decided at present. At present the only point for decision is whether the petitioner is entitled to maintain an application under S. 20 and not to determine the exact relief to which he may be entitled. That question has to be, and should be, left to be decided later on if and when an application is made under S. 19 of the Act.

---

[2] Perianna Goundan v. Sellappa Goundan, (1939) 26 A I R Mad 186=182 I C 879=I L R (1939) Mad 218=(1938) 2 M L J 1068.

[3] Narayanachari v. Annamalai Chettiar, (1940) 27 A I R Mad 61=(1939) 2 M L J 225.

Mr. Viswanatha Sastri has also relied on the case reported in I L R (1939) Mad 525[4] but that case is really not in point because the decision there was not on the basis that the liability was not a debt at all from a general point of view but that it was not a debt under the Act and that for the special reason that the liability arose by reason of the fact that one of several co-owners was in possession of common property and therefore liable to account. As pointed out by Varadachariar J. at page 528, the relationship between such co-owners of whom one is in possession of common funds is not that of creditor and debtor. Dealing with the claim to interest in that case, it was observed that interest could be claimed only on the basis of some breach of trust and that by reason of that fact, the liability could not be regarded as a debt under the Act solely by reason of the specific provision in clause (f) of S. 4 of that Act which excludes from the operation of the Act liabilities arising out of any breach of trust. The learned District Judge appears to have relied also on S. 21 of the Act as a ground for dismissing the petition for stay. That Section merely says that:

> Nothing in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets.

It may be that the debt in the present case is one payable by the father and he is an insolvent in whose insolvency a dividend has been declared long ago, but that does not mean that his son who is in possession of the family property is not entitled to claim the benefits of the Act simply because his father cannot do so by reason of S. 21 of the Act. In the view that I have taken, it follows that the original decree itself which is now being executed must be regarded as a decree to which the petitioner is virtually a party though not by name, and he must be regarded as being a person by whom the debt is payable as well as by his father and the insolvency of the father and the payment of a dividend cannot, in my opinion, disentitle the son from applying under the Act, if otherwise he satisfies the conditions laid down in the Act. The exclusion of an insolvent enacted in S. 21 must be limited only to the insolvent, and the debts payable by him, and even if the same debt is payable by another, say his son, the son cannot be regarded as being virtually excluded by S. 21. For instance, if a debt is payable by more than one person, the insolvency of one cannot deprive the other person liable for the debt of his right to apply under the Act if he otherwise satisfies the provisions of the Act. This seems to be fairly clear, and therefore any reason based under S. 21 for the purpose of non-suiting, so to say, the petitioner, must be dismissed as one based on a misapprehension of the scope of Sec. 21. It follows from what I have said that the reasons given by the learned District Judge for dismissing the petition are not sustainable in law and his order must be set aside, but, as I have observed already, as the main question of fact which arises in this case, namely whether the petitioner is an agriculturist has not been properly decided, the petition will be remanded to the Court below for fresh disposal according to law in the light of the observations contained in this judgment after giving reasonable opportunities to both parties to adduce evidence on the point which is to be enquired into, namely whether the petitioner is an agriculturist. The costs of this petition will abide the event and should be provided for in the revised order of the lower Court.

---

[4] Mottai Meera v. Abdul Kadir, (1939) 26 A I R Mad 471=(1939) 1 M L J 528 = I L R (1939) Mad 525.

C.R.K./D.S. *Petition remanded.*

A. I. R. 1940 Madras 98

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank Ltd.

S. Barkat Ali and others—Petitioners.

Dharmambal Ammal — Applicant.

v.

James Voce Pirrie Cyril Gill and John Stanley Goodwin (Official Liquidators) — Respondents.

Application No. 139 of 1939 (in O. P. No. 158 of 1938), Decided on 28th July 1939.

Banker and Customer—Relationship between customer and bank is that of creditor and debtor—Mere fact that customer gives direction to banker to apply money to his credit in particular manner would not clothe bank with trust.

Where there is a deposit to a customer's credit in a bank the banker is the debtor and the customer is the creditor and the amount deposited is a loan to the bank. The mere fact that a customer gives directions to a banker to apply the money to his credit in a particular manner would not clothe the bank with a trust. [P 99 C 1, 2]

Where a sum of money is paid to the general account of the customer with a direction that it must be applied in a particular manner when occasion arises, until the said sum of money is appropriated in a manner directed, no question of trust would arise. Hence, where according to an arrangement between a bank and a subscriber to a chit fund it is provided that out of the money paid by the subscriber to the banker in the savings bank account the bank should pay on behalf of the subscriber the instalments of a chit fund when they fall due, there is no question of any trust in such case : *Case law discussed.* [P 100 C 1, 2]

A. V. Viswanatha Sastry and S. Ramaswamy Iyengar — *for Applicant.*

C. Krishnaswami Iyer, instructed by King and Partridge — *for Respondents.*

Order. — This is an application by a subscriber to a chit conducted by the Travancore National Subsidiary Co. Ltd., for payment of a sum of Rs. 820 standing to the credit of the applicant in the accounts of the Travancore National and Quilon Bank Ltd., in preference to the ordinary creditors of the bank. She is a subscriber to a B class chit. According to R. 1 (a) of the rules governing the chit she had to subscribe at the rate of Rs. 40 each month for 25 successive months as the chit amount is Rs. 1000. She subscribed to the chit on 17th January 1938 and on the same day she deposited with the Mylapore Branch of the Travancore National and Quilon Bank a sum of Rs. 990. Her case is that the said amount of Rs. 990 was deposited for the specific purpose of paying the subscriptions to the chit every month as and when they fell due and the Bank undertook to pay the same as and when they fell due and therefore as the amount was received by the Bank for the said specific purpose, it was trust money in their hands. As the Subsidiary Company has now failed and the chit has come to a close, she claims to be entitled to be paid the balance of Rs. 820 remaining after payment of the instalments which fell due prior to the date on which the company was wound up. The Official Liquidator of the bank contests her claim and his case is that she was no more than an ordinary creditor of the bank. He submitted various reasons therefor and those are :

(1) The deposit was made only with a view to earn interest at a higher rate;

(2) there was no obligation for any subscriber to deposit the amount in this account;

(3) the applicant was not obliged to have the monthly subscription in respect of her client adjusted from and out of such savings bank account as she had the option of paying the same without recourse to this account; and

(4) there is no limit to the amount to be deposited in the said account.

It was also pointed out in the counter-affidavit of the Official Liquidator, and this fact was not disputed before me, that R. 4 of the Chitty Savings Bank Account was not strictly applied in the case of non-prize subscribers. Rule 4 runs thus :

> Amount deposited in the Chit Savings Bank Accounts shall not be available for withdrawal for purposes other than for payment of chit instalments till the termination of the particular chit in respect of which the account was opened.

The non-prize subscriber like the applicant was allowed to withdraw the amount standing to his credit provided he accepted a lower rate of interest allowed in the case of an ordinary savings bank account and further loans were granted on the security of such amounts in the same way as in the case of other deposits of the Bank. The main contention of Mr. Viswanatha Sastri is that Rule 18 (b) of the Chit Fund Rules read with the rules of the Chitty Savings

Bank Account clothe the Bank with a trust in respect of the amount deposited by a subscriber in the Chitty Savings Bank Account of the Bank. R. 18 (b) runs thus:

> Arrangements have been made with the Travancore National and Quilon Bank Ltd. and its branches providing facilities to every chit subscriber of the company to open Chit Savings Bank Account with them from which chit instalments will be adjusted as and when they fall due.

The rules regarding the Chitty Savings Bank provide that the chit fund subscription due every month will be appropriated and adjusted from the Chitty Savings Bank Account as and when the subscription falls due for payment if there be sufficient balance to the credit in the account. It seems to me that none of these provisions makes the Bank a trustee for the subscriber. The account is opened by the Bank in pursuance of a letter addressed to them to open a deposit account which prima facie indicates that the amount was deposited by way of a deposit. It is no doubt true that the deposit was made subject to the rules relating to that account. So far as the arrangement evidenced by these rules is concerned, it is an arrangement purely with the Bank and the subscriber to which the company is not a party. It is unlike the case of a subscriber who has won the prize and deposited the amount in the Bank in pursuance of an arrangement entered into with the company. No question of an equitable assignment of any debt in favour of the company as in the case of a prize subscriber arises in this case because in the case of a non-prize subscriber there is no debt due to the Bank, though of course he is under a liability to pay the subscription, the failure of which entails some consequences and does not make him a debtor. The penalty for non-payment of future subscriptions is that he is liable to be removed as a subscriber and the subscriptions already paid are returned to him after the termination of the whole chit.

The question therefore is, what is the relationship constituted under such circumstances between the Bank and the subscriber by virtue of the deposit in the Chitty Savings Bank Account? Prima facie, it is a deposit to his credit in the Bank. Therefore according to the rule which regulates the relationship between a banker and a customer, the banker is the debtor and the customer is the creditor and the amount deposited is a loan to the Bank. This relationship is in no way modified by R. 18 (b) and the rules relating to the Chitty Savings Bank Account. R. 18 (b) only states that facilities have been provided for by arrangement with the Bank to enable subscribers to make deposits in the Bank in order to provide for the regular payment of subscriptions. It only secures an advantage for them in that they get a decent rate of interest for the amount deposited and as and when the subscriptions fall due, the amount will be paid according to the directions given to the Bank on the due dates. So far as the rules relating to the Chitty Savings Bank Account are concerned, they only amount to an authorization to the Bank to pay the amount of subscription as and when it becomes due. In substance, the transaction is that instead of the subscriber operating on the account every month by drawing the required amount of subscription payable and paying it to the company, he gives a standing order to the Bank to pay every month on his behalf the subscriptions as and when they fall due. It is nothing more than a mandate given to the Bank; that is to apply the money which he has to his credit in a particular manner. The mere fact that a customer gives directions to a banker to apply the money to his credit in a particular manner would not clothe the Bank with a trust. Considerable reliance was placed by Mr. Viswanatha Sastri, who argued the case on behalf of the applicant, on (1857) 26 L J Ch 710[1] and on my decision reported in A I R 1939 Mad 337[2] which followed the said decision and also on 33 Mad 150.[3] It seems to me that none of the decisions apply to the facts of this case. The scope of the decision in (1857) 26 L J Ch 710[1] has been much misunderstood. As I understand that decision, it is this: Where a certain sum of money is entrusted to a banker with a direction to apply it to a particular purpose and not to carry it to his account in the Bank and the Bank receives and undertakes to apply it to the said purpose, there is a trust created in favour of the person who so entrusts the money for the said purpose. On a close examination of the facts of that case it will

---

1. Farley v. Turner, (1857) 26 L J Ch 710=3 Jur (N S) 532=5 W R 666.
2. Gopalakrishnan v. Official Liquidators T. N. & Q. Bank Ltd., (1939) 26 A I R Mad 337 = 183 I C 203 = (1939) 1 M L J 209 = 1938 M W N 1337.
3. Official Assignee of Madras v. Oriental Government Security Life Assurance Co. Ltd., (1910) 33 Mad 150=5 I C 200.

be seen that Goodwin, who was a customer of the Bank of Farley and Turner having an account in the Bank paid in a further sum of £707 with an intimation that £500 out of that should be set apart for meeting an acceptance of a bill by him at Messrs. Roberts & Co. Turner's Bank did advise Roberts & Co., of this fact and sent them sufficient amount for meeting that acceptance. The Bank failed before the acceptance was met but it was held that the sum of £500 was trust money and that it belonged to Goodwin. It is no doubt true that the clerk of Turner's Bank credited the sum of £707 to his general account and debited him with £500. It was pointed out by Kindersley V. C. that that was not carrying out the instructions of Goodwin and in his view it was not a deposit at all and the Bank could have directly sent the sum of £500 without crediting it into the general account. Turner's Bank was so to speak an agent of Goodwin in respect of £500. This is clear from the following observations made by him in the judgment:

> I admit that the money is not a particular deposit with the bankers, but it is money placed in their hands to be applied in a particular way. What I now decide will not trench upon the authorities which decide that money paid into a banker's is not a deposit which you may receive back in the identical notes and sovereigns, but that it is a debt. That is quite a different case.

No doubt Turner's Bank carried out the instructions of Goodwin and therefore it may be deemed to have appropriated the amount even assuming the money was paid to the credit of the customer and carried to his general account. But the ground of the decision was not rested on the principle of appropriation as it is sometimes understood. Where a sum of money is paid to the general account of the customer with a direction that it must be applied in a particular manner when occasion arises, until the said sum of money is appropriated in the manner directed, no question of trust would arise. The matter would rest in a mere mandate. What happened in the present case is that the money was paid to the banker to be credited in the savings bank account in the ordinary way money is credited with a banker. The bank was dealt with by the customer not in the capacity of a pure agent who is entrusted with a sum of money on his behalf but as a banker who is to have his money in respect whereof an account is to be opened with him and which has to be operated upon according to his directions. As pointed out in (1867) 36 L J Ch 73,[4] persons lend moneys to the bankers for the convenience of having it repaid in driblets as they want it. It is always open to a customer to give directions as to how his money has to be repaid. Under the rules governing such accounts it was stipulated that the bank should pay on his behalf subscriptions to the company as and when they fall due. The condition as to withdrawal was only made in the interest of the subscriber so that there may be enough money in the bank for him to meet his obligations. As pointed out in the counter-affidavit of the Official Liquidator, the provision as to withdrawal was never insisted on in the case of a subscriber like the applicant and the subscriber is allowed to withdraw provided he agrees to accept a lower rate of interest applicable to ordinary savings bank. It is not like the case in (1857) 26 L J Ch 710,[1] where money was not intended to be carried into account. In this view I think it is unnecessary to deal with the cases cited by the counsel for the Official Liquidator, namely 39 L J Ch 635 and 91 L T 225. The ground on which, if I may say so with respect, Sir John Romily in 39 L J Ch 635 sought to distinguish (1857) 26 L J Ch 710[1] is not warranted by the observations of Kindersley V. C. In my decision in A I R 1939 Mad 337,[2] it will be seen that the amount was given by the employee of the Bank as cash security and not for the purpose of investment in current account or fixed deposit and he could not operate on it during the period of his service nor could the Bank operate on it on his behalf or under his directions except in a certain contingency and therefore it was not an ordinary banking transaction resulting in the relationship of a debtor and creditor. In 33 Mad 150[3] money was received by Arbuthnot & Co. from the Oriental Life Assurance Co. for the purpose of paying the amount to Mariam Chandy who had no account with Arbuthnot & Co. Further Mariam Chandy did not intend to keep any account with them and called upon them to pay the money. In those circumstances it was held that. Arbuthnot & Co. held the money in trust for Mariam Chandy. I am therefore of the opinion that there is no question of any trust in this case; the Bank is not a trustee for the applicant and her claim for preferential payment must therefore be negatived and she can only rank as an ordinary creditor. Her name is directed to be included in the list of claims already settled by me.

---

[4] **In re Agra and Masterman's Bank Ltd., Ex parte Anderson, (1867) 3 Eq 337=36 L J Ch 73=15 W R 246.**

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 101

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank Ltd., S. Barkat Ali and others — Petitioners.

Secretary, All India Spinners Association, Tamil Nad, Branch — Applicants.

v.

James Voce Pirrie, Cyril Gill and John Stanley Goodwin — Respondents.

Application No. 514 of 1939, (in O. P. No. 158 of 1938), Decided on 21st April 1939.

(a) Banker and Customer — Person paying certain amount in Bank for getting draft in exchange drawn on Bank's branch—On liquidation of Bank person is not entitled to preferential payment in regard to this sum.

Where a person pays certain amount into a Bank for getting a draft in exchange drawn by the Bank on its branch, the transaction is nothing more than a purchase of the draft. The money is not entrusted to the Bank for any specific purpose and the Bank does not receive the money in the capacity of an agent for applying the said moneys for a specific purpose. Hence, on the liquidation of the Bank the person is not entitled to preferential payment in regard to this amount. [P 101 C 2]

(b) Banker and Customer—Cheques given by person to bank for collection only—Proceeds of cheques realized by Bank after it suspended payment—Such person is entitled to preferential payment regarding such proceeds.

Where a person has paid certain cheques into a Bank for the purpose of collection only and the Bank has realized the proceeds of these cheques after it has suspended payment, the person is entitled to preferential payment regarding these proceeds: *(1923) 1 Ch 41, Foll.* [P 101 C 2; P 102 C 1]

V. P. Chakravarthi — *for Applicants.*

C. Krishnamurthi, instructed by King and Partridge — *for Respondents.*

Order.—This is an application by the Secretary of the All India Spinners Association, Tamil Nad Branch, for payment to him of a sum of Rs. 9200 in preference to the ordinary creditors of the Travancore National and Quilon Bank. The claim for the said amount is put under two heads: (1) a sum of Rs. 5000 being the amount paid into the Tiruppur Branch of the Bank for getting a draft, No. 1506 of 1938, in exchange drawn by the Bank on its Rajapalayam Branch in favour of one Sankararaja; and (2) Rs. 4200 being the proceeds of three cheques delivered to the Tiruppur Branch of the Bank for collection, namely (a) cheque for Rs. 3000 bearing No. N. G. 7448 dated 15th June 1938 drawn on the Canara Industrial Banking Syndicate Ltd., Payyanur; (b) cheque for Rs. 500 bearing No. M. S. 621239 dated 17th June 1938 drawn on the Indo-Commercial Bank Ltd., Vijayapuram, Trivandrum; and (c) a cheque for Rs. 700 bearing No. 112315 dated 17th June 1938, drawn on the Indo-Commercial Bank Ltd., Chidambaram. The receipt of the cash of Rs. 5000 and the three cheques is admitted by the Official Liquidators. The claim in respect of Rs. 5000 is made on the basis that the amount was specifically entrusted to the Bank for the specific purpose of being transmitted to Sankararaja through the Bank's branch at Rajapalayam. The Official Liquidators deny this fact and submit in their counter-affidavit that the Spinners Association purchased a draft for Rs. 5000 on payment of that sum and it was nothing more than an ordinary banking transaction done in the usual course of business. The facts bear out the contention of the Official Liquidators. The money was not entrusted to the Bank for any specific purpose and the Bank did not receive the money in the capacity of an agent for applying the said moneys for a specific purpose. The transaction was nothing more than a purchase by the Spinners Association of the draft. I therefore disallow the claim to preferential payment in regard to this amount.

But the claim in respect of the proceeds of three cheques stand upon a different footing. The three receipts given by the Bank unmistakably show that the cheques were received for collection only. Further the amounts were realized by the Travancore National and Quilon Bank only subsequent to 20th June 1938, that is after the Bank suspended payment. It seems to me that the decision of Astbury J. confirmed by the Court of Appeal in (1923) 1 Ch 41[1] concludes the matter. In that case a cross cheque was paid into the Bank for collection and the moneys were received after the Bank suspended payment. In the course of the judgment, the learned Judge observed thus:

> It is common ground that the time at which this cheque was cleared in fact and the moneys made available for Barclay's Bank as agent for Farrow's Bank was 12-30 on Monday, 20th Decem-

---

[1] In re Farrow's Bank Ltd., (1923) 1 Ch 41=92 L J Ch 153=128 L T 332=66 S J 78.

ber. Farrow's Bank however had stopped payment, if not on Saturday or Sunday certainly in the early hours of Monday morning and long before 12-30 in the day. That being so, it seems to me that after ceasing to act as a going concern and stating their intention no longer to act as a going concern they had no longer any authority from Voyce to take what was in fact his money received after the stoppage and convert it into money forming part of their assets in respect of which they would be entitled to assume the position of debtors instead of agents.

Following this decision I uphold the claim of the Spinners Association to preferential payment in respect of the sum of Rs. 4200 being the proceeds of the said three cheques realized by the Bank after suspension. The applicant will get Rs. 35 plus Rs. 5 for the Judge's summons for his costs which will be paid by the Official Liquidators from the assets of Travancore National and Quilon Bank. The Official Liquidators will have Rs. 35 as and for their costs.

C.R.K./D.S. *Order accordingly.*

---

* A. I. R. 1940 Madras 102

PATANJALI SASTRI J.

Alagiri Chetty and another — Appellants.

v.

Muthuswami Chetty and others — Respondents.

Second Appeal No. 512 of 1936, Decided on 2nd August 1939, against decree of Sub-Judge, Salem, D/- 7th December 1935.

(a) License — License is purely matter personal between licensor and licensee — It is deemed to have elapsed with death of licensor.

A license does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the license. Such license must be held to have elapsed with the death of the licensor : *A I R 1931 Mad 216, Rel. on.* [P 105 C 1, 2]

*** (b) Limitation Act (1908), Art. 141—Person without title to property in possession of it after death of widow — Possession not permissive—Character of possession is not changed by his becoming entitled to share in property along with reversioner — Suit by reversioner brought more than twelve years after widow's death is barred under Art. 141.**

Where a person who has no title to the property has been in possession which is not permissive after the death of widow, the character of his possession is not changed by his subsequently becoming entitled to a share along with the reversioner. His accrual of a share in the property does not affect his previous possession and does not arrest the course of limitation under Art. 141. A suit by reversioner for possession more than 12 years after the death of the widow would be barred under Art. 141 : *Case law discussed.* [P 106 C 1]

B. Sitarama Rao — *for Appellants.*

K. Desikachari — *for Respondents.*

Judgment. — The suit out of which this appeal arises was brought for partition and separate possession of the appellant's share of a certain house in Salem Town of which this appeal is concerned only with the eastern portion measuring 10 ankanams which is hereinafter referred to as the house. The facts so far as they are material for the determination of this appeal are briefly these : The house belonged to one Servaraya Chetti who died some time before 1891 leaving him surviving his widow Minakshi who died in that year. At the time of her death the nearest reversionary heir was one Alagiri Chetti who was the elder brother of Servaraya Chetti and the paternal grand-father of the present appellants. Alagiri Chetti died in 1900 leaving behind five sons of whom respondent 1 herein who has throughout been in occupation of the house is one.

The appellant's case was that Minakshi left a registered will by which she devised the house to the five sons of Alagiri Chetti in equal shares of which the appellants claim two shares in the right of their deceased fathers Annaswami and Kandaswami. As already stated, respondent 1 is one of the sons of Alagiri Chetti and respondents 2 to 8 are his descendants. The case of these respondents was that Servaraya Chetti having no issue brought up respondent 1's wife as his foster-daughter and made an oral gift of the house to her on the occasion of her marriage and that since then respondent 1 and his wife and their descendants have been in continuous possession and enjoyment of the house. Both the Courts below have found that the gift alleged by the respondents was not proved and that the will set up by the appellants was inoperative as Minakshi had no power under the Hindu law to effect any testamentary disposition of her husband's property. These findings are clearly right and are not attacked in this appeal. But the trial Court further held that, notwithstanding the failure of their title under the will, the appellants, as representing two of the sons of Alagiri Chetty who succeeded to the house on the death of Minakshi, were entitled to two out of the five shares in which the house devolved on his sons at his death and that the long possession and enjoyment pleaded by respondent 1 and his descendants was of no avail to them, as it could not have been adverse to the appellants, respondent 1 having been a co-owner of the house with the other sons of Alagiri Chetti after the latter's death.

The learned Subordinate Judge disagreed with this view. He found that respondents 1 to 8 had been in possession of the house for over 40 years and that such possession and enjoyment existed even during the lifetime of Alagiri Chetti when respondent 1 had no title whatever to the property. He held that the fact that respondent 1 became a co-owner along with his brothers after Alagiri's death could not change the nature of his possession and that therefore the respondents had acquired title to the house by adverse possession and the appellants' suit was barred by limitation.

Mr. Sitarama Rao, the learned counsel for the appellants, attacked this finding before me and contended that the gift put forward by the respondents having been found against their possession and enjoyment of the house till Minakshi's death must be deemed to have been only permissive, and the respondents not having shown that they were in possession after her death in assertion of a right inconsistent with that of Alagiri, the permissive character of their possession must be deemed to have continued throughout, with the result that there could be no acquisition of title by the respondents by adverse possession. I cannot accede to this contention. It is no doubt true that the lower Appellate Court based its decision upon the "adverse possession" of the respondents during the long period they had been occupying the house, thus presumably applying Art. 144, Limitation Act, to the facts of this case; but the proper Article applicable is clearly Art. 141 and not Art. 144, and therefore it seems to me, no question of adverse possession really arises. Minakshi having died in 1891 and there being nothing to show that Alagiri Chetti who was then entitled to succeed to the property ever took possession or assumed any kind of dominion or control of the house or permitted respondent 1 and his descendants to continue in occupation thereof, time commenced to run in 1891 under Art. 141, and a suit brought by Alagiri or his heirs more than 12 years thereafter would stand barred and their title would, by the operation of S. 28 of the Act, be extinguished. Mr. Sitarama Rao indeed conceded at a later stage of his argument, that the proper Article applicable was Art. 141 and that no question of adverse possession really arose. But he somewhat changed his ground and contended that once the gift put forward by the respondents was found against, they must be regarded as having lived in the house as mere guests, at any rate till Minakshi died, and thereafter their occupation cannot be regarded as legal possession at all so as to put Alagiri and his heirs to their action. In other words, time did not commence to run against Alagiri, for though he was not in actual occupation, he was in legal possession and there was no one against whom he could bring an action. For this contention, Mr. Sitarama Rao strongly relied on (1888) 13 A C 793.[1] Alternatively, Mr. Sitarama Rao also urged that even assuming that time commenced to run against Alagiri under Art. 141, on Alagiri's death in 1900 before the expiry of the period of 12 years limited by that Article, respondent 1 became a co-owner of the house with his brothers including the fathers of the appellants, and this changed the character of the respondent's possession which must thereafter be ascribed to such co-ownership. In support of this contention, reliance was placed upon a decision of this Court in 39 Mad 879.[2]

I find it difficult to accede to either of these contentions. In the first place, it is highly doubtful whether respondent 1 could be said to have been in permissive possession during the lifetime of Servaraya or his widow Minakshi for these were living in the same house. Respondent 1 was in the house as a mere guest and it cannot be said that he was in any sense of the term in possession of the house even permissively. It was only after Minakshi's death in 1891 that respondent 1's possession of the house could be said to have begun and there is absolutely nothing in the case to show that such possession arose with the consent or permission of Alagiri who then succeeded to the property. Mr. Sitarama Rao urged that this was a natural inference having regard to the relationship of respondent 1 to Alagiri. But the lower Appellate Court has, in all the circumstances, refused to draw that inference of fact and indeed went further and found that respondent 1's possession was even adverse to Alagiri. It seems to me therefore that there is no scope here for the application of the proposition contended for by Mr. Sitarama Rao that occupation with the consent or permission of the owner does not amount to any legal possession at all. In this connexion the English case in 5 C P D 368[3] is instructive. There to an action in ejectment brought in 1879 on behalf of the Brighton Corporation the defendants who had been allowed in 1853 by the predecessors-in-title of the Corporation to occupy some of their buildings pleaded the Statute of Limitations. The Court upheld the plea and observed at page 374 :

---

[1] Trustees Executors and Agency Co. Ltd. v. Short, (1888) 13 A C 793=58 L J P C 4=59 L T 677=53 J P 132=37 W R 433.

[2] Velayutham v. Subbaroya Pillai, (1916) 3 AIR Mad 139=31 I C 398=39 Mad 879.

> It was contended that the defendants were mere licensees and had no possession of the premises, the possession remaining in the plaintiffs. We cannot accede to that contention and think that it is disproved by the facts. It is admitted that the defendants had the exclusive use of the offices and that they never paid any rent nor gave any acknowledgment in writing. How it can be said in these circumstances that the possession remained in the plaintiffs we are at a loss to understand.

These observations aptly apply to the contention of the learned counsel for the appellants. It is no doubt true that the plaintiffs in that case asked for an acknowledgment in 1863 and it was refused but it is significant that the defendants were considered to have been in possession ever since 1853 (see the concluding passage at p. 375). As stated already, Mr. Sitarama Rao placed reliance upon (1888) 13 A C 793.[1] The principle laid down there was that it is not sufficient for the purpose of the Statute of Limitations that the rightful owner has been out of possession but it is also necessary actual possession should have been held by a stranger in favour of whom the statute can operate. If respondent 1 is to be treated as, in my view, he should be, as having held possession throughout, the decision can obviously have no application here. On the other hand, the quotation from the judgment of Baron Parke in *Smith* v. *Lloyd*,[4] at p. 799 tends to support the respondent's contention that no adverse possession is necessary in such cases. That learned Judge observed :

> There must be both absence of possession by the person who has the right, and actual possession by another, *whether adverse or not*, to be protected, to bring the case within the statute, (the italics are mine).

It is worthy of note that the starting point under the English statute is the accrual of the right of action, the same as under Article 141, Limitation Act, though differently expressed. The decision of the Privy Council reported in 12 Rang 238[5] was also relied on. There one Lim Chin Tsong bought a house and allowed his mistress to live therein for more than 12 years during his lifetime. A gift to her was put forward but was found against. Lim Chin Tsong himself had all along been paying the rents and taxes and also making the necessary repairs. In a suit brought by the receiver of his estate about three years after his death to recover possession of the house, the question arose whether the possession of the mistress was adverse to Lim Chin Tsong, and their Lordships held that there was no evidence on which it could properly be held that she was possessing the property in a manner adverse to the continuance of the title in Lim Chin Tsong. I do not see how this decision supports the contention of the appellant in this case where, as already stated, there is nothing to show that Alagiri ever did any proprietary act in respect of the house, and, ex concessi, no question of adverse possession arises.

Mr. Sitarama Rao also cited 6 Cal 311.[6] There one Hira Lal Seal who was the owner of a house and the predecessor-in-title of the plaintiff allowed the defendant's predecessor to occupy the house and the question arose whether Article 142 or Art. 144 governed the suit brought to recover possession of it. The learned Judges held that Art. 144 applied to the case, Garth C. J. observing :

> But where the owner in the exercise of his own proprietary right permits some other person to occupy his land or to receive his rents then, whether the relation of landlord and tenant exists between the parties or not, I consider that the possession of the owner is not discontinued because under such circumstances the possession of the occupier is the possession of the owner.

Mr. Sitarama Rao particularly stressed the last sentence of this passage as showing that Alagiri must in this case be regarded as having been in possession of the house but, as already observed, he is not shown to have permitted respondent 1 to occupy the house after he became entitled to the property on Minakshi's death. This decision therefore does not support his contention. Mr. Sitarama Rao then referred me to the well known case in (1889) 14 A C 437.[7] There the agent of a proprietor of an estate continued to receive the rents and profits even after the death of his principal in the same manner as he did before, i. e. not as for himself but as agent and receiver for the heirs of the deceased though they had not been ascertained, and the question was whether such receipt of rents dispossessed the true heirs of the deceased who brought the suit to recover the estate and for an account of the rents and profits and after the expiry of the statutory period, and it was held that there was no dispossession of the heirs under those circumstances. The Earl of Selborne observed at page 457 :

---

[3] Mayor of Brighton v. Guardians of Brighton, 5 C P D 368.

[4] (1853) 9 Ex 562=2 C L R 1008=23 L J Ex 194=22 L T (O S) 289=96 R R 837.

[5] Lim Charlie v. Official Receiver, (1934) 21 A I R P C 67=147 I C 328=12 Rang 238 (PC).

[6] Gobind Lal Seal v. Debendranath Mullick, (1881) 6 Cal 311=7 C L R 181.

[7] Lyell v. Kennedy, (1889) 14 A C 437 = 59 L J Q B 268=62 L T 77=38 W R 353.

> Lord Coke's doctrine as to the effect of entry by an unauthorized stranger on behalf of the true owner, seems to me applicable, in reason and principle, to such a receipt of rents as that of the respondent in this case down to 1880: 'If an infant, or any man of full age, have a right of entry into any lands, any stranger, in the name and to the use of the infant or man of full age, may enter into the lands; and this regularly shall vest the lands in them without any commandment, precedent or agreement subsequent.'

But this doctrine on which that decision was founded cannot obviously apply to the facts of this case as respondent 1 is not shown to have entered into or continued in possession of the lands in the name and to the use of Alagiri and the decision therefore does not help the appellant. Mr. Sitarama Rao also placed reliance upon the decision of the Privy Council in 47 Mad 572[8] and particularly the passage at p. 582 of the report where their Lordships observe :

> Their Lordships think that a licensee cannot claim title only from possession however long unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence.

In the first place, that was a case where the plaintiff claimed to have acquired title against the Government by adverse possession whereas, as already observed, there is no question of adverse possession in this case. Secondly for the reasons stated before respondent 1's exclusive possession of the house can be considered to have arisen only on Minakshi's death in 1891 and he is not shown to have entered under a license from Alagiri Chetti. In the third place, even assuming that defendant 1 had been in possession even earlier under a license from Servaraya and Minakshi, it seems to me that such license must be held to have elapsed with the death of Minakshi. A license does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the license: *see* 54 Mad 554,[9] where the possession after the death of a licensee by his successors was held not to be permissive but adverse.

Turning next to the alternative contention of Mr. Sitarama Rao he strongly relied in support of it upon the decision in 39 Mad 879.[2] That case arose out of a suit for redemption to which the contesting defendant pleaded the bar of limitation under Art. 134, Limitation Act, by reason of his having been in possession for more than 12 years before the suit under a sale from the mortgagee. It was however found that within 12 years from the date of the purchase, the plaintiff and the contesting defendant became entitled to the property as co-heirs of the mortgagor and it was held that the defendant's possession thereafter was not adverse to the plaintiff "unless and until the latter was excluded notoriously." With all respect, it is somewhat difficult to understand how any question of adverse possession could arise under Art. 134, Limitation Act, or how the accrual of a right to the defendant in co-ownership with the plaintiff before the expiry of the period would arrest the running of time under that Article. In any case I cannot regard this decision as a binding precedent in view of the later decision of the Privy Council in 43 Mad 244,[10] where their Lordships definitely held that the adverse character of the possession held by a person was not changed by reason of that person subsequently becoming entitled to a share in the property. Mr. Sitarama Rao sought to distinguish that case by pointing out that the question of adverse possession did not arise in that case with reference to the possession of the share to which the person in adverse possession of the whole property became entitled as co-owner. I am however unable to see how that circumstance makes any difference in the principle of the decision or excludes the application of that principle to the present case. The person in possession there had been in enjoyment of the whole property like respondent 1 here. Later on, she became entitled to an undivided half-share in that property under a right of succession and their Lordships held that there was no reason for holding that when she became legally entitled to a moiety of the property the character of her possession in respect of the other moiety was changed. The position, in my judgment, is essentially the same in the present case. Respondent 1 having been in possession of the whole house became legally entitled to an undivided fifth share thereof. In both the cases, the person in possession without a title became entitled to an undivided share in the property and if the accrual of a right to a moiety in the case before their Lordships could not change the character of the possession held and stop the running of time in its favour under Art. 144, why should the accrual of a right to a fifth share in the suit house to respondent 1 on Alagiri's death affect his previous possession and arrest the course of limitation under Art. 141? Following this decision of the Privy Council I disallow this contention also. In the result the appeal fails and should be dismissed with costs. Leave granted.

---

[8] Ambu Nayar v. Secy. of State, (1924) 11 A I R P C 150=80 I C 835=51 I A 257=47 Mad 572 (P C).

[9] Chinnan v. Ranjithammal, (1931) 18 A I R Mad 216=131 I C 175=54 Mad 554=60 M L J 709.

[10] Varada Pillai v. Jeevarathnammal, (1919) 6 A I R P C 44=53 I C 901=46 I A 285=43 Mad 244 (P C).

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 106

LEACH C. J. AND PATANJALI SASTRI J.

R. V. Rajarathna Chettiar—Appellant.

v.

Shari Shaick Mahboob Sahib and others — Respondents.

Appeal No. 30 of 1936, Decided on 18th April 1939, against judgment and decree of Wadsworth J., in C. S. No. 420 of 1932, D/- 26th February 1936.

(a) Hindu Law—Guardian—Powers of natural guardian stated.

A guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in contract entered into by his guardian. The minor's personal law may however affect the position. For instance, the natural guardian of a Hindu minor has power without the Court's sanction to mortgage or sell any part of the minor's estate. In cases of necessity the guardian of a Hindu minor may borrow money upon a promissory note and the minor's estate is liable for repayment with interest at a proper rate. The minor is not liable on the note, but on the debt evidenced by the note. His liability is created by his personal law : *6 M I A 393 (P C) and A I R 1939 Mad 538, Rel. on.* [P 108 C 1]

(b) Mahomedan law—Guardian—De facto — He cannot bind minor to a covenant to transfer his property even in part.

Under the Mahomedan law the power of a guardian to sell or pledge moveables of his ward cannot confer a right to bind minors to a covenant to transfer their property, even in part. [P 108 C 2]

(c) Minor—Unconscionable bargain set aside — Court of equity cannot award against minor interest at rate of 75 per cent. per annum.

A Court of equity in setting aside an unconscionable bargain cannot award against minors interest at the rate of 75 per cent. per annum whatever the risk. [P 108 C 2]

(d) Mahomedan Law — Minors are not liable to pay interest on sums advanced to them.

Mahomedan law does not impose upon minors any obligation to pay interest on sums advanced to them. [P 108 C 2]

(e) Contract Act (1872), S. 68 — Word "reimburse" whether includes payment of interest *(Quære)*.

Whether a person who has advanced money to a minor for his necessaries is entitled, when reimbursing himself, to payment of interest on the money advanced : *A I R 1927 All 55; A I R 1930 All 292 and 7 Cal 140, Expl.* [P 109 C 1]

(f) Interest Act (1839), S. 1, Proviso—Person advancing money to minor for his necessaries is entitled to interest.

A person who has advanced money to a minor for his necessaries is entitled to interest at a fair rate on that money on the ground that the interest would be allowed by a Court of equity: *A I R 1938 P C 67 and (1876) 4 Ch D 428, Rel. on.*

[P 109 C 1, 2]

(g) Limitation Act (1908), Arts. 61 and 120 —Suit to recover money advanced to minor for his necessaries is governed by Art. 61 and not by Art. 120.

Article 61 applies to S. 68, Contract Act. Hence a suit to recover money advanced to a minor for his necessaries is governed by Art. 61, Limitation Act, and not by Art. 120 : *A I R 1935 Lah 437 and 34 Mad 167, Rel. on.* [P 110 C 1]

V. Radhakrishnayya and T. Krishnaraja Nayakar — *for Appellant.*

T. Aravamudha Ayyangar and N. T. Shamanna — *for Respondents.*

Leach C. J.—In order to appreciate the questions which arise in this appeal it is necessary to trace the course of events for some eleven years before the institution of the suit. The grandfather of respondents 2, 3, 4 and 5, one Chidri Ismail, was a dealer in skins and hides and carried on business in partnership with another Mahomedan, named Dhabaywallay Manjalay. In 1921 Chidri Ismail instituted on the Original Side of this Court a suit (Civil Suit No. 697 of 1921) for the dissolution of the partnership and for the taking of accounts. He died before the suit came on for hearing and his heirs were made plaintiffs in his stead. Chidri Ismail had a son, Chidri Abdul Rahiman, and a daughter, Masum Bi. Chidri Abdul Rahiman married one Sakina Bi, by whom he had three children, respondents 3, 4 and 5 in this appeal. Masum Bi married respondent 1 and respondent 2 is the issue of that marriage. Chidri Ismail's son, daughter, son-in-law, daughter-in-law, and his four grand-children were all made plaintiffs in the suit. The grand-children were minors and were minors at all times material to the questions involved in this appeal. Masum Bi died in 1924 and Chidri Abdul Rahiman in 1925. On 16th August 1926 the partnership suit was dismissed for default and on 7th September 1926 an application was filed on behalf of the surviving plaintiffs asking for its restoration to the list.

On 10th December 1926 the application was granted so far as the minor plaintiffs were concerned, but was dismissed as against the major plaintiffs, Sakina Bi and respondent 1. The major plaintiffs appealed, but the appeal was dismissed on 8th February 1929 on the undertaking that no objection would be taken by the defendant-respondent to the minor plaintiffs proceeding with the suit and recovering whatever they were entitled to as heirs of Chidri Ismail. On 11th December 1929, a preliminary decree was passed in favour of the minor plaintiffs and the Official Referee was directed to take the accounts. On 4th March 1929, the Official Referee submitted his report, but before it was taken into consideration by the Court a compromise was agreed upon under which the defendant was to pay to the minor plaintiffs a sum of Rupees 50,000 in satisfaction of their claims, and a decree embodying the terms of the settlement was passed. The partnership assets included immovable properties and the receiver who had been appointed was authorized to realize sufficient of the properties to pay the amount to the minor plaintiffs. The minor plaintiffs were without funds to carry on the litigation and the appellant alleges that he financed the suit and also provided money for their maintenance. On 20th March 1928, an agreement was entered into under which the appellant was to provide Rs. 1000 for the expenses of the suit and of the appeal of the major plaintiffs against the order dismissing the application for restoration so far as they were concerned. For his financial help the appellant was to receive one-half of what was recovered as the result of the suit, after allowing for the repayment of the loan. There was no provision in the agreement for the payment of interest. In his plaint Chidri Ismail had valued the relief sought by him at Rs. 1,50,000. The agreement was signed by respondent 1 on his own behalf and as the guardian of respondent 2, and by Chidri Jehangir, the brother of Chidri Ismail, on behalf of himself and of respondents 3, 4 and 5. Chidri Jehangir was acting as the next friend of respondents 3, 4 and 5 in the partnership suit and at the most can only be regarded as a de facto guardian.

On 3rd September 1932, the appellant instituted the suit out of which this appeal arises. He claimed to be entitled to Rupees 30,992-0-9 made up of Rupees 5992-0-9, the amount which he alleged he had advanced for the maintenance of the minors and for the expenses incurred in C. S. No. 697 of 1921, and Rs. 25,000 being one-half of the amount decreed in that suit. The case was tried by Wadsworth, J. who held that it had not been proved that any amount had been advanced by the appellant for the maintenance of the minors, but that the agreement of 20th March 1928 was binding on them subject to "relief against harshness." He considered that it would not be fair to allow the appellant to have the half of the decretal amount but he was of the opinion that he was entitled to recover all that he had advanced for the purposes of the litigation with interest at 20 per cent. On this basis, he directed the Official Referee to take an account of the moneys advanced for the expenses of the previous suit. The Official Referee took the account on the basis of actual expenditure and having received the report the learned Judge passed a decree against the respondents for Rupees 10,733-3-11. Of this sum, Rs. 4727-9-9 represented advances by the appellant for the expenses of the previous suit and Rupees 6005-10-2 interest thereon at 20 per cent. per annum. The appellant has appealed against the decree and the minor respondents have filed a memorandum of cross-objections. Before us the appellant has not pressed his claim that he should receive half the amount awarded to the minor plaintiffs in Civil Suit No. 697 of 1921, but has contended that he should be allowed interest at the rate of 75 per cent. per annum on the sums which he advanced for the purposes of the suit. He challenges the finding that he had advanced no money for maintenance and says that he should be awarded in this connexion Rs. 1264-7-0, being the difference between Rs. 5992-0-9, the amount claimed for maintenance and litigation expenses, and Rs. 4727-9-9, the amount awarded for litigation expenses. Respondents 2, 3, 4 and 5 have raised the following contentions: (1) the agreement of 20th March 1928 is not binding upon them; (2) even if the appellant could have claimed relief under Sec. 68, Contract Act, he is barred from the benefit of that Section because the suit was based on the agreement and no alternative plea was advanced; (3) in any event, the appellant is not entitled to interest on the sums advanced by him; (4) the account had been taken on a wrong basis; and (5) Art. 61, Limitation Act, applies in respect of all sums advanced by the appellant.

The plea advanced by the minor respondents that the appellant is not entitled to claim recompense by way of interest on the ground that he had not advanced this plea in his plaint may be disposed of at once. An examination of the plaint shows that this objection cannot be sustained. In para. 19 of the plaint the appellant avers that the amounts advanced by him for the conduct of the litigation and for the maintenance of the minors were lent for necessary purposes and the minors are bound to repay him. No mention is made of interest, but if the appellant is in law entitled to interest on moneys advanced for necessaries, we think that he has sufficiently indicated his case to justify the award of interest. We consider that in holding that the appellant was entitled to sue on the agreement of 20th March 1928 the learned Judge erred. It is a well-settled principal of the general law that a guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in a contract entered into by his guardian : 11 Bom 551[1] and 19 Cal 507.[2] The minor's personal law may however affect the position. For instance, the natural guardian of a Hindu minor has power without the Court's sanction to mortgage or sell any part of the minor's estate in a case of need; or for the benefit of the estate : 6 M I A 393.[3] In cases of necessity, the guardian of a Hindu minor may borrow money upon a promissory note and the minor's estate is liable for repayment with interest at a proper rate. The minor is not liable on the note, but on the debt evidenced by the note. His liability is created by his personal law. This question was fully discussed in the judgment of a Division Bench of which I was a member in L P A No. 39 of 1936.[4] This judgment has not yet been reported, but it is not necessary to travel over the same ground. I have sufficiently indicated the effect of the personal law of a Hindu minor.

It has been argued on behalf of the appellant that the Mahomedan law is very much the same as the Hindu law and that the agreement of 20th March 1928 can be enforced under Mahomedan law. The basis for this statement is the rule that a de facto guardian has power to sell the goods and chattel of his ward for the ward's imperative necessities. The power to sell or pledge moveables cannot confer a right to bind minors to a covenant to transfer their property even in part. The learned advocate subsequently had to concede that this was so and that his client could not base his claim on the agreement, but inconsequentially he asked the Court to hold that the appellant was entitled to interest because a Court of Equity in setting aside an unconscionable bargain could impose terms. I cannot imagine a Court of Equity awarding against minor's interest at the rate of 75 per cent. per annum whatever the risk, but it is not a question of setting aside an unconscionable bargain on terms. The agreement was void ab initio so far as the minors were concerned. As there is no agreement in law and as the personal law of the minors does not impose upon them any obligation to pay interest—in fact Mahomedan law is against the charging of interest — the appellant is confined to his remedy under the provisions of S. 68, Contract Act.

Section 68, Contract Act, entitles a person who has supplied necessaries to a minor to reimburse himself from the minor's property. On behalf of the respondents it was conceded that the money which was advanced for the expenses of the partnership suit would come within the Section, provided that the money was properly expended for the purposes of the suit. They however contended that all that the appellant was entitled to was the recovery of the amounts which had been properly expended without interest. In this connexion our attention was drawn to the decision in (1801-12) 8 East 330=103 E R 369[5] where it was held that an infant cannot bind himself in a bond with a penalty conditioned for payment of interest as well as principal and to the judgment in (1844) 3 M & S 476 =105 E R 689[6] which was to the same effect. The English law and the Indian law with regard to contracts by minors are not the same. Under the English law the contract of a minor is voidable. In this country it is void and we have to consider the position in the light of the Contract Act, rather than in the light of English cases. While by reason of S. 11 of that Act a minor is incapable of contracting, S. 68 allows a person who has supplied a minor with necessaries to reimburse himself from the minor's property. The appellant has contended that reimbursement must include the payment of interest, as otherwise a person who lends money to a minor and is not repaid for an appreciable period of time suffers loss. He could, it is said, only be reimbursed if he were repaid the principal together with the amount he would have received if he had use of the money. Sec. 32, Trusts Act, was here referred to. That Section allows a trustee to reimburse himself out of the trust property all moneys expended by him inter alia for the support of the beneficiary. The Section expressly provides that where he has paid the expenses out of his own pocket he has a first charge upon the trust property for such expenses and interest. The learned advocate for the appellant also drew our attention to three cases in which interest had been allowed in respect of claims falling within S. 68, Contract Act: 49 All 52,[7] 52 All 391,[8] and 7 Cal 140.[9] In none of these cases however was the question of the right to interest raised. It was granted apparently as a matter of course.

---

[1] Waghela Rajasanji v. Shekh Masludin, (1887) 11 Bom 551=14 I A 89=5 Sar 16 (P C).

[2] Indur Chunder Singh v. Radhakrishore Ghose, (1892) 19 Cal 507=19 I A 90=6 Sar 185 (PC).

[3] Hanoomanpersaud Panday v. Mt. Babooee Munraj Koonwaree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

[4] Annamalai Chetty v. Muthuswami Maniagaran, *Reported in* (1939) 26 A I R Mad 538 =(1939) 1 M L J 792.

[5] Fisher v. Mowbray, (1801-12) 8 East 330=103 E R 369.

The question whether the word "reimburse" should be given the meaning which the appellant would have is one of some difficulty, but in order to decide whether the appellant is entitled to interest it is not necessary to decide this particular question. We consider that he is entitled to interest on the ground that interest would be allowed by a Court of equity. The proviso contained in the Interest Act leaves it open to the Court to allow interest in any case in which interest would be allowed by a Court of equity: I L R (1938) 2 Cal 72.[10] That a Court of equity would allow interest in a case like the one now before us is to be gathered from the decision in (1876) 4 Ch D 428.[11] There a minor executed a deed to secure the repayment of monyes advanced to him for necessaries. When he came of age the lender sued to enforce his security. Jessell M. R. held that he was not entitled to do so, but that he was entitled to have an account (1) for all moneys advanced to the minor before he attained majority and expended by him on necessaries or in paying debts incurred for necessaries; (2) for an inquiry whether any such sums had been repaid, and (3) for an order for repayment of the amounts found due with interest at 4 per cent. That case is analogous to the case now before us and we hold that the appellant is entitled to recover moneys advanced by him for the purposes of the litigation with interest, but at a fair rate. A fair rate we consider would be the Court rate which is six per cent. per annum.

It follows that the account which has been taken of the advances will have to be reopened. The respondents have asked that in the course of the further inquiry the trial Court should be directed to examine the sums provided by the appellant for litigation expenses and reject all amounts not shown to have been reasonably required for the purposes of the litigation. When the matter was before the Official Referee all that the appellant was called upon to prove was that he had provided the amounts claimed by him. It was not suggested that the amounts provided had not been properly spent. This was accepted. Therefore, it is too late in the day for the respondents to say that the account should be taken on a new basis. Subject to what is said in the appeals against the final decree (Original Side Appeal No. 8 of 1938 and Original Side Appeal No. 24 of 1938) and to the law of limitation which I will deal with in a moment, the account as settled by the trial Court will stand and interest will be calculated at six per cent. on the various amounts supplied from the dates of advancement.

The respondents have contended that this suit falls within Art. 61, Limitation Act, and therefore the appellant cannot recover sums

---

6. Baylis v. Dineley, (1844) 3 M & S 476 = 105 E R 689.
7. Phalram v. Aiyub Khan, (1927) 14 A I R All 55=98 I C 657=49 All 52=24 A L J 895.
8. Sri Nath v. Jagannath, (1930) 17 A I R All 292=126 I C 230=52 All 391.
9. Watkins v. Dhunnoo Baboo, (1881) 7 Cal 140 =8 C L R 433.
10. B. N. Ry. Co. Ltd. v. Ruttanji Ramji, (1938) 25 A I R P C 67=173 I C 15 = 65 I A 66 = I L R (1938) 2 Cal 72=32 S L R 374 (P C).
11. Martin v. Gale, (1876) 4 Ch D 428=46 L J Ch 84=36 L T 357=25 W R 406.

which were advanced more than three years before suit. The appellant contends that the proper Article is Art. 120. We are of the opinion that the Article which applies is Art. 61. This Article fixes a period of limitation of three years for money payable to the plaintiff for money paid for the defendant. The moneys which the appellant paid were paid for necessaries of the minors. Support for the opinion that Art. 61 applies is to be found in the judgment of the Lahore High Court in 17 Lah 78.[12] Further support is to be obtained from the decision of this Court in 34 Mad 167.[13] That case related to a claim under Sec. 70, Contract Act, which entitles a person to recover money which he has paid for another, not intending to do so gratuitously, and the other person has enjoyed the benefit of the payment. There is no difference in principle between S. 70 and S. 68, Contract Act, and if Art. 61 applies to S. 70, it must apply to Sec. 68. In the taking of the new account, regard must therefore be had to the provisions of Art. 61, Limitation Act. So far as respondents 3, 4 and 5 are concerned the law of limitation will apply to all payments made three years before the date of the institution of the suit, namely 3rd September 1932. This date, however, does not apply to respondent 1. The appellant has asked the Court to hold that all payments made three years before 2nd March 1931 can be recovered proportionately against respondent 2, because on that date respondent 1, his lawful guardian, signed an acknowledgment of the amount due in respect of the advances for maintenance and litigation expenses. The Official Referee refused to accept the statement that respondent 1 signed the acknowledgment on 2nd March 1931 and held that he must have signed at some date subsequent to 11th July 1932. The report of the Official Referee was accepted by the learned Judge and we see no reason to come to a contrary conclusion. Therefore so far as respondent 2 is concerned, he will be liable for his share of the money paid for litigation expenses after 11th July 1929.

The only question which remains to be considered is the appellant's claim that he should be allowed the sum of Rs. 1264-7-0 for maintenance. We consider that the learned trial Judge should have directed the Official Referee to take an account in respect of the maintenance claim as there was sufficient evidence on the record to justify this course. In addition to the oral testimony of the appellant, there were his account books and a letter (Ex. C) from the mother of respondents 3, 4 and 5 asking respondent 1 to raise money from the appellant for the maintenance of the minors. The learned Judge refused to order an account because there was no evidence that any particular sum had been utilized for the support of any particular minor. What had been utilized for the respective minors had, however, never been inquired into. All that the appellant was required to do was to satisfy the Court that monies had been provided. How much had been provided and how much had been spent on the minors respectively were matters to be inquired into by the Official Referee. The maintenance claim can only be decided after an investigation in the first place by the Official Referee and he will be directed to take the account. The appellant will be entitled to interest at the rate of six per cent. per annum on any amounts found due. Art. 61, Limitation Act, also applies here.

The result is that the appellant fails on his claim to interest at the rate of 75 per cent., but is awarded interest on his payments at the rate of six per cent., and he succeeds on his claim for an account of the monies advanced for maintenance. The respondents have failed in their contention that the appellant is not entitled to any interest, but have succeeded in part on their claim for the reopening of the account and on the question of limitation. The decree of the Original Side will be set aside so far as respondents 2, 3, 4 and 5 are concerned, but it will stand against respondent 1, who has not appealed. The case will be remanded to the Original Side to be disposed of in accordance with this judgment so far as respondents 2, 3, 4 and 5 are concerned. The decree under appeal provides for a personal decree against the minors. There can be no personal decree against them. The decree which is passed will be against their properties only. In drawing up the final decree, care will be taken to allocate liability to the minor respondents according to the respective shares in the estate. In dealing with the question of costs, Wadsworth J. allowed two sets for the respondents. This has been objected to and we consider that there should only be one set. The parties will pay and receive, here and below, proportionate costs, one set, but there will be a certificate for two counsel on each side.

---

[12] **Piare Lal v. Lajja Ram, (1935) 22 A I R Lah 437=159 I O 203=37 P L R 246=17 Lah 78.**

[13] **Kandaswamy Pillai v. Avayambal, (1911) 34 Mad 167=7 I O 399=20 M L J 989.**

C.R.K./D.S. *Case remanded.*

A. I. R. 1940 Madras 111

BURN AND STODART JJ.

In re Paluvadi Venkataramayya — Petitioner.

Criminal Revn. Case No. 418 and Petn. No. 388 of 1939, Decided on 19th September 1939, to revise judgment of Sess. Court, Kurnool Division, in Cri. Appeal No. 7 of 1939.

(a) Criminal P. C. (1898), S. 415—"Any two or more of the punishments" refer to two or more punishments of different kinds.

Section 415 refers to two or more of the punishments of different kinds and has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. [P 112 C 1, 2]

Where an accused who was convicted only of rioting and sentenced to pay a fine of Rs. 20 had filed an appeal under provisions of S. 415-A alleging that the other two accused who had been sentenced to pay two fines of Rs. 20 (for rioting) and Rs. 25 (for an offence under S. 355, Penal Code) had a right of appeal under S. 415-A and therefore he having been convicted at the same trial had also a right of appeal :

Held that none of the accused had any right of appeal since there was no combination of punishments in one sentence within the meaning of Sec. 415 : *1936 M W N 213, Dissent.*; *A I R 1939 Cal 274, Foll.*; *A I R 1932 Oudh 27*; *A I R 1937 Oudh 524 and A I R 1931 Cal 642, Not foll.*; *AIR 1932 Cal 551 and A I R 1926 Bom 416, Rel. on.* [P 112 C 2]

(b) Criminal Trial — Revision — Powers of Court—Revisional Court cannot interfere on facts with conviction by lower Court—*(Obiter)*.

When the grounds taken for saying that the lower Court was wrong in convicting accused are all grounds of fact and not connected with any question of law, the revisional Court cannot interfere with the conviction. [P 113 C 1]

K. S. Jayarama Ayyar — *for Petitioner.*

K. Venkataraghavachari for Public Prosecutor — *for the Crown.*

Burn J.—This is an application for revision of the order of the learned Sessions Judge, Kurnool, in C. A. No. 7 of 1939. That appeal was presented to the learned Sessions Judge from the decision of the Sub-Divisional First Class Magistrate, Markapur, in C. C. No. 48 of 1938. In that case the First Class Magistrate was dealing with 24 persons who had been tried by the Stationary Second Class Magistrate of Giddalore in C. C. No. 593 of 1937. The learned Sub-Magistrate found all the 24 accused persons guilty of rioting (S. 147, I. P. C.,) wrongful confinement (S. 341, I. P. C.,) assault with intent to dishonour (S. 355, I. P. C.,) and simple hurt (S. 323, I. P. C.,) read with S. 149, I. P. C. He convicted them under those Sections but considering that they were persons who might properly be dealt with under S. 582, Criminal P. C., he submitted the case to the Sub-Divisional Magistrate under the provisions of S. 562 (1) proviso. The learned First Class Magistrate dealing with the case under the provisions of S. 380, Criminal P. C., convicted all the 24 accused of rioting (S. 147, I. P. C.) and sentenced them for that offence to pay a fine of Rs. 20 each and accused 6 and 24 be convicted also under S. 355, I. P. C., and sentenced them to pay a fine of Rs. 25 each for that offence. The learned Sub-Divisional Magistrate did not say what he proposed to do with regard to the other convictions which had already been recorded by the Sub-Magistrate. But that is a matter which is not before us now and we do not propose to interfere with it.

The appeal presented to the learned Sessions Judge was on behalf of accused 23 only. He had been convicted only of rioting (S. 147, I. P. C.,) and sentenced to pay a fine of Rs. 20. Under S. 413, Criminal P. C., accused 23 would ordinarily have no right of appeal but the appeal was filed on his behalf under the provisions of S. 415-A. It was alleged that accused 6 and 24 having been sentenced to pay two fines of Rs. 20 and Rs. 25 had a right of appeal under S. 415-A and therefore accused 23 having been convicted at the same trial had also a right of appeal. The learned Sessions Judge has held that none of the 24 accused had any right of appeal in this case. He therefore rejected the appeal referring accused 23 to an application for revision to this Court if so advised. Accused 23 has applied for revision of the order of the learned Sessions Judge. The only authority of this Court quoted by learned counsel for the petitioner is the decision of King J., in 1936 M W N 213.[1] That was a case in which on a summary trial a First Class Bench of Magistrates had sentenced one of several persons convicted under the Gaming Act to pay a fine of Rs. 25 for an offence under S. 9 and a fine of Rs. 50 for an offence under S. 8. The persons convicted appealed to the Sessions Judge, and he held that an appeal lay. The learned Public

---

[1] Public Prosecutor, Madras v. Kollur Dasa Pai, (1936) M W N 213.

Prosecutor filed a revision petition against that decision and King J. held that the learned Sessions Judge's decision was correct. With respect we think that the decision of King J. in that case was wrong. The matter depends upon the interpretation of S. 415, Criminal P. C., which says:

> An appeal may be brought against any sentence referred to in S. 413 or S. 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

It is contended on behalf of the petitioner that the learned Subdivisional Magistrate when he imposed upon accused 6 and 24 two fines of Rs. 20 and Rs. 25 respectively was passing a sentence combining two of the punishments referred to in S. 413. Now S. 413 is as follows:

> Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the First Class passes a sentence of fine not exceeding Rupees 50 only.

There are two punishments here mentioned (1) imprisonment and (2) fine. But it is pointed out that in S. 415 there is a reference to "any two or more" of the punishments mentioned in S. 413 or S. 414 and since in S. 413 there are only two kinds of punishments mentioned and in S. 414 there is one kind of punishment mentioned, namely the punishment of fine, it is argued that if there are two or more sentences of fine this must be regarded as a sentence combining two of the punishments mentioned in S. 413 or S. 414. We are unable to accept this argument. We are of opinion that S. 415 when it refers to two or more punishments is referring to two or more punishments of different kinds. The history of the Code is we think important in this connexion and makes the matter clear. When S. 415 was just enacted there were three kinds of punishments provided in both Ss. 413 and 414, namely in S. 413 a sentence of imprisonment not exceeding one month only, fine not exceeding Rs. 50 only or whipping only and in S. 414 a sentence of imprisonment not exceeding three months only, fine not exceeding two hundred rupees only or whipping only. In those circumstances although it might possibly be argued that S. 415 was to some extent superfluous, it could not be argued that it had no meaning. It was clear that it meant to refer to sentences in which two or more different kinds of punishments referred to in S. 413 and S. 414 were combined. After the modifications in S. 413 and S. 414 introduced in 1923 it is impossible to attribute any real meaning to the phrase "any two or more of the punishments therein mentioned" in S. 415 so far as it relates at any rate to S. 414. It is clear, we think, as Edgley J. stated in 43 C W N 360[2] that S. 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. Learned counsel for the petitioner has relied upon two decisions of the Oudh Chief Court reported in 7 Luck 501[3] and 13 Luck 618[4] and also upon the decision of Cuming J. in the case reported in 59 Cal 19.[5] With respect we are not able to agree with those decisions. We prefer the opinion of Mitter J. in the case reported in 59 Cal 1131[6] and the view of the learned Chief Justice of Bombay and Crump J. in the case reported in A I R 1926 Bom 416.[7] Our decision can be rested upon the words of S. 415 itself. It is not possible in this case to say that the learned Subdivisional Magistrate has passed any sentence by which any two or more of the punishments mentioned in S. 413 are combined. The learned Subdivisional Magistrate did not combine any of the punishments in either of the sentences that he imposed. He imposed two separate sentences of fine. There is no combination of punishments in one sentence within the meaning of S. 415, Criminal P. C. We think therefore that the learned Sessions Judge was correct and that this application for revision must be dismissed.

Learned counsel for the petitioner has attempted to persuade us to interfere in revision finally against the order of the learned Subdivisional Magistrate. That is not the prayer in the petition which is for revision of the order passed by the learned Sessions Judge. But in so far as this is concerned we observe that the grounds taken for saying that the learned Subdivisional Magistrate was wrong in convicting accused 23 (present petitioner) are all grounds of fact and not connected with any question of law. Learned counsel points out that the Sub-Magistrate who tried the case recommended that all the accused should be dealt with under S. 562, Criminal P. C. But the learned Subdivisional Magistrate has given reasons for not dealing with them under that Section and we do not think that there are sufficient grounds for interfering with the exercise of his discretion. We cannot interfere with the conviction on the facts. Accused 23 was convicted of rioting and let off with a fine of Rs. 20 which cannot be said to be excessive. This petition is dismissed therefore.

---

[2] Kali Charan v. Adhar Mandal, (1939) 26 A I R Cal 274=182 I C 258=40 Cr L J 652=I L R (1939) 1 Cal 325=43 C W N 360.

[3] Kandhai v. Emperor, (1932) 19 A I R Oudh 27 =1932 Cr C 59 = 136 I C 248=33 Cr L J 278 =7 Luck 501=8 O W N 1373.

[4] Markand Singh v. Ganga, (1937) 24 A I R Oudh 524=171 I C 337=38 Cr L J 1062=13 Luck 618 =1937 O W N 1088.

[5] Akbbar Ali v. Emperor, (1931) 18 A I R Cal 642=1931 Cr C 842=134 I C 1196=33 Cr L J 90=59 Cal 19=35 C W N 752.

[6] Nawabali Haji v. Joinab Bibi, (1932) 19 A I R Cal 551 = 1932 Cr C 551 = 138 I C 720 = 33 Cr L J 704=59 Cal 1131=36 C W N 407.

[7] Shidlingappa v. Emperor, (1926) 13 A I R Bom 416=96 I C 270=27 Cr L J 926=28 Bom L R 668.

C.R.K./N.K. *Petition dismissed.*

* * A. I. R. 1940 Madras 113

FULL BENCH

LEACH C. J., PANDRANG ROW, ABDUR RAHMAN, KRISHNASWAMI AYYANGAR AND PATANJALI SASTRI JJ.

C. R. Ramaswami Ayyangar (Minor) — Petitioner.

v.

C. S. Rangachariar and others — Respondents.

Civil Revn. Petn. No. 267 of 1936, Decided on 6th October 1939.

(a) Court-fees Act (1870), S. 7 (v)—Applicability — Partition suit — S. 7 (v) applies only where plaintiff is out of possession and not when he is in joint possession.

Section 7 (v) cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. A joint owner who is in possession does not need to sue for possession. He has possession and the fact that his possession is shared by others does not affect the position. S. 7 (v) applies only where the plaintiff is seeking relief in respect of possession of immovable property when he is out of possession: *33 Bom 658, Not followed.* [P 117 C 1]

*** (b) Court-fees Act (1870), S. 7 (iv) (b) and Sch. 2, Art. 17 (vi) — Partition suit by member in joint possession of family property—S. 7 (iv) (b) does not apply—Suit falls within Art. 17 (vi): *21 M L J 21=8 I C 512 (F B), Overruled.***

The language of S. 7 (iv) (b) is incompatible with a claim for partition when the plaintiff is in joint possession with other members of his family. A suit to enforce a right to share in any property on the ground that it is joint family property is a suit of a different nature from a suit to enforce the right to a share. Where the claim is to share, it implies that the plaintiff is not in possession; where as a suit to obtain possession of a share is compatible with the plaintiff being in joint possession of the whole. [P 117 C 1,2]

The words of Sec. 7 (iv) (b) according to their ordinary meaning cannot apply to a suit for partition by a member of a joint family who is still in joint possession. The only provision in the Court-fees Act which is applicable is Art. 17 (vi), Sch. 2 (Art. 17-B of Sch. 2, Madras Amendment) : *Case law discussed ; A I R 1920 Mad 585, Rel. on ; 21 MLJ 21=8 I C 512 (F B)*, **Overruled.** [P 117 C 2]

(c) Court-fees—Partition—Suit against father —Son challenging transactions entered into by father as manager — Plaintiff cannot evade court-fee by omitting to ask for relief — Court must look at the real nature of suit and decide reliefs claimed and assess court-fee accordingly.

Where a minor in a suit for partition against his father challenges the validity of transactions entered into by his father as manager of the family, he must pay court-fees in accordance with the relief which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for. [P 117 C 2; P 118 C 1]

Therefore where the plaintiff in effect asks in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the properties alienated he must pay court-fee in respect of such transactions in accordance with the provisions of S. 7 (v), Court-fees Act. [P 118 C 1]

(d) Court-fees Act (1870), S. 7 (iv-A) (Madras Amendment)—Partition suit — Minor suing for partition and cancellation of simple money decrees passed against him in suits in which he was eo nomine impleaded as party—In respect of such decrees court-fee must be paid as prescribed by S. 7 (iv-A).

Where a minor sues for partition of joint family property and cancellation of simple money decrees passed against him in suits in which he had been eo nomine impleaded as a party, he must pay the fee prescribed by Sec. 7 (iv-A) in respect of such decrees. Such decrees bind him until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or a junior member of the family, as the considerations which apply to the decree of a competent Court once it is passed, are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for cancellation of the decrees passed against him and must accordingly stamp his plaint ad valorem on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. [P 118 C 1]

*** * (e) Court-fees — Partition — Minor — Suit against father — Challenging alienations to which minor was not eo nomine a party—Plaint for partition need not contain prayer for declaration or cancellation and hence additional court-fee need not be paid — Fact that alienees and creditors have also been impleaded as parties to suit is immaterial.**

(Per *Full Bench.*) — In respect of alienations by father to which the minor was not eo nomine a party and which are challenged by him in the suit for partition against his father, the plaint need not contain a prayer for a declaration or cancellation, as the prayer is for a purely incidental but unnecessary relief. When there is no such prayer there is no justification for implying them and then demanding a fee for it. There is no force in the argument that the position is altered by the joinder in the suit of the parties to the transactions who are interested in supporting them. Whether they are before the Court or not, the Court is bound as between the members of the family to decide which are the debts binding on the family, before directing division. [P 118 C 1, 2]

The presence of the third parties would no doubt invest the decision with a finality, but this cannot be regarded as a ground for reading into the plaint a prayer which the member suing is not obliged to seek under the law in the face of the provision in O. 1, R. 10 (2), Civil P. C. By impleading several creditors, the plaintiff cannot be deemed to have asked for declarations in respect of each of the transactions impugned, and therefore no separate court-fee as regards each one of them need be paid. [P 119 C 1]

(Per *Abdur Rahman J. dissenting.*)—Where in a suit for partition against father, the minor challenges the transactions or decrees to which he was not eo nomine a party, the minor can ask for a partition of the property without having any regard to such alienations and can insist that no funds need be reserved at the time of partition for payment to such decree-holders, if the plaintiff does not implead the alienees or creditors in the suit and does not ask for a decree for accounts. If the plaintiff wants the Court to go into these questions and prays for a relief which must in the circumstances be taken to be tantamount to asking for an adjudication of the questions relating to his liability for the decrees passed against his father or to the binding nature of the alienations of family property, there is no reason why the plaintiff should not pay the court-fee with regard to them. [P 123 C 1, 2]

(f) Court-fees — Receiver — Interim — Son challenging transactions by father as manager —Application for appointment of receiver— Separate court-fee not necessary.

Where a minor in a partition suit against his father challenges transactions entered into by the father as manager of the family and prays for the appointment of a receiver he need not pay separate court-fee in respect of that prayer as the relief is entirely of an interlocutory character. [P 119 C 1]

V. V. Srinivasa Ayyangar, S. Ramanujachariar and V. R. Venugopalan — *for Petitioner*.

Govternment Pleader, T. S. Venkatarama Iyer, K. R. Rangaswami Ayyangar, R. Rajagopala Ayyangar, S. Venkatesan and R. Viswanathan — *for Respdts.*

ORDER OF REFERENCE

Abdur Rahman J. — One of the points raised in this case is whether Art. 17-B of Sch. II or S. 7 (iv) (b), Court-fees Act, applies. In 21 M L J 21,[1] a Full Bench of this Court held (one Judge dissenting) that S. 7 (iv) (b) applies. There have been decisions on this question in other High Courts and there is a divergence of opinion. The other questions involved in the present case are also of importance and in order that the questions may be definitely settled so far as this Court is concerned we consider that the case should be placed before a Bench of five Judges.

JUDGMENT

Leach C. J. — This petition raises important questions with regard to the stamping of plaints in suits for the partition of estates of joint Hindu families. The petitioner is the minor son of a Hindu father. Through his mother as next friend he has filed a suit in the Court of the Subordinate Judge of Kumbakonam for partition of the family properties and for possession of his one-fifth share therein. He has joined as defendant his father, his three brothers, and twenty-two other persons. The stranger defendants are made parties either as alienees of family properties or as creditors of the family. In his plaint, the plaintiff avers that the family is one engaged merely in agriculture and that before the matters complained of, it had large cash resources. He alleges that his father has engaged in reckless speculation in land, in trade, and in litigation with the result that the cash resources have disappeared, the family properties have been sold or mortgaged and numerous debts contracted. The plaintiff says that his father's transactions are not binding on the family, but he has not in terms asked for the setting aside of the alienations of family properties or for declarations that his father's other transactions are unenforceable against the estate. His prayers are for (i) an account of the moveable and immovable joint family properties, (ii) the partition by metes and bounds of his one-fifth share, (iii) the appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (iv) the costs of the suit and (v) such further and necessary reliefs as in the circumstances may be considered necessary and proper. He values his share of the family properties at Rs. 40,000 but has merely stamped his plaint with a court-fee of Rs. 100 under Art. 17-B of Sch. II, Court-fees Act, as amended in Madras.

On the filing of the plaint the Subordinate Judge called for a statement of the transactions which the plaintiff says are invalid as against the family and a statement was submitted. From this statement and the order of the Subordinate Judge with which this petition is concerned the following particulars have been extracted:

---

[1] **Rangiah Chetty v. Subramania Chetty, (1911) 21 M L J 21=8 I C 512 (F B).**

Item No.	Nature of alienation or debt.	Amount Rupees	In whose favour	Person or persons alleged to have entered into the transaction or have been held liable.
1	Simple mortgage dated 15-11-1932.	45,000	Defendant 5	Defendant 1 for himself and as manager of the joint family.
2	Simple mortgage dated 7-3-1934.	7600	Defendants 6 and 7	Defendant 1
3	Simple mortgage dated 13-3-1934.	3297	Defendant 8	Do.
4	(a) Usufructuary mortgage dated 28-12-1933.	8800	Defendant 9	Do.
	(b) Sale in Court auction in O. S. No. 15 of 1933, Sub-Court, Kumbakonam.	...	Defendant 9	(not stated).
5	Promissory note, dated 14-3-1933.	4000	Defendant 10	Defendants 1 and 26
6	Charge decree debt in O. S. No. 39 of 1926 on the file of the Subordinate Judge's Court, Kumbakonam.	26,000	Defendant 11	Defendant 1
7	Simple money decree debt in S. C. No. 211 of Subordinate Judge's Court.	600	Defendant 12	(not stated).
8	Simple money decree debt in O. S. 42/33 on the file of the Subordinate Judge's Court, Kumbakonam.	3000	Defendant 13	Defendant 1
9	Simple money decree debt in O. S. 23/33, Mayavaram Subordinate Judge's Court.	6343-7-8	Defendant 14	Defendants 1 to 4 and plaintiff.
10	Simple money decree debt in O. S. 10/33, Mayavaram Subordinate Judge's Court.	6000	Defendant 15	Do.
11	Sale dated 29th July 1934.	18,879-5-8	Defendant 18	Defendant 1
12	Simple money decree debt on the file of the Subordinate Judge's Court, Kumbakonam, O. S. 15/33.	9000	Defendant 19	Do.
13	Decree in O. S. 298/34, on the file of the District Munsif's Court of Valangiman.	3680	Defendant 20	(not stated).
14	Sale.	750	Defendant 21	Defendant 1
15	Simple money decree in S. C. 400/33 of the Subordinate Judge's Court, Kumbakonam.	675	Defendant 22	Do.
16	(a) Simple mortgage.	5600	Defendant 23	Defendant 1 as manager.
	(b) Simple money decree debt in S. C. 375/33 on the file of the Subordinate Judge's Court, Kumbakonam.	978	...	Defendant 1
17	Simple money decree debt in S. C. 814/33 on the file of the Subordinate Judge's Court, Kumbakonam.	246	Defendant 24	Defendant 1
18	Simple money decree debt in O. S. 66/33 on the file of the Subordinate Judge's Court, Kumbakonam.	5513-8-5	Defendant 25	Defendants 1 to 4
19	Simple money debt.	400	Defendant 26	(not stated).

It does not appear from the statement nor from the order of the Subordinate Judge why defendants 16 and 17 are made parties, though in the plaint it has been alleged that they are among the persons from whom defendant 1 has borrowed. The Subordinate Judge has held that as the plaintiff himself is "constructively" a party to the mortgage for Rs. 45,000 he must pay in respect of this matter a court-fee in accordance with the ad valorem scale specified in Art. 1 of Sch. 1, Court-fees Act. He has also held that the plaintiff is constructively a party to the transactions which are items 9, 10, 11, 13, 16 (a) and 18 in the above table and has directed the plaintiff to pay a court-fee in respect of these items also on the ad valorem scale. In the Subordinate Judge's opinion, the plaintiff is not even constructively a party to the other transactions, but he has held that he should pay under Art. 17-A (1) of Sch. 2 a court-fee of Rs. 100 in respect of each "for the relief of declaration." The Subordinate Judge has also called upon the plaintiff to pay a court-fee of Rs. 100 under Art. 17-B of Sch. 2 because he has asked for the appointment of a receiver. The total amount payable by way of court-fees under this order is Rupees 6324-9-0. The plaintiff contends that as he has not expressly asked for relief in respect of the transactions which he challenges he can only be called upon to pay a court-fee of Rs. 100 under the provisions of Art. 17-B of Sch. 2 in respect of his prayer to be put in possession of his share in the estate.

Section 17, Court-fees Act, provides that where a suit embraces two or more distinct subjects the plaint shall be chargeable with the aggregate amount of the fees to which the plaint in suits embracing separately each of such subjects would be liable under the Act. Before discussing the question of the stamping of the plaint in respect of the transactions which the plaintiff challenges it is necessary to decide under which provision of the Act the plaint requires to be stamped in respect of the general relief for partition and delivery to the plaintiff of his share. The plaintiff's contention that Art. 17-B of Sch. 2 applies here is contrary to the majority decision of the Full Bench of this Court (White, C. J., Krishnaswami Ayyar and Ayling JJ.) in 21 M L J 21.[1] It was there held by White C. J. and Krishnaswami Ayyar J. that a suit for partition of joint family property where the plaintiff is in joint possession with the other coparceners is governed by Sec. 7, cl. (iv) (b) and that therefore the plaint in such a suit should be stamped ad valorem on the amount at which the relief sought is valued. Ayling, J. dissented and held that the case fell within Art. 17 (vi) of Sch. 2 which is now Art. 17-B, Madras Court-fees (Amendment) Act, 1922. The latter Act made extensive amendments in the Court-fees Act of 1870 in certain other respects. The opinion of White, C. J. and Krishnaswami Ayyar, J. is not shared by any other Indian High Court. The Calcutta High Court has applied Art. 17 (vi) of Sch. 2: *see* 8 Cal 757,[2] 6 C L J 651,[3] 52 Cal 128[4] and 59 Cal 315.[5] The Allahabad and the Lahore High Courts are of the same opinion: *see* 34 All 184[6] and 15 Lah 531.[7] The Bombay High Court has held that even where the plaintiff is in joint possession of the family property the provisions of Sec. 7 (v) should be applied: 18 Bom 209[8] and 33 Bom 658.[9] It is true that in 22 Bom 315,[10] S. 7 (iv) (b) was applied, but in 33 Bom 658[9] an attempt was made to distinguish the former decision and it cannot be regarded as representing the Bombay view. The question having been raised we must consider whether 21 M L J 21[1] was correctly decided.

Section 7 (iv) (b) says that suits to enforce the right to share in any property on the ground that it is joint family property shall be stamped according to the amount at which the relief sought is valued in the plaint. The reasons for the majority view in 21 M L J 21[1] are to be found in the judgment of Krishnaswami Ayyar J. in which White C. J. concurred. The reasons given by Krishnaswami Ayyar J. can be shortly stated in this way. It would not be likely that the Legislature in enacting a measure with regard to court-fees would have omitted to make specific provision for such a common form of suit as a suit for partition by a member of a joint Hindu family and the Privy Council had applied a clause similarly worded in the Limitation Act of 1859 to such suits. The clause referred to in that Act is cl. 13 of S. 1, which fixed a period of 12 years for suits to enforce the right to share in any property moveable or immovable on the ground that it is joint family property. Ayling J. agreed with the opinion expressed in 33 Bom 658[9] that a suit to recover by partition a definite and ascertained share of a specified property could not fall under S. 7 (iv) (b), but he did not accept the Bombay view that Sec. 7 (v) was the appropriate Section. He accepted the decision in 8 Cal 757[2] as embodying the correct view. In that case Garth C. J. observed that it was impossible to say what would be the value to the plaintiff of the change in the nature of his property. A partition suit changes the form of enjoyment of the property. Instead of an undivided share the plaintiff claims a divided share. Ayling J. agreed that it was impossible to estimate in money the value of such a suit. In this connexion it may be mentioned that in 43 Mad 396,[11] Wallis C. J. and Sadasiva Iyer J., held that a suit for partition of immovable property by a person who alleged that he was in possession of it as co-tenant on behalf of himself and others was governed by Article 17 (vi) of Sch. 2 (now Art. 17-B) because the value of the subject-matter was not capable of valuation.

---

[2] Kirty Churn v. Aunath Nath Deb, (1882) 8 Cal 757=11 C L R 95.

[3] Bidhata Rai v. Ram Chariter Rai, (1907) 6 C L J 651=12 C W N 37.

[4] Rajani Kanta v. Rajabala Dasi, (1925) 12 AIR Cal 320=85 IC 870=52 Cal 128=29 CWN 76.

[5] Nandalal Mukherjee v. Kalipada Mukherjee, (1932) 19 A I R Cal 227=136 I C 600=59 Cal 315=35 C W N 942.

[6] Tarachand Mukherjee v. Afzal Beg, (1912) 34 All 184=13 I C 185=8 A L J 1329.

[7] Asa Ram v. Jagannath, (1934) 21 A I R Lah 563 = 150 I C 994 = 15 Lah 531=36 P L R 48 (F B).

[8] Balwant Ganesh v. Nana Chintamon, (1894) 18 Bom 209.

[9] Dagdu v. Totaram, (1909) 33 Bom 658=4 I C 243=11 Bom L R 1074.

[10] Motibhai v. Haridas, (1898) 22 Bom 315.

The Bombay High Court stands alone in its application of S. 7 (v). That Section says that in suits for the possession of land, houses and gardens the stamp fee shall be paid according to the value of the subject-matter, and states how that value shall be arrived at. In my opinion, this sub-section cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. A joint owner who is in possession does not need to sue for possession. He has possession and the fact that his possession is shared by others does not affect the position. I consider that S. 7 (v) can only apply where the plaintiff is seeking relief in respect of possession of immovable property when he is out of possession. If S. 7 (v) is ruled out the only other provisions of the Court-fees Act which call for consideration are S. 7 (iv) (b) and Art. 17-B of Sch. 2. The language of S. 7 (iv) (b) is, however, incompatible with a claim for partition when the plaintiff is in joint possession with the other members of his family. A suit to enforce a right to share in any property on the ground that it is joint family property is a suit of a different nature from a suit to enforce the right to a share. Where the claim is to share, it implies that the plaintiff is not in possession; whereas a suit to obtain possession of a share is compatible with the plaintiff being in joint possession of the whole.

With regard to the reasoning of Krishnaswami Ayyar J., based on Sec. 1, cl. 13, Limitation Act of 1859, it falls to be observed that the wording of this clause was changed by the Limitation Act of 1871 and that the change has been maintained in the Acts of 1877 and 1908. The corresponding Article to S. 1, cl. 13 of the Act of 1859 in the two later Acts is Art. 127, which provides a period of limitation of 12 years in respect of a suit by a person excluded from joint family property to enforce a right to share therein. The Article now clearly only refers to a suit by a person who is excluded from joint family property. Krishnaswami Ayyar J. did not think that this amendment made any difference in the interpretation of the Article, but, in my opinion, the alteration of the wording certainly robbed the argument of any force it might have had. As altered, its applicability is expressly limited to a case where the member suing is not in joint possession. If the words of S. 7 (iv) (b) are to be given their ordinary meaning they cannot apply to a suit for partition by a member of a joint family who is still in joint possession. It follows that I consider that the majority decision in 21 M L J 21[1] is erroneous and should be overruled. In these circumstances the only provision in the Court-fees Act which is applicable is Art. 17-B of Sch. 2 and in stamping his general relief under this provision the plaintiff has acted rightly.

I am unable to accept the plaintiff's contention that he should not be called upon to pay court-fees in respect of any of the transactions which he challenges because he has not asked for specific relief in respect of them. His plaint challenges the validity of transactions entered into by his father as manager of the family, and particulars of these transactions have been supplied. The plaintiff must pay court-fees in accordance with the relief which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for. In this case he is asking for possession of his share in the estate to be calculated after certain transactions have been set aside. Mr. V. V. Srinivasa Iyengar has rightly conceded that if it is necessary for the plaintiff to ask for relief in respect of any of the transactions he must pay extra court-fee. The plaintiff is in effect asking in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the properties alienated. In respect of these transactions the plaintiff clearly has to stamp his relief in accordance with the provisions of S. 7 (v). This will apply to items 4, 11 and 14 of the table set out above.

---

[11] Gill v. Varadaraghavayya, (1920) 7 A I R Mad 585=55 I C 517=43 Mad 396=38 M L J 92.

In respect of decrees passed against him in suits in which he had been eo nomine impleaded as a party, it is plain that he must pay the fee prescribed by S. 7 (iv-A). Such decrees bind him until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or merely a junior member of the family, as the considerations which apply to the decree of a competent Court, once it is passed, are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint ad valorem on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. These remarks apply to items 9 and 10 in the table. The other transactions of defendant 1, whether the plaintiff is made a party thereto or not, stand on a different footing. He is not bound under the substantive law by which he is governed, to sue for a declaration or cancellation in respect of any of them. The legal position has been correctly explained in 14 Mad 26[12] at p. 28 in the following words which were taken from an unreported decision of this Court :

> If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist.

The same principle has been distinctly laid down by the Privy Council in 34 Cal 329[13] at p. 333, where their Lordships point out the jural basis underlying such transactions. In that case the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limited by Art. 91, Limitation Act, was fatal to the suit. The following observations which are equally applicable to a father or manager of a joint family are apposite :

> A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not therefore absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the ijara or any derivative dealing with the property were not in fact voidable, but were binding on the reversionary heirs.

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental but unnecessary relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained, there is no justification for implying them and then demanding a fee for it. Nor can I see any force in the argument that the position is altered by the joinder in the suit of the parties to the transactions who are interested in supporting them. Whether they are before the Court or not, the Court is bound as between the members of the family to decide which are the debts binding on the family before directing a division: *vide* 50 Mad 535[14] and

---

[12] Unni v. Kunchi Amma, (1891) 14 Mad 26.

[13] Bijoy Gopal v. Krishna Mahishi Debi, (1907) 34 Cal 329 = 34 I A 87 = 5 C L J 334 = 11 C W N 424 (P C).

[14] Venkureddi v. Venku Reddi, (1927) 14 A I R Mad 471=50 Mad 535 = 52 M L J 387 (F B).

17 Lah 644.[15] The presence of the third parties would no doubt invest the decision with a finality, but this is scarcely a ground for reading into the plaint a prayer which the member suing is not obliged to seek under the law in the face of the provision in O. 1, R. 10 (2), Civil P. C., which permits the name of any person to be included in a suit whose presence before the Court would enable it effectually and completely to adjudicate upon and settle all questions involved in the suit. I am unable therefore to appreciate the argument that by reason of his impleading the several creditors, the plaintiff must be deemed to have asked for declarations in respect of each of the transactions impugned, and must pay a separate court-fee as regards each one of them.

It follows that in my opinion the plaintiff cannot be called upon to pay any additional court-fee in respect of the transactions challenged other than the transactions described in items 4, 9, 10, 11 and 14. It will be for the respective defendants to establish their right to rank as creditors in the other transactions when the account is taken. Neither the plaintiff be called upon to pay a separate court-fee in respect of his prayer for the appointment of a receiver. This relief is entirely of an interlocutory character. The record will be remitted to the trial Court and the plaintiff will be given an opportunity of stamping his plaint in accordance with this judgment. Notice of this petition was served on the Government Pleader but as the plaintiff has succeeded in part, there will be no order as to costs.

Pandrang Row J. — I agree with my Lord.

Krishnaswami Ayyangar J. — I concur in the opinion expressed by my Lord the Chief Justice.

Patanjali Sastri J. — I concur in the judgment just delivered by my Lord the Chief Justice.

Abdur Rahman J. — I agree with my Lord the Chief Justice in regard to the conclusions at which he has arrived on the various questions involved in this revision except on one and would therefore give my reasons.

Three divergent views have been expressed by different High Courts in regard to the court-fee to be put on a plaint for partition of joint family properties where the plaintiff happens to be in joint possession of the same with his coparceners. The Calcutta and Allahabad High Courts have consistently taken the view that the fee in such a case would have to be fixed under Art. 17 (vi) of Sch. 2 to the Court-fees Act: *vide* 8 Cal 757,[2] 6 C L J 651,[3] 52 Cal 128,[4] 59 Cal 315[5] and 34 All 184.[6] The Lahore High Court was taking a different view before but has in a recent Full Bench case decided, to fall in with the view of the Calcutta and the Allahabad Courts: *vide* 15 Lah 531.[7] The Bombay High Court has been, except in one case, 22 Bom 315,[10] of opinion that inasmuch as a suit for partition involves a claim for possession it should be governed by Sec. 7 (v) of the Act. The view adopted in this Presidency after the Full Bench decision in 21 M L J 21[1] has been that the fee was to be paid in accordance with the rule contained in S. 7 (iv) (b) of the Act. In view of this conflict of judicial opinion, I referred the revision raising this and three other questions when it came up before me for an authoritative decision by a larger Bench. It was placed before a Full Bench which decided to place this and other questions for a decision by five Judges and this Bench was constituted in consequence.

The questions which arise for determination in this revision are: (a) what is the requisite fee payable in cases where a plaintiff asks for partition of family property of which he is or claims to be in joint possession? (b) What would be the court-fee payable in respect of a property which a plaintiff has included in his suit for partition but which property has been alienated by a manager of the family and its possession has passed out of the family? (c) Whether it is incumbent upon the plaintiff, if he wishes to get rid of any decrees or alienations to which he was eo nomine a party, to sue for their cancellation. If so, what fee would he be liable to pay for that relief? (d) Was it essential for the plaintiff to sue for a declaration or cancellation in regard to transactions (decrees or alienations) to which he had not been made a party? Or in other words, would he be justified in ignoring these transactions altogether and claiming partition although he impleads the decree-holder or the alienee, thus desiring to have a final adjudication as between him and them in regard to the binding character of the decrees or alienations? If he is not justified in ignoring these transactions and is bound to ask for a relief, what should he sue for and what is the requisite fee for that relief ?

---

[15] Sat Narain v. Sri Kishen Das, (1936) 23 A I R P C 277=164 I C 6=17 Lah 644=63 I A 384 (P C).

As to the first question, it was conceded by the learned Judges of this Court whose decision prevailed in the Full Bench case, 21 M L J 21,[1] that the subject-matter in dispute, which was nothing but a convenience sought by the plaintiff in the form of his enjoyment, was not capable of being estimated at a money value. They however declined to apply the provisions of Art. 17 (vi) to a suit of this nature as they found the second condition necessary for its application to be wanting. They felt that S. 7 (iv) (b) in terms applied to a suit for partition even when the plaintiff claimed to be in joint possession of the family property and since the provisions of Art. 17 (vi) could not be attracted as long as a provision could be found in the Act for a suit of this kind, they held the above stated Article to be inapplicable. There is no doubt that if S. 7 (iv) (b) applied to a suit of this nature, Art. 17 (vi) would have no application. But the question is if S. 7 (iv) (b) is applicable. It reads as follows : "To enforce the right to share in any property on the ground that it is joint family property." It has to be admitted that the language of this clause is clumsy and has now been repealed in Bengal where a new Section has been enacted in its place which provides a fixed fee in suits for partition where the plaintiff is in joint possession of property. The same course has not been adopted in other Provinces, although in the interests of the litigant public it might have been properly so. Since the old Section of the Act still exists on the statute book, we have to determine if this clause was rightly applied by the learned Judges of the Madras High Court to this class of cases. It might be stated at the outset that this sub-section is apparently applicable to persons who own joint family property in the sense in which that expression is used in the Hindu law and could not be applied to persons who are merely tenants-in-common. The only Lahore case which was brought to our notice in which the present Section was extended to Mahomedans has been dissented from by a Full Bench of that Court : *vide* 15 Lah 531.[7]

As for the words used in S. 7 (iv) (b), ordinarily the expression "to enforce the right to share" would convey the meaning that the plaintiff wanted to enforce a right which he had been deprived from sharing and not that he wished to exercise a right which had been enjoying although in a different form or manner. I am not at present considering cases where a person has not been permitted to enjoy even joint rights in the family property, or in other words where he has been ousted from joint enjoyment of the property, but only those in which he had been enjoying and in regard to which he wished to seek a partition, that is to say, where he wished to enjoy his specific share in the property separately after severing his rights from those of the other members of the coparcenary or joint family as the case may be. In the latter type of cases, the plaintiff can only be said to have asked for a change in the mode of enjoyment and it would not be, to my mind, quite correct to say that in seeking this changed mode of enjoyment he was trying to enforce a right to share a joint property, a right which he had been enjoying heretobefore without any hindrance by the other members. If a plaintiff has been in joint enjoyment and he does not wish to continue to enjoy the property in that manner, all that he need ask for is, not possession which is already with him, but partition, a relief for which no provision has been specifically made in the Court-fees Act. The language of the Section, if construed grammatically, does not help us in arriving at the result that the provisions of the sub-section were meant to cover cases of partition at the instance of a person who had been in joint enjoyment of the family property. Let me then examine the reasons given by the learned Judges in the Full Bench decision, 21 M L J 21,[1] for coming to the conclusion that this Section was applicable in regard to suits of the nature mentioned therein. The first reason given by them was that the language of the Section if it was not construed in the manner suggested, would lead to the startling result that while provision in regard to, what they call, rare cases, (i. e. cases where coparceners bring suits for joint possession after being excluded from the enjoyment of or for participation in the profits of the joint property) might be found to have been contained in this sub-section, no provision for common cases, i. e. suits for partition by coparceners in possession, would be found to have been made at all. This reasoning would not, with great deference to the learned Judges, justify us in bringing cases within the scope of this subsection if they would not otherwise fall within it. Where has the very common case of a suit for partition of property owned jointly by a tenant-in-common been, one might well ask, provided under the Act? Is there any reason to hold that while cases of partition by tenants-in-common of property which cannot fall within the expression 'joint family property' should be held to fall under Art. 17 (vi) of Sch. 2 to the Act, suits for partition by joint tenants should be deemed to come under this clause? I find none for drawing this distinction.

The second reason given by the learned Judges was drawn by an analogy from the construction placed on similar words by their Lordships of the Judicial Committee and by the High Courts in India occurring in Art. 127, Limitation Acts of 1871, 1877 and 1908 or its corresponding provision in the earlier Limitation Act of 1859 : *see* 6 Bom 741;[16] 10 Bom 24;[17] 11 Cal 777[18] and 14 Cal 493.[19] The words of that Article in Col. 1 in the present Limitation Act and in its predecessor (Act 15 of 1877) read as follows : "By a person excluded from joint family property to enforce a right to share therein."

It is manifest from the language that this Article was meant to apply to a person who was excluded from the joint family property. The same language was employed in Act 9 of 1871 with the difference that the "Hindu" was used instead of the word 'person'. This would be of no consequence. In all these Acts of Limitation the period of limitation was to begin from the date when the exclusion became known to the plaintiff. As for Act 14 of 1859, Sec. 1, cl. 13 contained a provision for suits "to enforce the right to share in any property, moveable or immovable, on the ground that it is joint family property." The period prescribed was twelve years and it was to run from the death of the person from whom the property alleged to be joint was said to have descended or from the date of the last payment to the plaintiff or any person through whom he claimed by the person who was in possession or enjoyment of such property on the ground of such alleged share. It would thus be seen that it applied only to persons who were not in joint enjoyment of the property which was claimed to have descended to them from the deceased or to those who did not get their shares of income from the persons who were actually in possession. The provisions contained in the various Limitation Acts were thus not applicable to persons who were in joint enjoyment of the property but to those only who had been excluded from its enjoyment either actually or by non-payment of any income on account of their share. There would have been no difficulty if, in applying the analogy of the construction placed on the words of the Limitation Acts to the language employed in Sec. 7 (iv) (b), Court-fees Act, the same assumption of exclusion could be made here as well; but unfortunately it is not so. It was taken to cover cases where the plaintiff had been in the joint enjoyment of family property. If an excluded person wishes to enforce his right against a person in possession, he would necessarily have to establish it before he can be permitted to enforce it and in attempting to enforce his right to share a property, when the right is one of joint enjoyment, he must confine his claims to share its enjoyment and cannot ask for its actual participation by getting a share or a slice out of the joint property. It would therefore seem to follow that the demand for a share was not contemplated or in any case covered by this sub-section.

These were the only two reasons given by the learned Judges in coming to the conclusion that S. 7 (iv) (b) applied to a suit for partition by a member of a joint Hindu family in respect of property of which he had been in joint possession with the other members. The other reasons given by them were advanced really to repel the arguments put before them to show that the Section was inapplicable. Stress was laid by the counsel who appeared in the case on the facts that the clause uses the verb "to share" and not the noun "share" and on the use of the words "on the ground that it is joint family property." They were repelled by Krishnaswami Ayyar J. who wrote the leading judgment in the Full Bench case, on the ground that the use of the verb instead of the noun was justified as "until partition no member of a joint Hindu family is entitled to a definite portion of the family estate." As for the use of the expression, "on the ground that it is joint family property," it was met by saying that the words could not be construed to mean "on the ground that it is property of a continuing joint family."

It may be true that if a person has not communicated his intention to sever himself from a joint Hindu family before he files a suit for partition he would be a member of a joint Hindu family at the time when the suit is instituted. But the moment the plaint is actually presented by him or on his behalf a disruption of the joint family comes into effect and what the plaintiff would be entitled to, and that is plainly the object of his suit which is one for partition, is a share in the joint family property. He cannot, after a severance has taken place, ask to share the joint family property but only for a share in that property. It goes without saying that as soon as a severance in status takes place in the eye of law, the property does not retain the character, which it had before partition, of joint family property. Hence in a suit for partition the property, although undivided, cannot continue to be described to be that of a joint family. It would be thus clear that in a suit for partition — whatever be the plaintiff's status before suit — his share must be held to be definite after its institution and he must be held to be claiming a share in the property which was once joint family property and not to share the property on the ground that it is joint family property. I am therefore of opinion that S. 7 (iv) (b) could not be held to apply to a suit for partition instituted by a member of a joint Hindu family against the other members when the former was in joint enjoyment of the property.

---

[16] **Hari v. Maruti, (1882) 6 Bom 741.**

[17] **Nilo Ramachandra v. Govind Ballal, (1886) 10 Bom 24.**

[18] **Raghunath Bali v. Maharaja Bali, (1885) 11 Cal 777=12 I A 112=4 Sar 642 (P C).**

[19] **Pirthi Pal v. Jowahir Singh, (1887) 14 Cal 493=14 I A 37=4 Sar 758 (P C).**

The question then is whether S. 7 (v) as held by the Bombay High Court in 18 Bom 209[8] and 33 Bom 658[9] is applicable to the facts of this case. The facts have not been very closely stated in these cases and it is not possible to say whether the plaintiffs were in joint possession of the property on the dates on which those suits were instituted. If they were in possession or claimed to be so we would have to say, with very great respect to the learned Judges who decided those cases, that sufficient weight was not given by them to that fact. If a plaintiff is required in cases where he has been in joint enjoyment of property to pay court-fee as he would be when suing for possession, it would follow that his joint possession of the property which he has had at the time of the suit has been wholly ignored and at all events regarded of no consequence or value. If the view was taken in cases even when the plaintiff was in joint enjoyment, it cannot be supported. If the plaintiffs were on the other hand out of possession on the date on which they had filed these suits, they were rightly required to pay a court-fee under S. 7 (v).

Section 7 (iv) (b) and S. 7 (v) have been found to be inapplicable. There is no other provision in the Court-fees Act which would cover suits of this nature. If the convenience which the plaintiff desires in having his share partitioned is incapable of being estimated at a money value, as it undoubtedly is, the only Article applicable to a suit of this kind would be Art. 17 (vi) or Art. 17-B as enacted in Madras. The second question presents no difficulty. If the plaintiff was not in possession, either actual or constructive, of the property at the time when he instituted the suit, the provisions contained in S. 7 (v), Court-fees Act, would apply and he would have to pay court-fee in accordance with rules contained therein. Of course, it is the allegation of the plaintiff himself which is material in this respect. But the plaintiff on his own showing was not in possession of some of the properties such as these which were sold or given under a usufructuary mortgage.

As for the third question a perusal of the plaint would show that the plaintiff, after referring to a large number of transactions in paras. 6, 7 and 8 of the plaint and after alleging that the debts contracted by defendant 1, who was the plaintiff's father, were wholly for speculative objects and that the family enjoyed no benefit at all from the debts borrowed by him, asserted in para. 13 of the plaint that the alienations made by him in favour of defendants were null and void and did not bind the plaintiff's share in the joint family property. The plaintiff was ordered by the trial Court to furnish a statement of the various transactions which he wished to impugn and this was submitted to him.

A perusal of this statement shows that he has impugned decrees for money to which he was a party and certain alienations of joint property some of which have passed out of family's possession. It has not been shown in this statement whether the mortgages executed by defendant 1 as a father or manager of the family describe the plaintiff eo nomine to be a party to those documents. But the lower Court holds that he was made a party to some of them. The mortgagees, the decree-holders and the creditors have been impleaded as parties to the suit and although the plaintiff has asked for no specific relief and has contented himself with the prayer that an account of the moveable and immovable joint family properties be taken, yet it is obvious that if the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for, the plaintiff must be, in formulating his relief in that manner, taken to have asked for the questions of the binding nature of these alienations, decrees and debts to be adjudicated finally in this suit. If the plaintiff was eo nomine a party to the decrees as he is shown to be or any of the mortgages it would be incumbent upon him to ask the Court to go into the question whether they were binding on him. Unless that is done, the Court would be fully justified in assuming a decree to have been rightly passed against the plaintiff or an alienation to have been prima facie properly effected on his behalf by his father. I am not concerned just now with any question of burden of proof and consider it to be irrelevant for this purpose. If the plaintiff wishes to get rid of the decrees or alienations to which he was made a party, he must ask for a specific relief in regard to these transactions. The question then is as to what that relief should be. Not only has a cancellation of the whole of the decree or document been provided for in S. 7 (iv-A) (Madras Amendment) of the Court-fees Act but the Amendment covers cases where a plaintiff wishes to have a part of the decree or other document cancelled. In the presence of this provision, it is impossible to come to any conclusion other than that the plaintiff must sue in such cases for cancellation and pay a court-fee in accordance with the rule contained in Sec. 7 (iv-A), Court-fees Act.

The last question to be decided is in respect of transactions or decrees to which the plaintiff was not eo nomine a party. It has been argued and not without some force that the plaintiff may well ignore decrees passed against or instrument executed by a member of the family even though that member be his own father and manager of joint family and that he could ask for a partition of the property without having any regard to such alienations and could insist that no funds need be reserved at the time of partition for payment to such decree-holders. The argument would have been unassailable if the plaintiff had not impleaded such alienees or creditors in the suit and had not asked for a decree for accounts. The course adopted by him suggests that he wanted the Court to go into these questions and adjudicate on them once and for all. If the plaintiff desired the Court to go into these questions and prayed for a relief which must in the circumstances be taken to be as tantamount to asking for an adjudication of the questions relating to his liability for the decrees passed against his father or to the binding nature of the alienation of family property, there is no reason why he—the plaintiff should not pay a court-fee in regard to them. He may not have been liable to pay any court-fee if such an objection was raised by one of the defendants and the Court had impleaded a creditor or an alienee at the defendant's suggestion and had gone into that question or even when he, i. e. the plaintiff himself, had impugned a debt or a transaction, but had not impleaded the creditor or the alienee. These can be explained however on different grounds. In the first case, the plaintiff cannot be held liable to pay as the matter would have to be gone into at the instance of the defendant and in the second case, the matter would be decided as between the parties to the partition suit only. Naturally, the alienee or the creditor would not be bound by that decision in that case and cannot take advantage of it even if it is settled in his favour although in his absence. In such cases the plaintiff cannot be said to have asked for any final adjudication of these questions except for purposes of partition and is not liable to pay the court-fee for anything else except for that suit. But when he does ask for this adjudication either expressly or in such a manner that he must be deemed to have asked for these questions to be gone into and finally decided, there is no reason why he should not be required to pay for the relief which he has asked to be given to him. The plaintiff's allegations that the alienations or debts were not binding on him made against the parties whom he had impleaded as defendants can only be attributed to his desire to have final adjudication of these questions as between him and them.

In view of these assertions, his prayer for accounts must be taken to be equivalent of a prayer for declaration that these debts and alienations were not binding on the plaintiff. A prayer for declaration cannot be, and I say so with great deference, regarded under the circumstances either superfluous or even ancillary. A suit for partition in which the plaintiff wants an adjudication against a creditor or an alienee comprises two causes of actions and although permitted by procedure to be included in one suit, it covers two distinct subject-matters, both of which should be paid for. The fact that two periods of limitation are applicable to these causes of action would show that both of them are not only separate but independent. It is unnecessary to say what the result would have been if no such prayer had been made by him at all in the plaint although it is quite possible to conceive that in the absence of an express prayer by him, he might have been taken to have done so and the court-fee demanded as if that prayer had been made by him. In the circumstances of this case he should in my opinion be asked to pay court-fee as for simple declarations under Art. 17-A (1). The prayer for partition cannot in my opinion be considered to be one for consequential relief as the relief for partition cannot be said to directly flow from the declaration although it may be that in the event of such a declaration being granted his share may be augmented to a certain extent. It must not be overlooked that the plaintiff's prayer for the declaration is against the creditors or the alienees while the relief for partition is being asked for by the plaintiff not against them, i. e. the creditors or the alienees, but against his cosharers.

C.R.K./G.N. *Petition partly allowed.*

A. I. R. 1940 Madras 124

FULL BENCH

LEACH C. J. KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Ramasubramanya Pattar — Appellant.

v.

Karimbil Pati and others—Respondents.

Second Appeal No. 149 of 1936, Decided on 20th October 1939, against decree of District Court, South Kanara, in A. S. No. 327 of 1934.

(a) Civil P. C. (1908), O. 20, R. 12 — Interpretation — Application for ascertainment of mesne profits is not necessary—But if made it is not governed by Art. 181, Limitation Act : *71 M L J 388 = A I R 1936 Mad 801 = 164 I C 670, Overruled.*

Rule 12 does not contemplate an application being made for the ascertainment of mesne profits and if an application is made it is not an application governed by Art. 181, Limitation Act, as it cannot be regarded as an application in execution, but as a part of the suit itself. The fact that the decree-holder thinks it advisable to move the Court to commence the inquiry does not mean that he is making an application within the purview of Article 181. Whenever he moves the Court, the Court is bound by the rule to inquire and grant the decree-holder a final decree. In such cases the application is merely in the nature of a reminder of what is still to be done: *Case law relied on ; 71 M L J 388=A I R 1936 Mad 801 = 164 I C 670,* **Overruled ;** *A I R 1928 Mad 522, Not approved.* [P 126 C 1]

(b) Civil P. C. (1908), O. 20, R. 12 (3) (Madras) — Direction in R. 12 (3) does not apply where Appellate Court conducts inquiry by itself—Application under R. 12 (3) does not fall within Art. 181, Limitation Act.

The words in O. 20, R. 12 (3) "in every case the Court of first instance shall, on the application of the decree-holder inquire and pass a final decree" are necessarily subject to this limitation, namely that the direction cannot obviously apply in a case where the Appellate Court has decided to conduct the inquiry itself because sub-rule (3) does not say that the Appellate Court shall remand, but it says it may do so. [P 126 C 1, 2]

The application under R. 12 (3) does not fall within the meaning of Article 181, Limitation Act, and is only a motion entirely free from the mischief of Article 181. [P 126 C 2]

(c) Civil P. C. (1908), O. 20, R. 12 (3) (Madras)—Procedure—Appellate Court directing Court of first instance to inquire into mesne profits—Court of first instance should fix date for appearance of parties after receipt of record —If decree-holder fails to appear Court should not pass final decree but adjourn matter sine die.

Where the Appellate Court directs the Court of first instance to make an inquiry into mesne profits the proper course for the Court of first instance to adopt on receipt of the record from the Appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree but should adjourn the matter sine die : *A I R 1924 P C 198, Rel. on.* [P 126 C 2; P 127 C 1]

P. Govinda Menon — *for Appellant.*

K. Vittal Rao — *for Respondents.*

Leach C. J. — In 1926 the respondents filed a suit in the Court of the District Munsif of Kasargod for the recovery of possession of several items of immovable property and for the payment of mesne profits. By a decree dated 2nd December 1927 the District Munsif dismissed the suit. An appeal was then filed to the Court of the District Judge of South Kanara. The District Judge held that the respondents were entitled to recover possession of one of the items of property. In respect of that item he directed the trial Court to hold an inquiry as to past and future mesne profits and to pass a decree accordingly. The order of the District Judge was passed on 6th November 1930. On 30th March 1934 the respondents applied to the trial Court to ascertain the mesne profits from 31st October 1925, the date on which the appellant became possessed of the property, to 23rd May 1932, when he surrendered possession to the respondents in pursuance of the decree of the District Court. The District Munsif held an inquiry and found that there was due to the respondents Rs. 1173-4-7, which he directed the appellant to pay to them. The appellant filed an appeal before the District Judge and urged that the application was barred under Art. 181 of Sch. 2, Limitation Act. The District Judge rejected the contention raised by the appellant that the application was barred by the law of limitation. The contention was that inasmuch as more than three years had elapsed between the date of the District Court's decree and the date of the filing of the application, Art. 181, Limitation Act, applied. The District Munsif's finding on the amount of mesne profits was confirmed and the appeal dismissed. This second appeal is the result and it has been placed before this Full Bench as there is a conflict of authority. O. 20, R. 12 as it appears in the Code of Civil Procedure reads as follows:

> (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree
>
> (a) for the possession of the property;
>
> (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
>
> (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
>
> (i) the delivery of possession to the decree-holder,
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court,
>
> or (iii) the expiration of three years from the date of the decree, whichever event first occurs.
>
> (2) Where an inquiry is directed under cl. (b) or cl. (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

In 1911 this Court added to R. 12 a third sub-rule which is in these terms:

> Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass the final decree.

It is said that as the result of the addition of sub-rule (3) it is now obligatory on a decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, and that Art. 181, Limitation Act, requires such an application to be made within three years of the preliminary decree.

In 54 M L J 665,[1] Jackson and Srinivasa Ayyangar JJ. expressed divergent opinions on this question. The facts there were these. A decree for possession with mesne profits was passed on 3rd February 1919 by an Appellate Court. On 30th November 1921, the plaintiff applied to the trial Court for an order determining the mesne profits. He paid batta, but service of the notice was not effected, and, on his failure to pay additional batta, the application was dismissed. On 6th December 1922, more than three years after the date of the Appellate Court's decree, he applied again for an inquiry into the question of the amount of the mesne profits. Jackson J., was of the opinion that the application of 6th December 1922 was an application within the scope of Art. 181, Limitation Act, and having been filed three years after the decree, was time-barred, but he considered that the plaintiff could rely on his application of 30th November 1921, on the ground that the Court should not have dismissed that application unless in doing so it expressly stated that it was acting in accordance with the inherent powers reserved by Sec. 151, Civil P. C. Srinivasa Ayyangar J., agreed that the application was not barred by the law of limitation, but based his decision on firmer ground, namely, that the suit must be regarded as pending until a final decree was passed. He considered that the rule-making authority intended by adding sub-rule (3) to Rule 12 that the inquiry should always be ordered on the application of the decree-holder for the ascertainment of mesne profits, but he was not satisfied that the language of the sub-rule was sufficiently apt for that purpose. In other words as the rule stood an application could be made for the ascertainment of mesne profits at any time before the passing of the final decree, because the suit was pending until a final decree was passed.

In 71 M L J 388[2] Beasley C. J. and Stodart J. accepted the opinion expressed by Jackson J. in 54 M L J 665[1] that where an application is filed for the ascertainment of mesne profits it falls within Art. 181 of Limitation Act. Beasley C. J. and Stodart J. delivered separate judgments and although in the judgment of the learned Chief Justice no reference is made to the question, inasmuch as in his judgment Stodart J. said "we are clearly of opinion that Art. 181 applies" it must be taken that the learned Chief Justice concurred in the decision of Stodart J. on the point.

---

[1] Timmaraju v. Narasimharaju, (1928) 15 A I R Mad 522=109 I C 528=54 M L J 665.

[2] Rama Rao v. Sreeramamurthi, (1936) 23 A I R Mad 801=164 I C 670=71 M L J 388.

In the course of the arguments in the present case the Court has been informed that no other High Court has made the addition which this Court has made to R. 12. The High Courts which have considered the question of the wording of R. 12 as it stands in the Code have decided that the rule does not contemplate an application being made for the ascertainment of mesne profits and if an application is made it is not an application governed by Art. 181 as it cannot be regarded as an application in execution, but as a part of the suit itself : *see* 4 Pat 57,[3] 5 Pat 223,[4] 8 Pat 482,[5] 52 Bom 360[6] and 32 All L J 86.[7] It has not been suggested that these decisions have misconstrued R. 12 as it stands in the Code, nor could it with reason be suggested. Rule 12 unamended provides that where an order is passed directing an inquiry as to mesne profits a final decree shall be passed in accordance with the result of such inquiry. The fact that the decree-holder thinks it advisable to move the Court to commence the inquiry does not mean that he is making an application within the purview of Art. 181. Whenever, he moves the Court the Court is bound by the rule to inquire and grant the decree-holder a final decree. In such circumstances the application is merely in the nature of a reminder of what is still to be done.

Now does the addition of sub-r. (3) make any difference ? For the appellant it is said that the words "in every case the Court of first instance shall on the application of the decree-holder inquire and pass a final decree" have the effect of making an application necessary even where there has been no appeal. This direction obviously cannot apply in a case where the Appellate Court has decided to conduct the inquiry itself. Sub-rule (3) does not say that the Appellate Court shall remand the case to the trial Court; it says that it may do so. It may very well be that the Appellate Court considers that the inquiry should take place under its own immediate supervision and if it does so obviously an application to the Court of first instance for an inquiry and the passing of a final decree will not lie. The words "and in every case the Court of first instance shall on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, irrespective of any other limitation.

I cannot be persuaded to think that in adding this clause the rule making authority had in mind an application falling within Art. 181. In the first place, it would be contrary to the provisions of sub-r. (2). In the second place, it would put the litigant who is successful in the Appellate Court in a worse position than a successful litigant in the Court of first instance. Srinivasa Ayyangar J. in 54 M L J 665[1] thought that the rule-making authority had in mind an application to which Art. 181 applied, though as the result of the use of inappropriate words it had not carried its intention into effect. The intention must be gathered from the words used, and reading R. 12 as it stands amended it seems to me that the intention was to obviate the necessity of the decree-holder having to move the Appellate Court to pass a final decree after an inquiry into mesne profits made by the Court of first instance at the direction of the Appellate Court. Certainly sub-rule (3) might have been more happily expressed, but I am not prepared to read the word "application" as meaning an application falling within Art. 181. Before the addition to the rule was made a person who obtained a preliminary decree, whether in the trial Court or on appeal, had the right to a final decree on mesne profits being ascertained, irrespective of time. To take away a right the words used for the purpose must leave no doubt as to the intention. That is certainly not the case here, and I consider that the word "application" in sub-r. (3) should be read as meaning a motion entirely free from the mischief of Art. 181.

On an Appellate Court directing a Court of first instance to make an inquiry into mesne profits the proper course for the Court of first instance to adopt on receipt of the record from the Appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree, but should adjourn the matter sine die, a course

---

3. Harakhpan Missir v. Jagdeo Missir, (1924) 11 AIR Pat 781=84 I C 272=4 Pat 57= 5 PLT 626.
4. Bhatu Ram Modi v. Fogal Ram, (1926) 13 AIR Pat 141=92 I C 629=5 Pat 223=7 PLT 340.
5. Kamakhya Narayan Singh v. Akloo Singh, (1929) 16 A I R Pat 368=117 I C 647=8 Pat 482=10 P L T 762.
6. Shanker Appaji v. Gangaram Bapuji, (1928) 15 AIR Bom 236=109 IC 734=52 Bom 360=30 Bom L R 503.
7. Narain Das v. Bhagwati Prasad, (1934) 21 AIR All 465=151 I C 755=(1934) 32 ALJ 86.

which the Privy Council approved of in 4 Pat 61.[8] In that case the Patna High Court on appeal made an order for a partition upon certain terms and remitted the case to the Court below for disposal under the decree. The plaintiff did not appear on the date fixed by the Subordinate Judge and the suit was dismissed. Their Lordships pointed out that the plaintiff was put into an intolerable position, not being able to go on with his suit and yet not in a position to bring a fresh suit. Their Lordships were fully sensible of the necessity of leaving Judges in India with ample power of discipline, and means to check neglect and delay, but they said that a proper order in a case like the one before them would be an order adjourning the proceedings sine die with liberty to the plaintiff to restore the suit to the list on payment of all costs and court-fees (if any) thrown away. I do not read sub-r. (3) as an attempt to place a suit in which there has been a decree for possession with mesne profits to be ascertained on a different basis. At the same time I consider that the attention of the Rule Committee should be called to sub-r. (3) with a view to its being framed in a manner which will leave no scope for any misunderstanding. The appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[8] Lachmi Narain Marwari v. Balmukund Marwari, (1924) 11 A I R PC 198=81 I C 747=4 Pat 61=51 I A 321 (P C).

---

* A. I. R. 1940 Madras 127

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMMAYYA JJ.

Paladugu Veera Ramachandra Rao — Appellant.

v.

Paladugu Parasuramayya and another — Respondents.

Appeal No. 135 of 1937, Decided on 3rd November 1939, against appellate order of Dist. Court, Guntur, D/- 9th February 1936.

***(a) Civil P. C. (1908), S. 48—Starting point — Amendment of decree—S. 48 is not affected by Art. 182, Limitation Act—Limitation under S. 48 runs from date of original decree and not from date of amendment — Execution after 12 years from date of original decree is barred, amendment or no amendment.**

Under cl. 4 of Art. 182, Limitation Act, the period of limitation where the decree has been amended is three years from the date of the amendment, but the Article is expressly limited to applications for execution not provided for by Art. 183 or by S. 48, Civil P. C. Inasmuch as Art. 182 clearly leaves the provisions of S. 48 untouched there can be no execution of a decree governed by S. 48 when 12 years have passed from the date of the decree, amendment or no amendment. There is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152, Civil P. C. But because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred : *A I R 1932 All 351, Foll.; A I R 1918 Bom 217; A I R 1925 Lah 292 and AIR 1939 Pat 607, Rel. on.* [P 128 C 1, 2]

(b) Interpretation of Statutes—Language clear —Effect must be given to it even if anomaly arises (Per *Krishnaswami Ayyangar J.*)

Where the language of a statute is clear, the Court cannot refuse to give effect to it on the consideration that by so doing an anomaly is introduced. The remedy for such anomaly is in the hands of the Legislature. [P 129 C 2]

V. Parthasarathy and P. Satyanarayana Rao — *for Appellant.*

A. Lakshmayya — *for Respondents.*

Leach C. J.—This appeal raises a question of limitation. On 9th March 1922 respondent 1 obtained in the Court of the Subordinate Judge of Bezwada a money decree against the appellant, the appellant's uncle and a cousin, who were the members of an undivided family. The amount for which judgment was obtained was Rs. 3735 but a mistake was made in drawing up the decree and the figure inserted was Rs. 2200. It was not until 16th July 1928 that the mistake was corrected under the provisions of S. 152, Civil P. C. On 6th December 1933 the respondent caused the decree to be transferred to the Court of the Subordinate Judge of Guntur for execution and on 5th March 1934 he applied for attachment of certain immovable property. The appellant objected to the attachment on the ground that the property was his personal property and the decree had only made him liable to the extent of his interest in the family property. This objection was well founded and the attachment was raised. On 12th November 1935 the respondent filed another application for execution. Here he asked for the attachment of two decrees, one obtained by the appellant alone and the other in conjunction with his cousin. It was contended that the application was barred by the law of limitation and the contention was upheld by the Subordinate Judge. An appeal followed to the District Judge of Guntur who held that the decree was barred so far as it related to the sum of Rs. 2200 but it was enforceable to the extent of Rs. 1535, the difference between the Rs. 2200 and Rs. 3755, the figure which was inserted in the decree as the result of the amendment.

It is obvious that the District Judge's decision was wrong in allowing execution of part of the decree. The respondent must be entitled to the full amount, if entitled to anything. When the provisions of Sec. 48, Civil P. C. and Art. 182, Limitation Act, are considered it, however becomes manifest that the Subordinate Judge was right in holding that the decree was time-barred. S. 48 (1), Civil P. C., reads as follows:

> Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

Therefore a decree which has been passed for more than 12 years cannot be executed, but where the decree or an order passed subsequent to the decree directs payment of money or the delivery of property to be made at a certain date or at recurring periods the date of the default in such a case shall be the starting point for the period of 12 years. O. 20, R. 7 provides that the decree shall bear the date of the judgment. Sub-s. (2) of S. 48 says:

> Nothing in this Section shall be deemed (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application; or (b) to limit or otherwise affect the operation of Art. 180 of Sch. 2, Limitation Act, 1877.

The corresponding Article in the present Limitation Act is Art. 182. Now, turning to cl. (4) of that Article we find that the period of limitation where a decree has been amended is three years from the date of the amendment, but the Article is expressly limited to applications for execution not provided for by Art. 183 or by S. 48, Civil P. C. Art. 183 refers to applications to enforce judgments of High Courts and it has no bearing here. Inasmuch as Art. 182 clearly leaves the provisions of S. 48 untouched there can be no execution of a decree governed by S. 48 when 12 years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152 of the Code. But because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred.

The question under consideration has been the subject of decisions by the Bombay, Allahabad, Lahore and Patna High Courts and they have all agreed that an amendment of a decree to bring it in accordance with the judgment does not have the effect of starting a fresh period of limitation. *See* 42 Bom 309;[1] 54 All 622;[2] A I R 1935 Lah 292[3] and 18 Pat 395.[4] In 54 All 622[2] the Allahabad High Court observed:

> Now no change was made in S. 48, Civil P. C., providing for the extension of the period of 12 years in that Section from the date of the amendment of a decree. We consider that the Legislature advisedly omitted that provision for extension from S. 48, and that the omission was not accidental. In our opinion the effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by S. 48, that is, that the period of 12 years under S. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of 12 years, or whether that amendment is made after the expiry of the period of 12 years. The reason why no amendment was made in S. 48 is that probably the greater period of 12 years is allowed by that Section, and it is probably the intention of the Legislature that that period of 12 years should be final, and that within that period a decree-holder should amend his decree, and obtain all consequent remedies. If a decree-holder neglects to amend his decree within a sufficient period before the expiry of 12 years to allow him to obtain his remedy by execution, then he has only himself to blame.

I agree entirely with what is said here. In an unreported case of this Court (C. M. A. No. 264 of 1931) Madhavan Nair and Cornish JJ. without giving any reasons, held that the period of limitation should be calculated from the date of the amendment of the decree. As their decision runs contrary to the plain wording of S. 48, Civil P. C., and Art. 182, Limitation Act, it cannot be allowed to stand. The learned advo-

---

1. Narasinga Rao v. Bando Krishna Kulkarni, (1918) 5 A I R Bom 217=46 I C 107=42 Bom 309=20 Bom L R 481.
2. Fakir Chand v. Kundan Singh, (1932) 19 A I R All 351=138 I C 93=54 All 622=1932 A L J 471.
3. Ganesh Das v. Vishnu Das, (1935) 22 A I R Lah 292.
4. Mt. Dulhin v. Harihar Gir, (1939) 26 A I R Pat 607=18 Pat 395=20 P L T 932.

cate for the respondent has argued that S. 48, Civil P. C., is not in all cases final and has drawn attention to the provisions of S. 15, Limitation Act, but all that need be said is that S. 48 is final unless there is some statutory provision which governs it in a particular case, and that is not the position here. S. 48 applies in the present case and as more than twelve years had elapsed before the last application for execution was made the decree had become time-barred. The appeal will be allowed and the judgment of the Subordinate Judge restored. The appellant is entitled to his costs in this Court and in the District Court. A memorandum of cross-objections filed by the respondent does not call for consideration and will be dismissed without costs.

Krishnaswami Ayyangar J.—I am of the same opinion. Indeed, there is no escape from it when the language of S. 48, Civil P. C., is read in the light of the provisions of Art. 182, Limitation Act. The words used in col. 1 of that Article make it clear that the Legislature did not intend to interfere in any way with the limit of time fixed by S. 48. The Code of Civil Procedure and the Limitation Act were enacted at the same time and a comparison of the provisions of the two statutes makes it abundantly clear that there is an intimate relationship between the two. In the Limitation Act of 1908 a new provision was inserted to fix the point of time from which the period of limitation under Art. 182 has to be calculated where the decree is amended; cl. (4) was added to the Article, so as to make it clear in such a case that it is the date of the amendment from which limitation will run. While the case of an amendment is thus met and provided for by Art. 182, Limitation Act, it is significant that the language of S. 48, Civil P. C., has been left unaltered. It is therefore a fair inference that the period of twelve years should be counted from the date of the decree irrespective of any amendment that it might have undergone since. The date of the amendment does not therefore furnish a fresh starting point under S. 48, Civil P. C., and must accordingly be ignored in making the calculation.

It was suggested on behalf of the respondent that the fact that there is no period of time limited for an application for an amendment under Sec. 152 introduces an anomaly. It was said that a Court may grant and may be obliged to grant an amendment even after the period of twelve years fixed by S. 48, Civil P. C., and where an amendment is so granted the order would be rendered futile and barren unless S. 48 is understood as permitting the twelve years' period to be calculated from the date of the amendment. This may be an anomaly but the remedy is in the hands of the Legislature. When the language of the statute is clear we cannot refuse to give effect to it on a consideration of this kind.

Somayya J.—I agree with my Lord the Chief Justice.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 129

WADSWORTH J.

Vallabhaneni Parandamayya — Appellant.

v.

Kosaraju Surayya — Respondent.

Appeal No. 60 of 1937, Decided on 24th August 1939, against order of Dist. Court, Guntur, D/- 21st September 1936.

Provincial Insolvency Act (1920), S. 37—Judgment-debtor adjudicated insolvent pending attachment of his property — Order of dismissal of pending execution would not automatically raise attachment — Attachment is ineffective so long as it is in hands of receiver —When adjudication is annulled property vests in judgment-debtor subject to attachment.

Where in execution of a decree the property of the judgment-debtor is attached and while that attachment is pending, the judgment-debtor is adjudged insolvent, the order of adjudication merely makes the attachment ineffective so long as the property is in the hands of the receiver. The order of dismissal of the pending execution petition would not automatically raise the attachment. When the adjudication is annulled, the property will revest in the judgment-debtor with all the burdens which existed upon it at the time of adjudication. Hence, the attachment that was pending at the time of adjudication will still be existing: *A I R 1918 All 402; A I R 1918 All 324 and A I R 1922 Mad 189, Expl.* [P 130 C 2]

K. Kameswara Rao — *for Appellant.*

A. Lakshmayya — *for Respondent.*

Judgment. — The appellant is a judgment-debtor and appeals against an order permitting execution without any fresh attachment, the learned District Judge having held that an attachment before judgment did not come to an end by the adjudication of the judgment-debtor as an insolvent which was subsequently annulled. In 1930 a decree was obtained against the appellant and there was an attachment before judgment which was enforced in an execution petition of 1931. Just before the date to which the sale was posted, the judgment-debtor was adjudged an insolvent and on this fact being intimated to the executing Court the order passed was, "judgment-debtor is adjudged insolvent. Sale stopped. Dismissed." The last word is not very clearly decipherable, but I accept the interpretation of the learned District Munsif's handwriting which has appeared correct to the Courts below. On 16th August 1934 the adjudication was annulled. On 4th January 1935 the decree-holder having died, his legal representative filed a fresh execution petition No. 76 of 1935 praying for recognition of the applicant as the legal representative of the decree-holder and for sale of the properties by virtue of a subsisting attachment before judgment. The District Munsif held that there was no attachment. On appeal the learned District Judge came to the contrary conclusion. To my mind the learned District Judge's decision is correct.

My attention has been drawn to three decisions, 40 All 197,[1] 40 All 86[2] and 69 I C 326,[3] all of which really do nothing more than point out that the practical effect of an adjudication is to put an end to an attachment. These decisions do not purport to lay down as a proposition of law that an adjudication automatically raises an attachment so that there will be no attachment subsisting if and when the adjudication is annulled. An attachment may be raised either by the completion of the sale with a view to which the attachment has been imposed, or by an express order raising the attachment, or by the operation of O. 21, R. 57, Civil P. C., whereunder when an execution petition is dismissed for the decree-holder's default, the attachment shall cease. Now, though the learned District Munsif on being informed of the insolvency erroneously passed an order dismissing the execution petition which was then pending, instead of staying the proceedings as he should have done with reference to S. 29, Provincial Insolvency Act, it cannot, I think, be said that this order of dismissal was an order of dismissal for default of the petitioner. Whatever be the legal effect of this dismissal, it will not have the effect of automatically terminating the attachment as would be the case had it been a dismissal under O. 21, R. 57. It is true that when there is an adjudication of the judgment-debtor the attachment will not operate to prevent the Official Receiver from realizing the property attached and selling it for the purpose of satisfying the creditors. Nor will it operate against any transferee from the Official Receiver who acquires an interest in the process of realization. But I see no reason why we should read into the Insolvency Act a provision which is not there, to the effect that on adjudication all attachments shall be raised. There is no reason why an attachment should not notionally continue subject to the superior power of the Official Receiver to ignore the attachment for the purpose of realising the assets of the judgment-debtor and distributing the proceeds to his creditors.

In a case such as the present when there is an attachment at the time of the adjudication and the insolvency is not prosecuted with the result that an order of annulment is passed, the effect of the order of annulment will be that which is laid down in S. 37, Provincial Insolvency Act. That is to say subject to any changes in the title to the property due to the acts of the Court or the receiver, the property will revert to the debtor to the extent of his right or interest therein or such conditions as the Court may declare. There is nothing in S. 37 to justify the conclusion that the order of annulment will enlarge the right of the debtor in the property as compared with the right as it subsisted on the date of the adjudication. To my mind, the natural conclusion is that on annulment, subject to the special contingencies contemplated in S. 37, the property will go back to the debtor with any burdens which existed upon it at the time of the adjudication. I have held that the order of dismissal of the pending execution petition did not automatically raise the attachment. There is no order subsequently raising the attachment. The order of adjudication to my mind merely makes the attachment ineffective so long as the property is in the hands of the receiver. When the adjudication is annulled, the property will re-vest in the debtor to the extent to which he had a right therein at the time of the adjudication. At that time his right was clearly subject to the attachment and I am of opinion that his interest in the property is still bound by the attachment on the date of the annulment. To hold otherwise would be to allow a fraudulent judgment-debtor to go through the pretence of insolvency and take advantage of the order of annulment resulting from his own default, to make alienations before the creditor has time to levy a fresh attachment. In the result therefore the appeal is dismissed with costs. Leave to appeal is refused.

---

[1] Govind Das v. Karan Singh, (1918) 5 A I R All 402=43 I C 672=40 All 197=16 A L J 32.

[2] Dambar Singh v. Munwar Ali Khan, (1918) 5 A I R All 324=43 I C 129=40 All 86=15 A L J 877.

[3] Balakrishna Menon v. Rangan Pattar, (1922) 9 A I R Mad 189=69 I C 326=45 Mad 70=41 M L J 334.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 131

PANDRANG ROW AND ABDUR RAHMAN JJ.

Jami Venkatappadu and others — Petitioners.

v.

Kannepalli Ramamurthi and others — Respondents.

Civil Revn. Petns. Nos. 224, 225, 226, 227, 228, 372, 373, 374, 375 and 588 of 1939, Decided on 20th September 1939, to revise order of Sub-Judge, Berhampore, D/- 4th July 1938.

Government of India (Constitution of Orissa) Order (1936), S. 20—Notification No. F-210 of 1936, Judicial, dated 1st April 1936—Execution petition pending on 1st April 1936 in Berhampore Court — It has jurisdiction to entertain petitions under Secs. 19 and 20, Madras Agriculturists' Relief Act.

The petitions under S. 19 as well as under S. 20, Madras Agriculturists' Relief Act, must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within the matters covered by S. 47, Civil P. C. Where execution petition was pending on 1st April 1936 in the Berhampore Sub-Court, the Berhampore Sub-Court is perfectly competent to go on with it as if the Order in Council constituting the Orissa Province has not been made. It has therefore jurisdiction to entertain applications under Ss. 19 and 20, Madras Agriculturist Relief Act. [P 132 C 2]

Sir A. Krishnaswami Iyer (Advocate-General), B. V. Ramanarasu and P. S. Raghavarama Sastry—*for Petitioners*.

T. R. Venkatarama Sastry and B. Jagannadha Dass — *for Respondents*.

Pandrang Row J. — These are revision petitions from the orders of the Subordinate Judge of Berhampore and of the Subordinate Judge of Chicacole on certain applications presented by the judgment-debtors under Ss. 19 and 20, Madras Agriculturists Relief Act, the judgment-debtors being the defendants in a mortgage suit instituted in 1929 in the Sub-Court at Berhampore in which the final decree was passed on 9th March 1933. The application for execution was made in August 1934 (E. P. No. 79 of 1934) and it was during the pendency of this application for execution that Orissa was constituted into a separate Province. The execution proceedings continued to be carried on in the Berhampore Sub-Court and some of the mortgaged properties, all of which have been since the formation of the Orissa Province come within the jurisdiction of the Sub-Court at Chicacole in this Presidency, were sold on 26th July 1937 and they were purchased by the decree-holders themselves after they had obtained permission to bid and to set off the sale price against the decree amount. The sale however was not confirmed because on 24th August 1937, i. e. within a month after the sale, an application was made by the judgment-debtors under O. 21, R. 90, Civil P. C., to set aside the sale and the inquiry into that petition was not completed till 2nd April 1938 on which date the judgment-debtors presented petitions under Sec. 20, Madras Agriculturists' Relief Act, praying for stay of execution. Petitions under S. 19 of the Act were presented in the same Court, i. e. the Berhampore Sub-Court, on 6th May 1938. Similar petitions under Sec. 19 of the Act were also presented by the judgment-debtors in the Chicacole Sub-Court on 14th April 1938 on the ground that the mortgaged properties were situate within the jurisdiction of that Court.

It would thus appear that the judgment-debtors were prosecuting the same remedy so far as the remedy given by S. 19 of the Act was concerned in two Courts at the same time. On 4th July 1938 an interim order was made by the Sub-Judge of Berhampore on the petitions for stay under S. 20 of the Act. It is that order which is sought to be revised by the decree-holders in C. R. P.s Nos. 224 to 228. On 5th November 1938 the Berhampore Sub-Court made an order directing the petitioners, that is to say the judgment-debtors, to elect between the two Courts, namely the Berhampore Sub-Court and the Chicacole Sub-Court and prosecute their remedy only in one of these two Courts. As this was not done by the petitioners, the Berhampore Sub-Court dismissed the petitions under Sec. 19 for non-prosecution on 13th December 1938. It is from this order that C. R. P.s Nos. 373 and 375 have been presented. It may be mentioned in this connexion that the applications under Sec. 20 of the Act were dismissed by the Berhampore Sub-Court on 23rd January 1939. C. R. P.s Nos. 372 and 374 are petitions to revise this order.

There was an order made by the Chicacole Sub-Court on the petitions presented to it under Sec. 19 of the Act to the effect that it had jurisdiction to deal with them. This order happens to have been made on the same date as the order of the Berhampore Sub-Court dismissing the similar petitions under Sec. 19 and C. R. P. No. 588 is the petition to revise this order of the Chicacole Sub-Court dated 13th December 1938 presented by the decree-holders. It was conceded by the learned Advocate-General who appeared for the petitioners in C. R. P.s Nos. 372 to 375 of 1939 that so far as the petitions under S. 20, Madras Agriculturists' Relief Act, were concerned, it was the Berhampore Court alone which had jurisdiction, as that was the Court which passed the decree and was actually executing the decree at the time. On the other side, Mr. Venkatarama Sastriar also agrees that the Berhampore Sub-Court had jurisdiction to deal with the petitions under S. 20 of the Act. So far therefore there is agreement, but as regards the petitions under S. 19 of the Act, it is contended by the learned Advocate-General that it was the Chicacole Court alone that had jurisdiction. His alternative contention however is that if the Chicacole Court had no jurisdiction, then the Berhampore Sub-Court which must have jurisdiction was not right in dismissing the petitions on the alleged ground of non-prosecution, in the circumstances which appear on the record. The question of jurisdiction is really not one of difficulty. The Order in Council which is relevant is the Government of India (Constitution of Orissa) Order of 1936. S. 4 (1) of that Order is to the effect that the date on which the said provisions, that is to say the provisions defining the Province of Orissa are to come into operation shall be 1st April 1936. So far as the judicial proceedings are concerned, S. 20 gives power to the Governor-General in Council to give such directions as he thinks proper as to the disposal of cases pending on or shortly before, the appointed date in any Court acting for an area any part of which is transferred by this Order to Orissa and as to the Courts in which proceedings by way of appeal or revision are to lie in cases decided by any such Courts before the appointed day.

In pursuance of these powers, the Governor-General in Council published a Notification No. F. 210 of 1936, Judicial, dated 1st April 1936. The notification consists of only two paragraphs which run as follows:

> (1) Every proceeding pending on the appointed day before any Court, other than a High Court, in, or in respect of any area transferred by the said Order to Orissa shall be continued, as if the said Order had not been made.
>
> (2) Any appeal or application for revision in respect of any proceeding so pending or of any decision made before the appointed day in any such Court in or in respect of any such area shall lie in the Court which has appellate or revisional jurisdiction to try such proceeding if the proceeding were instituted after the appointed day:
>
> Provided that, where the proceeding relates to any property situate partly within and partly without any area transferred by the said Order to Orissa, any appeal or application for revision shall lie as if the said Order had not been made.

It is clear from para. 1 as the execution petition was pending on 1st April 1936 in the Berhampore Sub-Court, the Berhampore Sub-Court was perfectly competent to go on with it as if the Order in Council constituting the Orissa Province had not been made. In other words, it had complete jurisdiction and so far as the jurisdiction to deal with the execution application then pending is concerned, the position was as if the old state of things had continued without any change and the Berhampore Sub-Court continued to function as a Court in this Presidency and subject to the jurisdiction of this High Court. We have no doubt that all the petitions, i. e. those under S. 19 as well as under S. 20, Madras Agriculturists' Relief Act, must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within the matters covered by Sec. 47, Civil P. C. They were therefore rightly presented in the Berhampore Sub-Court. The presentation of petitions under S. 19 of the Act for the same remedy in the Chicacole Sub-Court was obviously a precaution taken lest there should be some doubt expressed by the Berhampore Sub-Court about its own jurisdiction to deal with the petition under the Madras Agriculturists' Relief Act passed by the Madras Legislature after that Court had ceased to be included in the Madras Province to which alone that Act applied. But this precaution taken by the judgment-debtors cannot justify the Berhampore Sub-Court in dismissing the application made to it simply because the petitioners would not make the election which they were asked to make by the Court and would not withdraw the petitions presented by them in the Chicacole Sub-Court. This is not a judicial way of disposing of matters of this kind raising questions of considerable importance, the decision of which will entail serious consequences. It is enough to state in this connexion that if the judgment-debtors' case is established, the decree debt would be scaled down by over Rs. 25,000. The order of 13th December 1938 made by the Sub-Court of Berhampore is itself very clear that the only reason for dismissing the petitions was not any non-prosecution of the petitions but what the Court appears to have regarded as contumacy on the part of the petitioners. The order runs as follows:

> Adjournment cost paid. The applicants have so far taken no steps to comply with my previous orders, though the direction was specified and clear, even adjournment was allowed last time on terms of cost. On the contrary, Mr. Y. S. Ramamurthy, advocate for the decree-holders represents that the applicants are so far maintaining before the Subordinate Judge of Chicacole that it is that Court which is only seized with jurisdiction over the matter in question. As the applicants are playing this double game though they were warned more than once that they are expected to be more candid in their conduct towards the Court, I decline to grant any further adjournment on this ground and dismiss this application and the other analogous applications for non-prosecution.

The reasons given for refusing the adjournment are the only reasons for the dismissal of the applications because there is nothing to show that there was any non-prosecution as such. It is clear therefore that the Berhampore Court had jurisdiction to deal with the applications made to it under Ss. 20 and 19 of the Act and it was bound to deal with them on their merits and that its order dismissing the application on the alleged ground of non-prosecution is wrong and cannot be sustained. Before however remanding the petitions to the Subordinate Judge of Berhampore for fresh disposal on the merits, we have to deal with the contention put forward by Mr. Venkatarama Sastriar to the effect that the Berhampore Court would not be bound to apply or enforce the provisions of the Madras Agriculturists' Relief Act. This contention has to be met because if that contention were well founded, there would be no reason to remand the petitions to the Berhampore Sub-Court for fresh disposal. We are of opinion that this contention has really no foundation, because as was observed already, the very provision in the notification of the Governor-General in Council which provides that pending cases should continue to be dealt with by the Courts in which they were pending also shows that they should be dealt with as if the Order in Council constituting the Orissa Province had not been made. In other words, the proceedings have to be continued as if the Berhampore Sub-Court had not ceased to be a Court belonging to and included in this Presidency and as these petitions and applications are proceedings initiated in connexion with the pending execution application, it is obvious that the Berhampore Sub-Court and that Court alone has to deal with these applications and deal with them as if that Court is still a Court included in the Madras Province and as such bound by any legislative enactment that may be in force in the Madras Province.

We are therefore of opinion that the Madras Agriculturists' Relief Act has to be applied and its provisions enforced by the Berhampore Sub-Court in dealing with these petitions so long as the execution application continues to be pending in that Court, or, to use the words of the Notification, is "continued in that Court." It follows from this that Revision Petitions Nos. 372 to 375 have to be allowed and the orders of the Berhampore Sub-Court dated 13th December 1938 and 23rd January 1939 set aside and the petitions concerned remanded to the Berhampore Sub-Court for disposal according to law in the light of the observations contained in this judgment. There will, however in the circumstances of the case, be no order as to costs in this Court in these revision petitions. As regards the other revision petitions presented by the decree-holders from the order of the Berhampore Sub-Court dated 4th July 1938, the order sought to be revised is clearly on the face of it an interim order and it is equally clear that that order was discharged and became of no effect after the petitions in which that interim order was passed had been ultimately dismissed in January 1939 by the Berhampore Sub-Court. It is not disputed that this is the position in law. But Mr. Venkatarama Sastriar thinks that his clients might be prejudiced if certain observations made in the interim order of 4th July 1938 remain as they are because they might influence the final disposal on the merits of the petitions under Ss. 19 and 20. It is enough, in our opinion, to indicate our view that the order dated 4th July 1938 is no longer in force after the dismissal of the petitions themselves on 23rd January 1939 and that nothing contained in that order should be deemed to be of any force or effect. With this indication of our opinion.

these petitions are dismissed but without costs.

There remains only one other petition, namely C. R. P. No. 588 filed by the decree-holder, to revise the order of the Chicacole Sub-Court dated 13th December 1938 on the petitions presented to it under S. 19 by the judgment-debtors. That order merely states that the Chicacole Sub-Court had jurisdiction to deal with these petitions. From what we have said it is clear that the Chicacole Court had no jurisdiction because we have found it is the Berhampore Court alone which had jurisdiction. It follows from this that this petition must be allowed though without costs and the order of the Chicacole Sub-Court dated 13th December 1938 set aside.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 134

LAKSHMANA RAO J.

In re K. V. Lakshmana Rao and another Petitioners.

Criminal Misc. Petn. No. 135 of 1939, Decided on 6th April 1939, for issuing order expunging remarks made against petitioner by Sess. Judge, Bellary Division, in Case No. 30 of 1938.

Criminal P. C. (1898), Ss. 561-A and 367 — Deletion of disparaging remarks from judgment.

Disparaging remarks which are not warranted by the evidence against a person who is not before the Court or against a witness without affording him any opportunity to offer his explanation should be expunged from the judgment. [P 134 C 2]

B. Sitarama Rao and A. Gopalacharlu — *for Petitioners.*

K. Venkataraghavachari—*for the Crown.*

Order.—This is an application to expunge the remarks made against the petitioners by the Sessions Judge of Bellary in his judgment in Sessions Case No. 30 of 1938 and the facts are correctly stated in the affidavits filed in support of the application. The petitioners are Registered Accountants and Auditors practising at Banglore and Bellary respectively, and they had no concern with the formation or incorporation of the Hospet Sugar Mills by the accused. The company commenced business on a certificate granted on 14th November 1933 and the statutory meeting had to be held within six months from that date. A statutory report certified by the Auditor of the Company had to be placed before the meeting and the accounts had to be submitted for their audit. The accounts were not maintained in proper book form and accused 1 approached the second petitioner in January 1934 to recommend somebody to write up the accounts. The second petitioner recommended P. W. 8 who had passed the Book-Keeping Lower Grade Examination and the rough cash book and ledger were written by him from the share applications, vouchers and information furnished by accused 1. The second petitioner merely supervised his work and there is no warrant for holding that he brought into existence minutes of meeting not held and materials which did not exist. Further, the second petitioner was not before the Court and it was rightly conceded that the remarks made against him in para. 34 of the judgment should be expunged.

The first petitioner was employed on 17th May 1934 to prepare the fair cash book and ledger to be submitted to the Auditors, and the rough cash book, ledger and records specified in Ex. SS 1, were furnished to him. The preparation of fair books is admitted to be permissible, and Ex. SS 2, the telegram of 21st May 1934, was sent by accused 1 in reply to Ex. SS 10, the letter of the first petitioner of 20th May 1934, that it would take some time to prepare the fair cash book and ledger in proper form. The fair cash book and ledger were prepared subsequently from the materials furnished to the first petitioner and they were not impugned except as to the alleged collection of Rs. 50,500 towards allotment and share money and payment of Rupees 59,000 to Thakore and Company. The share applications and other records furnished to the first petitioner show collection of Rs. 50,000 towards share money, and the payment of Rs. 59,000 is found in the rough cash book. It was not borne out by invoices or receipt of goods, and the first petitioner pointed out in Ex. SS 3 his letter of 9th June 1934 that in the absence of invoices and receipt of goods the payment would have to be shown as a personal debit to the party. So he did what he should as an accountant, and it was not suggested to him that the receipts produced by accused 1 in 1935 were prepared at his instance. It was not put to him that he had any hand in the preparation of the rough books or minutes of the meeting, and the remarks in paras. 19 and 34 of the judgment were made without affording any opportunity to him to offer his explanation. The petition is therefore allowed and the remarks made against the petitioners in paras. 19 and 34 are expunged.

C.R.K./G.N. *Petition allowed.*

* A. I. R. 1940 Madras 135

WADSWORTH J.

Mandan Shetti — Appellant.

v.

Thimmi Avva and another — Respondents.

Second Appeal No. 673 of 1936, Decided on 13th October 1939, against decree of Dist. Court, North Malabar, in A. S. No. 223 of 1935.

*** Hindu law—Marriage—Validity—Marriage cannot be declared void merely on ground that bride was not virgin at the time of marriage.**

There is no rule of Hindu law whereunder a marriage can be declared void merely on the ground that the bride was not a virgin at the time that she was married. It is true that the ordinary practice is for Hindus of the higher castes to marry virgins. But if a Hindu chooses to marry a girl who is not a virgin and whom he knows not to be a virgin, he cannot use this fact as a ground for subsequently treating the marriage as null and void. Still more undesirable is it to allow a husband, in defence to a suit for maintenance by a deserted wife and child, to adduce evidence that he made the bride pregnant before he married her and that therefore the marriage is void. [P 135 C 2]

P. Govinda Menon — *for Appellant.*

S. Venkatachala Sastry — *for Respondents.*

Judgment. — This appeal arises out of a suit for maintenance. The appellant (the husband) raises the contention that his marriage with plaintiff 1 is invalid because plaintiff 1 was pregnant at the time of her marriage; consequently, her daughter, plaintiff 2, must be deemed to be an illegitimate child. The lower Appellate Court has found as a fact that plaintiff 1 was pregnant at the time of her marriage, that she was pregnant by the defendant himself and that the marriage was nonetheless valid, the parties being Sudras. It seems to me not quite clear whether in fact the parties, who belong to the caste known as Edanatan Shettis, are Sudras or Vaisyas, strictly speaking. But I am of opinion that this question has no bearing on the point to be decided. The learned District Munsif propounded a rule, for which he quotes no authority, that one of the essential conditions of a valid Hindu marriage is that the bride should be a virgin. The learned District Judge says that there is no objection under the Hindu law governing the Sudras to a pregnant woman marrying, quoting the well-known passage in Manu to the effect that when a man marries a woman who is pregnant, the male child of her womb belongs to the bridegroom and is called "the son received with the bride."

The practice recognized in that passage is described by Mayne as now obsolete. Granting that it is no longer the practice—at any rate among the higher castes—for a pregnant woman to be married with the approval of the community and her offspring to be recognized as legitimate regardless of its paternity, it is going a long way to say that if a girl has been regularly married and it is subsequently found that she was pregnant at the time of her marriage or was not a virgin, the marriage becomes void; and it is going still further to say that, when a man has married a girl with due formalities, he himself having had an irregular connexion with that girl before marriage, he is entitled to repudiate the marriage on the ground of the lack of virginity of the bride. No authority has been quoted before me in support of the rule that a marriage by a Hindu with a girl who is not a virgin is void. It seems to me most undesirable to lay down such a rule unless it is supported by the most ample authority, for, it would open the door to scandalous allegations brought by persons anxious to get rid of an unwanted wife. Still more undesirable is it to allow a husband, in defence to a suit for maintenance by a deserted wife and child, to adduce evidence that he made the bride pregnant before he married her and that therefore the marriage is void. I know of no rule of Hindu law whereunder a marriage can be declared void merely on the ground that the bride was not a virign at the time that she was married. I grant that the ordinary practice is for Hindus of the higher castes to marry virgins. But, if a Hindu chooses to marry a girl who is not a virgin and whom he knows not to be a virgin, he cannot, in my opinion, use this fact as a ground for subsequently treating the marriage as null and void.

It is suggested that a statement in the cross-examination of the plaintiffs' second witness that a pregnant woman cannot be married might be sufficient evidence of a special custom to that effect in the particular caste. There are grave objections to this contention. Firstly, the witness himself qualifies that statement by saying that such a marriage would be valid if the pregnancy was by the future husband. Secondly, it would take much more than the isolated statement of a single witness made in cross-examination to establish a valid custom as prevailing in the caste. Thirdly, even if it be the rule that a pregnant woman cannot be married, it does not by any means follow that a marriage celebrated in contravention of this rule would be null and void, for the doctrine of factum valet might well be called in aid. The appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 136

BURN AND STODART JJ.

In re Kataru Chinna Papiah—Accused.

Referred Trial No. 91 of 1939 and Criminal Appeal No. 411 of 1939, Decided on 25th September 1939, referred by Sess. Court, Cuddapah Division, D/- 24th July 1939.

(a) Evidence Act (1872), Ss. 24 and 27—Confession made under pressure is inadmissible —But statement leading to discovery of weapon though involuntary is admissible.

Where after six hours of questioning by the police the accused makes a confession that he had killed the accused, the confession being involuntary is inadmissible in evidence. But statement which leads to the discovery of an aruval (weapon) though not voluntary would be admissible in evidence under S. 27. [P 137 C 1]

(b) Criminal P. C. (1898), S. 288 — Contradiction—Evidentiary value.

Evidence of a witness, who in the Court of Session resiles from his statement before the committing Magistrate, though may be treated as substantive evidence under S. 288, should not be relied upon in the absence of corroboration. [P 137 C 2]

K. S. Jayarama Ayyar and C. K. Venkatanarasimham — *for Accused.*

Public Prosecutor — *for the Crown.*

Burn J. — The appellant has been convicted by the learned Sessions Judge of Cuddapah of three offences of murder and has been sentenced to death. This is a somewhat unusual case; the appellant single handed is supposed to have killed a forest guard and a forest watcher and another man. The prosecution case was that the appellant and a little boy examined as P. W. 2 trespassed into the forest reserve near Thimmayagaripalli before daylight on 16th March 1939 and that they cut wood in the forest and were making their way to the village when they were caught by the forest guard Kesavalu, forest watcher Somayya and another man Penchulagadu, a relation of Kesavalu. These three are supposed to have stopped the appellant and P. W. 2 and the appellant is supposed to have killed them one after the other, Kesavalu first, Penchulagadu second and Somayya third. Kesavalu and Penchulagadu are supposed to have been unarmed but Somayya was armed with a bill-hook which by the looks of it is quite as efficient a weapon as M. O. 5 which is said to be the appellant's weapon. The appellant escaped with nothing worse than a slight cut on his left forearm.

The prosecution story was spoken to in the Court of the committing Magistrate by the little boy, P. W. 2 who is a child of 13, and he described how on the morning of 16th March the appellant took him to cut fuel and how on the way back they were intercepted and the appellant cut all the three men. His deposition before the Sub-Magistrate was filed in the Sessions Court as Ex. G. The learned Sessions Judge has not expressly stated so, but it is clear that he meant to do this under the power conferred upon him by S. 288, Criminal P. C., because the boy in the Sessions Court stated that he knew nothing whatever about the matter and obstinately refused to answer any questions except "I do not know." P. W. 2 is supposed to have been the only eye-witness and the only other item of evidence of any importance against the appellant is that on the morning of 19th March he made a statement to the Superintendent of Police which led to the discovery of a bill-hook (M. O. 5) which the appellant said was the weapon used by him to kill all the three deceased. The appellant thereupon is said to have taken the police and certain respectable persons to a place in the forest 25 or 30 yards from the place where the corpses were found and there to have produced from under a bush this aruval (M. O. 5). Supposing for the moment that the evidence is admissible under S. 27, Evidence Act, there is no corroboration of the truth of the statements made by the appellant because the aruval when sent to the chemical examiner was not found to be stained with blood. Mr. Jayarama Ayyar who has appeared for the appellant in this Court has contended that evidence regarding the statements made by the appellant before the production of M. O. 5 ought not to have been admitted. We think that this contention is well founded.

The appellant is said to have made a statement to the Superintendent of Police (P. W. 8) on the morning of 19th March, but the Superintendent of Police was obliged to admit that for four hours on the night before, i. e. from 7-15 to 11-15 and for two hours on the morning of the 19th he was questioning the appellant. This was a flagrant violation of R. 303 in Vol. 1 of the Madras Police Executive Orders. It is there laid down that

> the practice of resorting to persuasion, trickery or oppression to induce any accused person to confess is prohibited. It is right that the police, when they are endavouring to discover the author of crime, should make inquiries of, or put questions to, any person from whom they think they can obtain useful information. But when once an accused person has been arrested, while they may, and indeed should listen to any statement which he may voluntarily make they are strictly forbidden to interrogate him or press him to make a statement.

It would be absurd to suppose that the statement made by the appellant to the Superintendent of Police after six hours' questioning was a voluntary statement. The learned Public Prosecutor has raised the question whether even if the statements were not voluntary the evidence regarding the production of the aruval would nevertheless be inadmissible. We think that there is no difficulty about admitting the evidence in so far as the production of the aruval alone is concerned, but we agree with Mr. Jayarama Ayyar that evidence regarding the statement made by the appellant in connexion with it could not be admitted; it would be ruled out by S. 24, Evidence Act.

The case is wholly unsatisfactory. It is not at all clear how the Superintendent of Police came into contact with P. W. 2 and consequently the appellant. The evidence of the police officers on this point is discrepant. There were engaged in the case the Sub-Inspector of Police, the Circle Inspector (P. W. 18) and the District Superintendent of Police (P. W. 8) not to mention the head constable (P. W. 16) who held an inquest for four hours on 17th March at which he examined only one witness (P. W. 7) who could give nothing but hearsay evidence about the discovery of the corpses. Now, the boy, P. W. 2, is supposed to have told what he had seen to P. W. 10 on the morning of 17th March, but P. W. 10 did not disclose anything of what he had learnt at the inquest held on that day. The Sub-Inspector says that P. W. 10 was not examined by him or by the Circle Inspector before the District Superintendent of Police came which was on the evening of 18th March. The Circle Inspector also says that he did not examine P. W. 10, but he says that the Superintendent of Police examined him in his presence on 18th March before P. W. 2 was examined. P. W. 10 however says that he was examined by both the Inspector and the Sub-Inspector on the morning of the day on which the District Superintendent arrived, i. e. the 18th. The District Superintendent does not say anything about having examined P. W. 10 and it does not appear from his evidence how he came into contact with P. W. 2.

In so far as the evidence of P. W. 2 is concerned, it is clear that his deposition in the Magistrate's Court could be used as substantive evidence under S. 288, Criminal P. C., if the learned Sessions Judge had recorded his opinion that the witness was speaking the truth before the committing Magistrate and had resorted to falsehood before him. But, it is clear that the evidence of such a witness as this is not to be safely relied upon in the absence of corroboration. Now, so far as the statement made by the appellant to the Superintendent of Police is concerned, it is clear that it is not consistent with the evidence given by the boy, P. W. 2. According to P. W. 2, when he and the appellant were coming away from the forest, they were first stopped by Penchulagadu whom the witness calls Mokatigadu. He says that it was Penchulagadu who first caught hold of the appellant. But the appellant when he was describing the occurrence to the Superintendent of Police said that it was Kesavalu who caught hold of the bundle of fuel which he was carrying on his head. It is singular also that the appellant spoke to the Superintendent of Police about a bundle of fuel whereas P. W. 2 said that he and the appellant had cut logs of wood. The fuel which the appellant and P. W. 2 are supposed to have cut in the forest and which must have been dropped at the place where the murders took place was not apparently found by the police and has not been exhibited in the case. Nor is there any evidence regarding the trees from which the fuel was supposed to have been cut.

The evidence of the doctor who made the post mortem examination of the bodies is quite inconsistent with the story told by P. W. 2 in the lower Court. The doctor found nothing but clean cut wounds on all the bodies. P. W. 2 says that the appellant used the back of the aruval against all the three men. The back of the aruval is nearly a quarter of an inch thick and could not produce clean cut wounds. We find the evidence in this case wholly insufficient to sustain the conviction of the appellant. We therefore set aside the conviction and the sentence of death and direct that the appellant be set at liberty forthwith.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Madras 138

BURN AND STODART JJ.

In re Nainamuthu Kannappan
Accused.

Referred Trial No. 107 and Criminal Appeal No. 439 of 1939, Decided on 17th October 1939; referred by Sess. Court, Coimbatore Division, D/- 11th August 1939.

(a) Criminal P. C. (1898), S. 164 — Confession of murder by accused to a Magistrate not investigating the case does not fall under S. 164.

Statement by the accused, that he had killed the deceased and describing the circumstances of the crime, to a Magistrate when he is not investigating the case or any of the facts connected with the case does not fall under S. 164 and hence can be put in evidence even though not recorded in accordance with the formalities prescribed by that Section: *A I R 1936 P C 253, Disting.* [P 138 C 2; P 139 C 1]

(b) Penal Code (1860), S. 300, Exception 5 —Culpable homicide—Accused on affectionate terms with deceased—Latter suffering death at the hands of accused with her own consent — Crime held fell under S. 300, Exception 5.

The accused and the deceased (the concubine of accused) were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Magistrate the accused stated that he killed the deceased at her own request and with her glad consent:

Held that deceased suffered death at the hands of the accused with her own consent and the accused was guilty of culpable homicide not amounting to murder. [P 139 C 1, 2]

M. C. Sridharan — *for Accused.*

Public Prosecutor — *for the Crown.*

Stodart J. — The appellant has been convicted of murdering Palaniammal, his concubine, a woman of 30 years, and sentenced to death subject to the confirmation of this Court. There can be no doubt about the facts of this case. The parties are Adi Dravidas. The accused was a married man and he had been keeping the deceased as his concubine for a considerable time. P. W. 2, his wife, lived with her parents in a house adjoining that in which the accused and the deceased lived. Some 4 or 5 months before the crime, the accused and his wife removed to another residence, namely a shed in a garden belonging to P. W. 3. This removal was in order to put a stop to the scandal of the accused living with his concubine while the accused's wife lived in a separate house. But even after this change of residence, the deceased used to visit the accused and even to spend the night with him in the new house. The accused's parents tried to put a stop to this conduct and complained to the owner of the garden with a view to pressure being brought to bear upon the accused and that was the state of affairs at the time the deceased was killed.

On the night of 13th February this year, the deceased was in the accused's house and had her food there. Appellant and deceased then went to a tope which is close by and lay down to sleep in front of the shed occupied by P. W. 4 and her son P. W. 5. P. W. 5, waking in the morning and going out to work, saw the accused and the deceased lying asleep. That was in the early morning. A little later, according to P. W. 2, the wife of the accused, the accused returned to his own hut and asked for a drink of water which P. W. 2 gave to him. He then left after telling P. W. 2 that he was going to the Pollachi Court "to tell everything there in person." P. W. 9, the Joint Magistrate of Pollachi, proves that the accused appeared before him at 11-30 in the morning of 14th February and made a statement to him that he had killed the deceased and describing the circumstances of the crime. P. W. 9 took down the statement in writing and that is Ex. C. The accused then went back to the village accompanied by the Circle Inspector of Police and took him to a place in the tope 50 yards from the hut of P. Ws. 4 and 5. The body was there in a hollow of the ground covered over with cocoanut leaves. The accused had already told the Joint Magistrate that he had covered the body with a thatti. The cause of death was a cut on the neck which cut through the spinal cord and also involved the trachea and the large blood vessels on either side of the neck. There is also evidence about the weapon with which the throat of the deceased woman was cut. P. W. 5 had purchased an aruval from the accused, 5 or 6 months before this crime and he kept this aruval in his hut in the cocoanut tope. On the morning of the crime it was missing from the hut and the accused produced it from his own hut.

It is urged upon us by the learned counsel for the appellant that the statement made by the appellant to the Joint Magistrate, P. W. 9, was improperly admitted in evidence. Learned counsel argues that this was a statement made under S. 164, Criminal P. C., and since it was not recorded after observing the formalities prescribed by that Section, it should not have been put in evidence. We think that that objection would be just if the Magistrate had been investigating the case but he was not investigating the case or any of the facts connected with the case. On the contrary, this information given by the accused was itself the first information of the crime. The ruling cited to us in 17 Lah 629[1] does not apply to the facts here. When he was examined in the committing Magistrate's Court, the statement he had made, Ex. C, to the Joint Magistrate, was brought to the notice of the accused and he admitted that he had made it. At the Sessions, however, he denied that he had made it and said that when he came into the Joint Magistrate's Court, his intention was merely to tell the Magistrate that his concubine had been killed, that thereupon a head-constable and the Inspector of Police pushed him into the dock and after that he did not remember what he had said to the Joint Magistrate. There is no doubt in our minds that the appellant did make this confessional statement, Ex. C, and the facts of the crime correspond in all material details with that statement. The facts proved against the appellant therefore establish that he killed Palaniammal.

The question however remains whether in the circumstances of the case, the offence was one of murder or whether it comes within the fifth exception to S. 300. The learned Public Prosecutor does not support the finding of the learned Sessions Judge that the offence proved against the appellant was murder. The evidence in the case is that the accused and the deceased were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Joint Magistrate, the appellant stated that he killed the deceased at her own request and with her glad consent. He stated that on the night in question, after some talk, she declared that she would sever her connexion with him and go away and then in the alternative, she suggested that both of them might commit suicide and that in the morning he killed her at the place where her body was found. This version of the crime apparently has been accepted from the beginning by the prosecution and it clearly amounts to this that Palaniammal suffered death at the hands of the appellant with her own consent. There were two contusions on the body besides the fatal wound on the neck which look as if they were caused by blows with a stick. But the accused was not asked about these marks. It was not suggested to him that the said marks were inconsistent with the statement which he had made to the Magistrate that the deceased had consented to be killed. There may be an explanation of these marks consistent with the story given by the appellant. In these circumstances, we set aside the conviction for murder and convict the appellant of culpable homicide not amounting to murder. We sentence him to transportation for life.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 139

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank Ltd.

Barkat Ali and others — Petitioners.

New Field & Co. by Proprietor K. L. Khuller — Applicant.

v.

Messrs. James Voce Pirrie, Cyril Gill and Stanley Goodwin (Official Liquidators) — Respondents.

Application No. 532 of 1939 (in O. P. No. 158 of 1938), Decided on 21st April 1939.

Banker and customer—Person paying certain sum to bank for remitting it by transfer to another place — Sum not credited by bank in his current account nor transferred owing to suspension of payment by bank — Person held entitled to preferential payment regarding such sum.

Certain sum was handed to a bank for remitting it by telegraphic transfer to another place. The bank did not credit the said sum on his current account but only the charges for the intended transfer were debited. The money was never transferred because on that very day the bank suspended payment :

Held that the money was held apart by the bank as the property of the person. The money was received by the bank in the capacity of a mere agent. Hence, the person was entitled to preferential payment. [P 140 C 1]

O. K. Nambiar — *for Applicant.*

C. Krishnaswamy Iyer — *for Respondents.*

Order. — This is an application for payment of a sum of Rs. 534-5-0 to the applicant in preference to the ordinary creditors of the Travancore National and Quilon Bank Ltd. It is alleged in the affidavit that on 20th June 1938, the day on which the Bank suspended payment, a sum of

---

[1] Nazir Ahmed v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=37 Cr L J 897=17 Lah 629 (P C).

Rs. 533-1-0 was handed to the Bank for remitting it by telegraphic transfer to the Great Indian Trading Co. at Bombay. It is in evidence that the applicant had a current account with the Bank but the Bank did not credit the said sum of Rs. 534-5-0 in his account, but only a sum of Re. 1-4-0 being the charges for the intended transfer was debited. It is also in evidence that the money was never transferred because on that very day the Bank suspended payment. On the facts of this case, it seems to me that the money was held apart by the Bank as the property of the applicant. I am also inclined to the view that the money was received by the Bank in the capacity of a mere agent. The claim must therefore be upheld. In the view I take of the facts of this case, I think it unnecessary to discuss the various authorities cited at the Bar. This application is therefore allowed with costs. The applicant will get Rs. 35 plus Rs. 5 for the Judges summons and the Official Liquidators Rs. 35.

C.R.K./D.S. *Application allowed.*

---

* A. I. R. 1940 Madras 140

LEACH C. J. AND PATANJALI SASTRI J.

Pandit Shiva Rao and another — Appellants.

v.

D. A. Shanmughasundaraswami, Official Liquidator and others — Respondents.

Appeal No. 71 of 1938, Decided on 18th August 1939, from judgment and order of Gentle J., D/- 9th September 1938.

*** (a) Registration Act (1908), S. 17 (1) (e) —Final mortgage decree is immovable property —Assignment of such decree is compulsorily registrable.**

When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. Hence, a mortgage decree must be regarded as immovable property. The assignment of a mortgage decree thus falls within S. 17 (1) (e), and must be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property : *Case law reviewed.* [P 141 C 2; P 144 C 2]

(b) Transfer of Property Act (1882), Ss. 100 and 59—Charge on immovable property can be created only by registered deed attested by at least two witnesses.

The words "so far as may be" in S. 100 have not the effect of taking S. 59 out of the purview of S. 100. Unless given by a statute a charge on immovable property can only be created by a registered instrument executed by the person creating the charge and attested by at least two witnesses. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of Ss. 59 and 100 operate to create a charge in law : *A I R 1939 Mad 202, Rel. on.* [P 141 C 2; P 142 C 1]

B. Sitarama Rao and K. Vittal Rao — *for Appellants.*

Thyagarajan for S. V. Shenoi and K. R. Shenoi — *for Respondents.*

Leach C. J. — The appellants appeal against an order refusing to recognize them as secured creditors of the Lakshmi Forest Company Ltd., which is now under liquidation under an order for compulsory winding up. On 3rd September 1932, by a registered deed the appellants conveyed to the Company certain lands in the village of Shedimane, South Kanara District, and assigned the benefit of a mortgage decree which they had obtained in the Court of the Subordinate Judge of South Kanara. The consideration was Rs. 80,000, payable in instalments. The deed purported to charge both the immovable property and the mortgage decree for the due payment of the balance of the consideration. It was also provided that the vendors should remit a sum of Rs. 10,000 if the Company should pay the balance falling due before 1st April 1933, with interest from 30th June 1932. The right to rank as secured creditors was challenged by the liquidator, and the appellants took out a Judge's summons for a declaration that under the general law and also under the provisions of the deed they were secured creditors in respect of the moneys remaining due to them under the deed. The deed had not been registered in accordance with the provisions of S. 109, Companies Act, 1913, and was therefore clearly void against the liquidator and any creditor of the Company if put forward as embodying a charge. The appellants however claimed that they were entitled to rank as secured creditors by reason of the lien given to an unpaid vendor by S. 55 (4), T. P. Act. This claim was disallowed by Gentle J. The learned Judge held that they were not entitled to the statutory lien because the deed of conveyance contained a contract contrary to the provisions of Sec. 55 (4) in that it created without any allocation a charge on both moveable and immovable property and under the Section the appellants could only claim a lien in respect of immovable property. The appellants challenge the decision of the learned Judge on three grounds. In the first place it is said that the mortgage decree is not moveable property, but immovable property. Secondly it is said that the conveyance did not in law effect any charge. In the third place it is said that even if the decree be regarded as moveable property the appellants are entitled to a lien as equity had extended the principle of the vendor's lien to moveable property of this description.

Before the amendment of S. 17, Registration Act, there was a conflict of opinion whether a mortgage decree could be regarded as moveable or immovable property. In 1 Bom 267[1] the Bombay High Court held that the assignment of a mortgage decree required registration. The Calcutta and the Allahabad High Courts expressed opinions to the contrary: *see* 23 Cal 450,[2] 6 C W N 5,[3] 12 C W N 625,[4] 13 All 89,[5] 26 All 603[6] and 35 All 524.[7] This controversy has been decided in favour of the Bombay view by the addition made to the provisions of Sec. 17, Registration Act, by S. 10, Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April 1930. That Act added cl. (e) to sub-s. (1) of Sec. 17, Registration Act. The clause reads as follows:

> Non-testamentary instruments transferring or assigning any decree, order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

The wording here follows that used in cl. (b). It has been argued by Mr. Thyagarajan on behalf of respondent 2 that the Court is not justified in regarding a mortgage decree as immovable property by reason of the addition of cl. (e) to the Section. He says that there has been no amendment of the definition of immovable property to be found in S. 3 (25), General Clauses Act, and in Sec. 2 (6), Registration Act, and the considerations which weighed with the Calcutta and the Allahabad High Courts still apply. As I have already indicated, I am unable to accept the argument. By virtue of the amendment of S. 17, Registration Act, an assignment of a mortgage decree is placed in the same category as instruments falling within clause (b), and admittedly such instruments must be regarded as immovable property. When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The Civil Procedure Code contains a form for the drawing up of a final mortgage decree and unless the Legislature regarded the decree to be drawn up in accordance with such form as operating to declare the mortgagee's rights in the mortgaged property the amendment of the Section would be idle. For the reasons indicated I hold that a mortgage decree must be regarded as immovable property.

I am also unable to share the opinion of the learned Judge that the conveyance of 3rd September 1932 created a charge, either as regards the lands or as regards the mortgage decree. Sec. 59, T. P Act, requires a mortgage deed to be signed by the mortgagor, attested by at least two witnesses, and registered. S. 100 provides that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property and all the provisions "hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge." In I L R (1939) Mad 199,[8] a Bench of which I was a member, held that the words "so far as may be" had not the effect of taking S. 59 out of the purview of S. 100. Unless given by statute a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. In the present case the company was not a party to the deed of conveyance and as it has not created a charge by another instrument there is in law no charge at all. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of Ss. 59 and 100 operate to create a charge in law. In these circumstances it cannot, in my opinion, be said that the parties had entered into a contract which deprived the appellants of the lien under S. 55 (4), T. P. Act.

---

[1] Gopal Narain v. Trimbak Sadashiv, (1875-77) 1 Bom 267.

[2] Gous Mohammad v. Khawas Ali Khan, (1896) 23 Cal 450.

[3] Baijnath Lohea v. Binoyendra Nath Palit, (1902) 6 C W N 5.

[4] Ram Ratan v. Jogesh Chandra, (1908) 12 C W N 625.

[5] Abdul Majid v. Mohammad Faizullah, (1891) 13 All 89.

[6] Ahmad Khan v. Abdul Rahman Khan, (1904) 26 All 603.

[7] Mumtaz Ahmad v. Sri Ram, (1913) 35 All 524 =21 I C 462=11 A L J 815.

[8] Viswanadhan v. M. S. Menon, (1939) 26 A I R Mad 202=183 I C 639=I L R (1939) Mad 199 =(1939) 1 M L J 185.

The appellants' contention that equity has extended the principle of the vendor's lien to moveable property of certain descriptions is based on the judgments in (1880) 13 Ch D 384,[9] (1862) 31 Beav 346 = 54 E R 1172,[10] (1871) 11 Eq 164,[11] (1900) 2 Ch 462[12] and (1906) 1 Ch 67;[13] but holding, as I do, that a mortgage decree drawn up in the ordinary form must now be regarded as immovable property and that the deed of 3rd September 1932 did not operate to deprive the appellants of their statutory lien under S. 55 (4), T. P. Act, it is not necessary to consider whether this argument is well founded, and if well founded the principle could be applied in India having regard to the provisions of the Sale of Goods Act. The appeal succeeds on the first two points and consequently there will be a declaration in favour of the appellants that they are entitled to a charge on the property conveyed for the balance of the purchase money. The appellants are also entitled to their costs, which will be paid out of the assets of the company. The Court has been informed that in other proceedings a creditor is claiming priority over the appellants, but this matter is not now before us and therefore cannot be inquired into. To avoid any misunderstanding, I will however add that our decision is entirely without prejudice to any claim to priority.

Patanjali Sastri J.—The main question argued in this appeal is whether a final decree for sale obtained in a suit brought to enforce a simple mortgage of immovable property is to be regarded as immovable property for the purposes of Chap. 3, T. P. Act, relating to sale of immovable property. The facts giving rise to the question have been fully set out in the judgment of my Lord the Chief Justice and it is unnecessary to recapitulate them here. The Transfer of Property Act does not define the term 'immovable property' except negatively by excluding standing timber, growing crops and grass. The General Clauses Act (10 of 1897) contains a definition in S. 3 (25) which is applicable to the Transfer of Property Act. There is also a definition in S. 2 (6), Registration Act, for the purposes of that Act. According to both these definitions so far as they are material to the present discussion, immovable property includes lands and benefits to arise out of land. We then have the definition of 'mortgage' in S. 58, T. P. Act, as the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, etc. This interest in the case of a simple mortgage consists of course in the right to bring the mortgaged property to sale for the realization of the debt. A simple mortgage has thus a dual character. It is a debt with a right to be recouped from the sale proceeds of specific immovable property.

Now, it has been held in this Court, having regard to these definitions, that a debt secured by hypothecation of land is immovable property for the purposes of Ss. 54, 55 (2) and 123, T. P. Act. *See* 41 M L J 453,[14] 41 M L J 267[15] and 44 Mad 196[16] and this position appears to have been accepted by their Lordships of the Privy Council in the recent decision in 57 All 314[17] where it was held that an assignment of a simple mortgage was of no effect as a transfer of the security by reason of non-registration. But the question in what category a final decree for sale obtained on a simple mortgage has to be placed has not been the subject of decision in this Court, though there are conflicting decisions on the point in some of the other High Courts in India. Before referring to these decisions which are not however binding on this Court though, of course, they are entitled to great weight, it is desirable, in my opi-

---

9. Mycock v. Beaston, (1880) 13 Ch D 384 = 49 L J Ch 127=28 W R 319.

10. Collins v. Collins, (1862) 31 Beav 346=135 R R 461=54 E R 1172.

11. In re Albert Life Assurance Co. ; Ex parte Western Life Assurance Co. Society, (1871) 11 Eq 164 = 40 L J Ch 166 = 23 L T 726 = 19 W R 321.

12. Davies v. Thomas, (1900) 2 Ch 462=69 L J Ch 643=83 L T 11=49 W R 68.

13. In re Stucley ; Stucley v. Kekewich, (1906) 1 Ch 67=75 L J Ch 58=93 L T 718 = 54 W R 256=22 T L R 33.

14. Official Receiver, Thichinopoly v. Lakshman Iyer, (1921) 8 A I R Mad 681=68 I C 752=41 M L J 453.

15. Balagurumurthi Chetti v. Ramakrishna Chetti, (1921) 8 A I R Mad 277=69 I C 473=41 M L J 267.

16. Perumal Ammal v. Perumal Naicker, (1921) 8 A I R Mad 137=61 I C 461=44 Mad 196=40 M L J 25.

17. Fanny Skinner v. Bank of Upper India Ltd., (1935) 22 A I R P C 108=155 I C 743=62 I A 115=57 All 314 (P C).

nion, to consider the question on principle. Prima facie, if a simple mortgage is to be treated as an interest in land or as a benefit arising out of land and thus coming within the definition of immovable property, there seems to be no valid reason why a decree directing the enforcement of such mortgage should be regarded any the less as immovable property. Before the decree, the mortgagee had the right to bring the mortgaged property to sale through Court for the payment of his debt, or he could give up the security and sue for mere recovery of the debt. After the decree however he can no longer seek to recover the debt apart from realizing the security and, unless the security proves insufficient on actual realization, his only right, having regard to the provisions of the Civil Procedure Code in that behalf, is to bring the mortgaged property to sale in execution of the decree. Thus, the decree does not in any way affect the mortgagee's interest in the mortgaged property which still remains in him in full force, and indeed his remedy is now confined to a realization of that interest, the mortgage debt being, to that extent, deprived of its dual character. It is thus clear that the decree only marks a stage in the process of realizing the security and the only change effected by it in the position of the mortgagee is to effectuate the benefit arising to him out of the land, the subject of the mortgage, by bringing it one step—and that an important step—nearer realization. It is therefore difficult to see on principle why a final decree for sale should be relegated to a different category of property from the mortgage itself on which it is based.

Turning now to the decided cases, we find that the High Courts at Bombay, Allahabad and Calcutta have had occasion to consider this point. The earliest case in Bombay is 9 Bom H C R 64,[18] where speaking of a court sale of a mortgage decree, the learned Judges observed that what was purchased

> was not a mere paper on which the decree was written but the interest in immovable property which was recoverable under that decree and such interest must be regarded as immovable property within the meaning of S. 259, Civil P. C.

In a later case in 1 Bom 267,[1] the same view was taken and it was held that an assignment of a mortgage decree was compulsorily registrable. The Calcutta High Court in the earlier case (9 Cal 839[19]) held that an unregistered deed of assignment of a mortgage decree was defective so far as it related to the mortgage lien on the property. In a later case, 23 Cal 450,[2] however that Court adopted the view that S. 17 (b), Registration Act, does not apply to a deed of assignment of a mortgage decree as it could not be said to be immovable property within the definition contained in that Act. There is no reference to the earlier decision of the same Court and the learned Judges do not refer to the definition of a mortgage in S. 58, T. P. Act, as involving the transfer of an interest in specific immovable property. In a still later decision reported in 6 C W N 5,[3] the question arose whether a mortgage decree was immovable property for the purpose of O. 21, R. 90, Civil P. C., when a court sale of such a decree was sought to be set aside under that provision. In this case, the definition of immovable property in the General Clauses Act was referred to, and it was held that a mortgage decree did not come within that definition. Here again the earlier decision of the same Court in 9 Cal 839[19] was not referred to. In the Allahabad High Court the treatment of the subject followed more or less the same course. In the earliest case in 1 All 348,[20] the question arose whether the sale of a mortgage decree was a sale of moveable property within the meaning of S. 252, Civil P. C., which provided that no irregularity in the sale of moveable property under an execution shall vitiate the sale and it was held to be a sale of an interest in immovable property. In 13 All 89[5] however the Court held that a deed of assignment of a mortgage decree did not come within the mischief of S. 49, Registration Act, as it could not be regarded as immovable property. In the two later cases in 26 All 603[6] and 35 All 524,[7] the decision in 13 All 89[5] was followed. In none of these cases was any reference made to the earlier decision of the same Court in 1 All 348.[20]

In this state of the authorities, the Legislature added cl. (e) to S. 17 (1), Registration Act, by S. 10, Transfer of Property (Amendment) Supplementary Act, 1929, thereby making compulsorily registrable instruments transferring or assigning any decree or order of Court when such decree or order purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. It is clear to my mind that the object of this amendment was to affirm the Bombay view and supersede the Calcutta and Allahabad decisions referred to above holding the contrary. It is however urged that this newly added clause would not apply to mortgage decrees as the words, "purports or operates to create, declare etc." must, in view of the Privy Council decision in 11 Pat 272[21] be construed to mean, "in itself purports or operates to create, declare etc." whereas a mortgage decree merely declares a pre-existing right, i. e., the mortgage right of the decree-holder. I think that this argument proceeds on a misapprehension of their Lordships' decision in the case referred to above. The distinction which their Lordships had in mind is the one between a mere recital of title as a fact and something which in itself creates a title. A reference to the passage from the judgment of West J. in 5 Bom 232[22] which their Lordships quote with approval would make their meaning still more clear. The learned Judge there says :

---

[18] Harigovind Joshi v. Ramachandra Pandurang, (1872) 9 Bom H C R 64.

[19] Kooblal Chowdhry v. Nittyanand Singh, (1883) 9 Cal 839=12 C L R 393.

[20] Mt. Bhawani Koer v. Gulab Rai, (1875-77) 1 All 348.

> There (i. e., in Sec. 17) 'declare' is placed along with 'create, assign, limit or extinguish a right, title or interest' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will; not a mere statement of fact.

A mortgage decree does not merely recite the pre-existing mortgage right. By its own force, it declares, even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realization of his debt without any further impediment. It embodies the expression of the Court's will that a definite change of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. It seems to me therefore idle to contend that a decree stands on the same footing as a document containing merely a recital of an existing right. In one sense, no doubt, a decree or order of Court does not ordinarily bring into existence any right which did not already vest in one of the parties litigant; and to insist that it should do so in order to come within cl. (e) of S. 17 would be to render that provision almost nugatory. The assignment of a mortgage decree thus falls within Sec. 17 (1) (e), and must now be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property. It follows that much of the reasoning underlying the decisions of the Allahabad and Calcutta High Courts holding that a mortgage decree cannot be regarded as immovable property falls to the ground and I cannot therefore regard them useful precedents on the question now under consideration.

For the above reasons, I am of opinion that a final decree for sale on a simple mortgage must be regarded as immovable property for the purposes of Chap. 3, T. P. Act. On the other questions argued at the Bar, I agree in the conclusions of my Lord and have nothing material to add.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 144

LAKSHMANA RAO J.

In re Kasireddi Appanna and others
Petitioners.

Criminal Revn. Case No. 174 and Petn. No. 168 of 1938, Decided on 9th November 1938, to revise judgment of Sub-Divisional Magistrate, Vizianagaram, in Criminal Appeal No. 31 of 1937.

Penal Code (1860), S. 430—Preventing complainant from opening sluice which had been closed some days before.

Preventing the complainant from opening a sluice which had been closed some days before the date of occurrence would not amount to an offence under S. 430. [P 144 C 2]

K. R. Vepa — *for Petitioners.*

A. S. Sivakaminathan for Public Prosecutor — *for the Crown.*

Order.—The case against the petitioners was that they prevented the complainant from opening a sluice which had been closed about a fortnight before the date of occurrence and as rightly conceded, this would not amount to an offence under Sec. 430, Penal Code. The conviction of the petitioners under Sec. 430, Penal Code, is therefore set aside and the fines if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

---

[21] Bhageshwari Charan Singh v. Jagarnath Kueri, (1932) 19 A I R P C 55=136 I C 798=59 I A 130=11 Pat 272 (P C).

[22] Sakharam Krishnaji v. Madan Krishnaji, (1880) 5 Bom 232.

* A. I. R. 1940 Madras 145

PATANJALI SASTRI J.

Shanmugha Nadar — Appellant.

v.

Shanmughavel Nadar and another — Respondents.

Second Appeal No. 491 of 1936, Decided on 6th October 1939, against decree of Sub-Judge, Tinnevelly, in A. S. No. 20 of 1935.

(a) Trade Mark—Passing off actions—Real question for determination stated.

The real question for determination by the Court in all passing off actions, however complex the scheme of deception may be, is always whether or not the goods of the defendant have been represented as and sold as if they were the goods of the plaintiff: *(1896) A C 199, Rel. on.* [P 145 C 2]

*** (b) Trade Mark — Passing off—Trader's name acquiring secondary significance in locality—Another trader of similar name using his name in combination with other words which taken as a whole not representing truth and also doing other things thereby deliberately intending to pass his goods as those of former —He should be restrained from doing so by means of injunction—Form of injunction stated.**

It is true that so long as a man takes care to distinguish his goods sufficiently from those of another person when placing them in the market, so as to avoid any likelihood of mistake or deception on the part of the purchasing public he cannot be restrained by any injunction from carrying on business in his own name even though such name has come to be so closely associated with that other person's goods as to denote them exclusively in the locality. But this principle cannot be invoked by a person who uses his name in combination with other words as a trade name which, taken as a whole, does not represent the bare truth, and whose conduct otherwise also shows that he deliberately intends to pass off his goods as those of another. Such person should be prohibited by injunction from doing so. But the injunction should not restrain him absolutely from using his own name in describing his business or designating his goods. The Court should so frame the injunction as to allow him to use his name, so as not to mislead the public into believing that his goods are the goods of the plaintiff: *Case law referred.*

[P 146 C 1, 2; P 147 C 2; P 148 C 2]

(c) Trade Mark—Passing off—Trader's name acquiring secondary signification—Mere dissimilarity in get up of goods of another trader using similar name affords no protection.

Where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get up of goods of another trader of similar name is immaterial and affords no protection to the latter: *(1901) 83 L T 259, Rel. on.* [P 148 C 1]

K. R. Rangaswamy Iyengar — *for Appellant.*

B. Sitarama Rao and K. Venkateswaran — *for Respondents.*

Judgment.—Respondent 1 (hereinafter referred to as the respondent) is a prominent Beedi manufacturer and trader carrying on business under the name and style of K. A. Shanmughavel and Co., in Shandy Bazaar, at Ambasamudram for about 15 years prior to the suit. He claims that his Beedies have acquired such a wide reputation in the market, particularly the two brands known as "Shanmughavel Beedi" and "Asal Shanmugham" or "Shanmugham Beedi", that the term "Shanmugham" and its adaptations have, as applied to Beedies manufactured or sold at Ambasamudram, become so much identified with his business and goods as to denote them exclusively among the purchasing public. Having learned that the appellant who bears the name of Shanmugha Nadar, taking advantage of his name, started business in beedies just a few months prior to the suit under the name and style of "P. S. Shanmugham and Brother" near the respondent's premises at the same place and was selling beedies describing them as "Seal Shanmugham Beedies" and making them with a colourable imitation of his own seal, he brought the suit out of which this second appeal arises against the appellant and his father (respondent 2) for an injunction restraining the defendants

(a) from using the trade mark described in the plaint schedule or any colourable imitation thereof or the words 'Seal Shanmugham Beedi, 'Shanmugham seal beedi' or 'Seal beedi' to designate or denote any beedies of their manufacture ; (b) from carrying on business under the firm name of 'P. S. Shanmugham and Brother' at all, or in any event without clearly and sufficiently distinguishing their goods from those of the respondent and without taking all precaution necessary in the trade and in the matter of wrappers and get up so as not to deceive and mislead purchasers; and (c) from using the term "Shanmugham" in connexion or association with beedies as a descriptive term thereof or as a trade name for their goods as distinguished and apart from any trader's name, under which they may be, if permitted, entitled to carry on business.

Though the real question for determination by the Court in all such passing off actions, however complex the scheme of deception may be, is always whether or not the goods of the defendant have been represented as and sold as if they were the goods of the plaintiff: see (1896) A C 199.[1] As many as seven issues were framed in the suit, dealing with what are but different aspects of the same question, and it is to be observed that the separate consideration of these issues and the recording of separate findings thereon, some of them apparently contradictory, have given rise to some contentions which might not have been otherwise possible. These findings which are concurrent may be summarised as follows: firstly, as regards the trade mark or seal, though the respondent had been using it from about 1920, he has not been very particular about using it since 1925 and its use was "more or less discontinued in or about that time;" secondly, the term "Shanmugham" has become so associated in the beedi trade at Ambasamudram and its vicinity with beedies manufactured by the respondent as to denote exclusively respondent's beedies; and the use of that term by the appellant either by itself or in conjunction with other words, as a description or designation of his goods would be calculated to deceive purchaser; thirdly, the trade name of "P. S. Shanmugham and Brother" was a false name as no such partnership between the appellant and his brother was proved; fourthly, so far as the get up of the goods is concerned, there was no such similarity in the labels or wrappers used by the parties as would lead to any mistake or confusion among purchasers; but by marking his goods with a colourable imitation of the respondent's seal and the words "Shanmugham seal beedi" the appellant intended to deceive purchasers. On these findings a decree was passed for the issue of an injunction restraining the appellant and his father (defendant 2, respondent herein),

---

[1] Reddaway v. Banham, (1896) A C 199=65 L J Q B 381=74 L T 289=44 W R 638.

> from using the term 'Shanmugham' in connexion or association with beedies as a descriptive term thereof or from using any trade name or trade mark in which the term 'Shanmugham' occurs or from carrying on business in the Ambasamudram Taluk in the firm name in which the word 'Shanmugham' occurs.

It is against this decree that this appeal has been preferred. The appellant's learned counsel Mr. Rangaswami Iyengar, in an interesting argument, contended before me that inasmuch as the appellant was merely using his own name for carrying on his business and describing his goods and it has been found by the Courts below that the get up of the appellant's goods as they were placed in the market was so dissimilar that there was no likelihood of purchasers being deceived, no case for the issue of an injunction has been made out. Relying upon (1889) 42 Ch D 128,[2] he urged that so long as a man takes care to distinguish his goods sufficiently from those of another person when placing them in the market, so as to avoid any likelihood of mistake or deception on the part of the purchasing public, he could not be restrained by any injunction either from carrying on business in his own name, or from using his name as a trade mark or as a descriptive term applied to his goods, even though such name has come to be so closely associated with that other person's goods as to denote them exclusively in the locality.

A number of cases have been cited on the one side or the other; but I do not propose to discuss all of them, as, in my view, the findings of the Courts below are plainly decisive of this appeal. There was also some debate at the Bar as to whether (1889) 42 Ch D 128,[2] on which Mr. Rangaswami Iyengar so strongly relied in support of his arguments, could still be regarded as good law, in view of the later decision of the House of Lords in (1896) A C 199[1] at any rate, in cases where a particular name or descriptive word as applied to certain goods has acquired what has been called a "secondary signification." I was referred to 30 Patent and Trade Mark Cases 493[3] at page 510 where Buckley L. J., observed that (1889) 42 Ch D 128[2] was qualified by (1896) A C 199.[1] On the other hand, it was pointed out that there has been no decision of the House of Lords definitely throwing doubt upon the soundness of that decision and that in one of the latest cases dealing with this subject, (1924) 41 R P C 277,[4] a case apparently of a name with a secondary signification, (1889) 42 Ch D 128,[2] was recognized and applied by Romer J. as an authority still in force. I do not, however, think it necessary in this case to decide whether and how far the principle enunciated in (1889) 42 Ch D 128[2] requires qualification in the light of the later decisions in England, as I am of opinion that even giving the fullest possible effect to that principle, it does not assist the appellant in this case. What happened there may be briefly stated. The plaintiffs had carried on business under the name of Thomas Turton and Sons and the name of the firm acquired reputation and prestige in the Iron and Steel Trade in the locality. The defendant John Turton also set up a business in the same place and of the same kind in partnership with his sons under the trade name of 'John Turton and Sons' and the action was brought for an injunction restraining the defendants from carrying on their business under this name, John Turton and Sons. It will be noticed that there was no question of the defendants having used any trade mark of the plaintiff in connexion with the goods but it was simply a question of the name under which the defendants were carrying on their business. The learned Judges held that so long as a man carried on business in his own name simply or in a name which as a description of that business, represents nothing but the accurate and exact truth, he did no wrong and could not be restrained by an injunction from doing so merely because the business of some other person better known in the trade under the same name was prejudicially affected. Lord Esher observed at page 134:

---

[2] Turton v. Turton, (1889) 42 Ch D 128=61 L T 571=38 W R 22.

[3] John Brinsmead and Sons Ltd. v. Edward George Stanley Brinsmead, 30 Patent and Trade Mark Cases 493.

[4] Joseph Rodgers and Sons Ltd. v. W.N. Rodgers and Co., (1924) 41 R P C 277.

> He had not done anything with the intent or for the purpose of making the use of his simple name look as if his name were the name of the plaintiffs. In some cases, besides using the name, parties have, to use what I think is a happy phrase of my brother Cotton's, garnished that use —that is, they have done things besides using the name in order that the use of that name might look as if it were being used by the old firm. There is nothing of that kind here. The defendants have carried on a business a great part of which is the same as the plaintiffs, but they having carried it on in the name of John Turton and Sons, the name of the principal being John Turton, and it being true that he has taken his sons as partners— he has done nothing but that.

After discussing the judgment of Turner, L. J. in (1853) 3 De G M & G 896[5] at p. 904, the learned Judge points out that the fundamental principle in such cases is that no man can have the right to represent his goods as the goods of another person, and where a man merely uses his own name, there is no prima facie case that he is selling his goods as the goods of another person:

> But if besides using his own name, he does other things which show that he is intending to represent, and is, in point of fact, making his goods represent, the goods of another person, then he is to be prohibited but not otherwise—at page 137.

It will be apparent from these quotations that the principle of the decision in (1889) 42 Ch D 128[2] is this: No man has any right to represent that his business is the business of another person, but when a man carries on business in his own name which happens to be also the name of another, he does not make any such representation, but represents only what is the 'accurate and exact truth,' namely, that it is his own business. Even the decision of Romer J. in (1924) 41 R P C 277[4] on which Mr. Rangaswami Iyengar relied as showing that (1889) 42 Ch D 128[2] must still be regarded as an authority in full force, shows that the principle of that decision cannot be invoked by a person who uses his name in combination with other words as a trade name which, taken as a whole does not represent the bare truth, and whose conduct otherwise also shows that he deliberately intends to pass off his goods as those of another. Romer J. stated the law thus:

> It is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another; or is in any way connected with the business of another; that is the first proposition. The second proposition is that no man is entitled so to describe or mark his goods as to represent that the goods are the goods of another. To the first proposition there is, I myself think, an exception; a man, in my opinion, is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another, and so long as he does it honestly. It is an exception to the rule which has of necessity been established . . . The exception to the first rule is however an exception made in the interests of honest trading; again, it is an exception which only authorizes the use by a man of his own name; it is not an exception which, even in an honest case, entitles a man to use something that is not his own name; that is to say it does not entitle him to use his name in combination with something else, such as the words 'and company' . . . To the second rule, to which I have referred, I think there is no exception at all, that is, a man is not entitled so to describe his goods as to lead to the belief that they are the goods of somebody else. It is not necessary that there should be an exception to that.

Now what are the facts found in the present case? From the summary given above, it will be seen that the appellant has been trading under a name which does not represent the truth; for no such partnership as 'P. S. Shanmugham and Brother' was proved and further, that the appellant has, by marking his goods with a seal which is a colourable imitation of the seal which the respondent was using, and by using the name 'Shanmugham' which has acquired a secondary signification as exclusively denoting the respondent's Beedies in the designation of the appellant's goods as 'Shanmugham seal Beedies', he wants to deceive the public. These findings, to my mind, completely exclude the application in (1889) 42 Ch D 128[2] and (1924) 41 R P C 277[4] to the facts of the present case. Mr. Rangaswami Iyengar laid great stress on the findings that the respondent had discontinued the use of his seal from about 1925 and the get up of the appellant's goods was so dissimilar that they would not be mistaken for the goods of the respondent, and urged that the appellant could not therefore be said to have intended to deceive the public. As I have already indicated, this argument has been made possible by the manner in which the Courts below have dealt with the different aspects of the case separately, recording distinct findings thereon as if they were different subjects for decision. The lower Courts, have however taken care to make it clear that their finding as to the get up of the appellant's goods not being calculated to deceive the public should be understood only as a finding on that issue alone viewed apart from the other issues arising in the case. The learned District Munsif observes in para. 10:

---

[5] Burgess v. Burgess, (1853) 3 De G M & G 896 =22 L J Ch 675=17 Jur 292=98 R R 350.

> Taking however my findings on the other issues and the facts on which such findings are based I would hold that though there is a strong dissimilarity, there is a likelihood of purchasers being deceived.

The learned Subordinate Judge's finding on this point is also similarly qualified while his conclusion that the appellant's conduct, taken as a whole, betrayed an intention to deceive the public is clear and emphatic. I do not therefore see any force in this contention. Moreover, it has been held by the Court of Appeal in England that where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get up is immaterial and affords no protection. In (1901) 83 L T 259[6] dealing with an argument based on the dissimilarity of the get up of the defendants' goods, Lord Alverstone M. R., observed at p. 269:

> It is said that the boxes containing the preparation are entirely different when you come to look at them. I do not at all deny it. I am not dealing with this case upon any consideration of make up of the goods put side by side. I do not suggest that anybody would think of necessity that the stuff in the bottle was the same as the stuff in the boxes. But knowing as we do that it is a common method of giving medicines now to put them into globules a person would be extremely likely to think that a Valentine's Meat Globule or that a Globule made by the Valentine Extract Company contained the same meat extract as Valentine's Meat Juice . . . I do not think that a person in the present day could properly use the words "Valentine's Extract" in connexion with meat juice without passing off his goods as the goods of the plaintiff.

Similarly Collins L. J. said at p. 271:

> The get up has nothing whatever to do with this case. It may be dismissed altogether from the discussion, because the representation is not as to the form in which the article is sold. It is not suggested that the defendants pass off bottles which are not distinguishable from the plaintiffs'. The representation is as to the thing contained in the integument. In the plaintiffs' case the integument is a bottle, and in the defendants' it is a globule in a tin. But the representation is that which is contained in the globule, namely the extract of meat is made by the plaintiffs. That is what the representation is, and therefore the form and get up have, I repeat, nothing whatever to do with the case, and may be dismissed.

That was, of course, a case where the name "Valentine," which happened also to be the name of one of the defendants, was found to have acquired a secondary signification so as to denote the plaintiffs' meat-extract exclusively and the defendant was enjoined from using that name though it was also his own name in connexion with his goods however different or dissimilar the get up of the latter might be. Similarly here, it having been found that the word 'Shanmugham' has become so much associated with the beedies of the respondent's manufacture as to denote exclusively such beedies in Ambasamudram and its vicinity, the appellant cannot sell his goods under a description containing the word "Shanmugham" without passing off his goods as those of the respondent, however different or dissimilar the wrappers and the get up of his goods may be. The case being therefore clearly one for the issue of an injunction the question next arises as to the form in which the injuction is to issue. It seems to me that the injunction ordered by the Courts below restraining the appellant, as it does, absolutely from using his own name in describing his business or designating his goods goes too far. It has been recognized in several cases that it is a strong thing to restrain a defendant from using his name in whatever manner in connexion with the business carried on by him or the goods manufactured by him, and even in cases where such name was found to have acquired a technical or a secondary signification in the market so as to denote the plaintiff's goods exclusively, Courts have so framed the injunction as to allow the defendant to use his name, so as not to mislead the public into believing that his goods are the goods of the plaintiff. In (1901) 18 R P C 213[7] the Court restrained the defendant from carrying on his business either in the name of 'cash' or under any other name in which the name "cash" occurred without taking reasonable precautions to clearly distinguish the business carried on by them from the business of the plaintiffs and from selling frillings or woven names or initials not manufactured by the plaintiffs as "cash's frillings" or "cash's woven names" or initials. In (1901) 83 L T 259,[6] already referred to, the injunction so far as it related to the defendant, Richard Valentine, restrained him from carrying on business as manufacturer or vendor of any preparation or extract of meat or meat juice under any name or title of which the name 'Valentine' or 'Valentines' formed part without clearly distinguishing such business from the business of the plaintiffs and from selling any such preparation under any such name or description without clearly distinguishing such preparation from the goods of the plaintiffs. Similarly, in (1913) 2 Ch D 545[8] also a case where the word 'Teofani' was found to have acquired a secondary signification, Warrington J. granted an injunction restraining the defendant from selling or offering for sale cigarettes as 'A Teofani's cigarettes' or otherwise marking his goods with the name 'Teofani' either with or without other names, without clearly distinguishing such cigarettes from the cigarettes of Teofani and Co., Ltd. (plaintiffs) and this injunction was confirmed by the Court of appeal. In view of these decisions, I am of opinion that the injunction ordered by the Courts below should be qualified in the manner indicated in these decisions, that is to say, by the addition, at the end of the words, "without taking reasonable precaution to clearly distinguish the business carried on or Beedies manufactured or sold by the defendants from the business carried on and the beedies manufactured by the plaintiff." Subject to this modification, the decree of the Court below is confirmed and the appeal is dismissed. In the circumstances each party will bear his own costs of this appeal. Leave refused.

---

[6] Valentine Meat Juice Co. v. Valentine Extract Co. Ltd., (1901) 83 L T 259 = 17 R P C 673 = 16 T L R 522.

[7] J and J Cash Ltd. v. Cash, (1901) 18 R P C 213.

C.R.K./D.S. *Decree modified.*

---

[8] Teofani & Co., Ltd. v. Teofani, (1913) 2 Ch D 545=82 L J Ch 490=109 L T 114=30 R P C 446 = 57 S J 686=29 T L R 591.

A. I. R. 1940 Madras 149

VENKATARAMANA RAO J.

Nayar Modern Bank Ltd. Palghat — Applicant.

v.

Official Liquidator, Travancore National and Quilon Bank Ltd. — Respondent.

Appln. No. 2875 of 1938, in O. P. No. 158 of 1938, Decided on 21st April 1939.

Banker and Customer—Preferential claim — Money deposited with bank for opening overdraft account — Money cannot be said to be deposited for a specific purpose so as to create a trust entitling depositor to preferential claim over other creditors of bank—Relation between depositor and bank is that of debtor and creditor, and vice versa.

Where money is deposited with a bank in fixed deposit account for the purpose of opening an overdraft account, the transaction between the depositor and the bank does not constitute anything more than the relation of a debtor and creditor. In the case of the fixed deposit account the bank is the debtor and the depositor is the creditor, while in the case of the overdraft account the position is reversed, the depositor being the debtor and the bank being the creditor. No question of trust arises in such a case, nor can it be pretended that the amount paid by way of fixed deposit is money placed with the bank for any specific purpose so as to clothe it with the relationship of a trustee entitling the depositor to a preferential claim in respect of the deposit over other creditors of the bank: *A I R 1939 Mad 337, Disting.* [P 151 C 1, 2]

K. Kuttikrishna Menon and K. Narayana Marar — *for Applicant.*

C. Krishnaswami Iyer — *for Respondent.*

Order. — This is an application by the Nayar Modern Bank Ltd., for payment of a sum of Rs. 23,950-3-4 in full and in preference to the ordinary creditors of the Travancore National and Quilon Bank Ltd. It is alleged in the affidavit filed in support of the application that under agreements with the Travancore National and Quilon Bank Ltd., the Nayar Modern Bank made fixed deposits at the various branches of the Travancore National and Quilon Bank at different times for the purpose of enabling the Nayar Modern Bank to open overdraft accounts on the security of such fixed deposits, that there were five such fixed deposits on the date when the Travancore National and Quilon Bank suspended payment and that after giving credit to the amounts drawn by it on overdraft account there remained a balance of Rs. 23,950-3-4 which is now claimed. A statement of account is given in para. 4 of the affidavit and its accuracy is not traversed by the Official

Liquidators. The ground on which the claim for preferential payment is made is thus stated in para. 2 of the affidavit:

> The fixed deposits were made and the overdraft accounts were opened at the same time and the deposits were made only for the specific purpose of obtaining accommodation by opening overdraft accounts.

The Official Liquidators traverse this allegation and state that the several deposits were made by the Nayar Modern Bank in the ordinary course of business, that an overdraft account was opened as per the terms of the agreement dated 11th November 1937, and that the amounts deposited by the applicant Bank were to be a security for the due payment of the amounts that were from time to time paid to the applicant bank in the overdraft account and that that was nothing more than a usual and ordinary banking transaction of loan. The question therefore is what is the nature of the transaction between the Nayar Modern Bank and the Travancore National and Quilon Bank? The agreement above referred to is marked as Ex. A. It contains the terms on which the Nayar Modern Bank were given accommodation by way of overdrafts by the Travancore National and Quilon Bank. Paras. 2, 3 and 6 of the agreement are as follows:

> 2. That the accommodation will be as desired by the obligors an account current in their name with liberty to overdraw same to the extent of Rs. 12,000 only.
>
> 3. That the said accommodation will be operated upon by the obligors by the issue of cheques.
>
> 6. That the Bank will charge interest at 5½ per cent. per annum on the daily overdrawn balance of the said account.

Paragraph 10 provides that the Nayar Modern Bank should pledge the deposit receipt in favour of the Travancore National Bank and Quilon Bank as security for the due repayment of any moneys that the Nayar Modern Bank may overdraw in the said account and that it shall always be open to the Travancore National and Quilon Bank to appropriate the same out of the amount of the said deposit without any reference to the Nayar Modern Bank. The Nayar Modern Bank originally commenced its dealings with the Quilon Bank and continued them after its amalgamation with the Travancore National and Quilon Bank. To understand the nature of the arrangement entered into at the inception of the dealings between the Nayar Modern Bank and the Quilon Bank, it may be necessary to refer to one or two letters that passed between them. On 24th May 1933 the Managing Director of the Nayar Modern Bank wrote to the Quilon Bank a letter, which runs as under:

> In furtherance of our letter of the 5th instant, to you and your reply No. 1393 of 1933 dated 8th instant, we are herewith sending you two cheques on the Bank of Hindustan Ltd., each for Rs. 4000 in your favour on their Madras and Calicut branches. The proceeds may be placed with you as a fixed deposit for one year in our favour and we request you to allow us an overdraft account on the security of this deposit at your earliest convenience. Your fixed deposit form and the specimen signature form are also herewith enclosed duly filled up. Our certificate of incorporation is also herewith enclosed for reference and return.

In reply thereto the Quilon Bank wrote the following letter on 29th May 1933:

> The two cheques received with your letter of the 24th instant amounting to Rs. 8000 have been realized to-day and the amount placed in fixed deposit for a period of one year at 5½ per cent. per annum. As desired, we shall be pleased to open an overdraft account for you and earmark the same for an overdraft of Rs. 7600 on the security of the fixed deposit receipt. Interest will be charged quarterly on the daily balance of this account at 7½ per cent. per annum. Kindly return us the enclosed fixed deposit receipt duly discharged together with the other forms completed and the power of attorney, if any, granted to the officers, who will operate on the account for registration in our books.

No doubt these letters relate to a period before the amalgamation of the Quilon Bank with the Travancore National Bank but there has been no change in the nature of dealings had after the amalgamation. That it is so is clear from a letter dated 11th November 1937, by the Travancore National and Quilon Bank to the Nayar Modern Bank Ltd., which runs as follows:

> As per sanction obtained from our central office, we have the pleasure to inform you that we shall, as a special case, reduce the rate of interest on the overdraft from 2½ to 1½ over the deposit rate, that is to say, a rate of 5½ will be charged on the overdraft account on the security of the fixed deposits. We may in this connexion remind you that your deposit with us for Rs. 15,000 which you withdrew on the 4th instant has also to be re-deposited with us in terms of your agreement.

The five deposits referred to in the affidavit filed in this matter were placed in fixed deposit account for a period of one or two years carrying certain rates of interest. Prima facie such deposits are governed by the ordinary law which regulates a banker and a customer, that is, they are loans made to the Travancore National and Quilon Bank by the Nayar Modern Bank and once the said amounts were received by the former Bank they became its property to be dealt with by it in the course of its business without reference to the Nayar Modern Bank. The amounts advanced to the Nayar Modern Bank by way of overdraft in the overdraft accounts are nothing more than loans advanced by the Travancore National and Quilon Bank to the Nayar Modern Bank. An overdraft is prima facie a loan (*vide* Hart on Banking, Vol. II, p. 697), and there is nothing in Ex. A or in the correspondence that has been filed before me to take the transactions in question out of the category of an ordinary overdraft as understood in the law of banking. The substance of the arrangement is that the Travancore National and Quilon Bank should from time to time lend moneys to the Nayar Modern Bank and as security for the due repayment of the said sums the Nayar Modern Bank should deposit sums of money with the Travancore National and Quilon Bank according to the ordinary course of business and pledge the deposit receipts to secure the amounts payable under the overdraft account. In effect the Nayar Modern Bank will be creating a first charge on the amounts owed by the Travancore National and Quilon Bank to it in the fixed deposit account so that this amount may be available to the Travancore National and Quilon Bank in preference to the other creditors of the Nayar Modern Bank. The transactions therefore between the Nayar Modern Bank and the Travancore National and Quilon Bank did not constitute anything more than a relation of a debtor and creditor. In the case of the fixed deposit account the Travancore National and Quilon Bank is the debtor and the Nayar Bank is the creditor; while in the case of the overdraft account the position is reversed, the Nayar Modern Bank being the the debtor and the Travancore National and Quilon Bank being the creditor. I am therefore unable to see how any question of trust arises in the case; nor can it be pretended that the amount which was paid by the Nayar Modern Bank to the Travancore National and Quilon Bank by way of fixed deposit is money placed with the latter Bank for any specific purpose so as to clothe it with the relationship of a trustee. It will be seen that what was given as security is not the specific amount that was deposited but the debt as evidenced by the deposit receipt issued by the Travancore National and Quilon Bank. Mr. Kuttikrishna Menon relied upon my decision reported in 1938 M W N 1337,[1] but that was quite a different case because there the money was entrusted for a specific purpose that is, for the fulfilment of certain obligations of the employees to the Bank. The Bank received and accepted the money for that purpose and it was their duty to return the said money clothed with the said trust as soon as the purpose is fulfilled. The claim of the applicant must therefore be disallowed. The application is accordingly dismissed with costs.

C.R.K./G.N. *Application dismissed.*

A. I. R. 1940 Madras 151

KUNHI RAMAN J.

Gopu China Jogayya and Seshawatharam Firm — Appellant.

v.

Mamidi Satyanarayana and others — Respondents.

Appeal No. 184 of 1938, Decided on 15th September 1939, against order of Dist. Court, Kistna, at Chilakalapudi, D/- 14th December 1937.

Provincial Insolvency Act (5 of 1920), S. 35 —Annulment of adjudication—Adjudication of debtor as insolvent cannot be annulled under S. 35 on ground that debt mentioned by petitioning creditor in his application is bogus unless it can be shown that debtor did not owe any other debts or was not really insolvent at the time of adjudication.

Where on a petition being presented by the creditor an adjudication is made and subsequently it is found possible to establish that on the date of that petition there was no genuine debt due to that creditor, the order of adjudication cannot be set aside under S. 35 on the ground that the debtor ought not to have been adjudged insolvent. [P 152 C 2]

There is no doubt that but for the petition presented by the creditor, the adjudication would not have taken place but once an adjudication takes place, all the other creditors of the debtor become interested in the matter and unless it can be shown that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made, it is not open to him to contend that it is a case in which the order of adjudication ought not to have been made: *(1883) 52 L J Ch 48, Rel. on; A I R 1935 Rang 276; (1879) 48 L J Bk 43; A I R 1938 Mad 898; A I R 1928 Mad 394 and A I R 1926 Mad 1159, Disting.* [P 152 C 2]

N. Vasudeva Rao — *for Appellant.*

V. Govindarajachari and V. Parthasarathy — *for Respondents.*

Judgment. — This is an appeal from the order made by the learned District Judge of Kistna in I. A. No. 1864 of 1935 in I. P. No. 15 of 1935 on the file of his Court. The facts are briefly as follows. On a petition presented by respondent 1, respondent 2 was adjudicated insolvent on 17th October 1935. Then the appellant who is one of the creditors, of the insolvent applied on 7th November 1935 for annulling the adjudication under S. 35, Provincial Insolvency Act. The ground alleged in the petition before the District Judge was that the debt mentioned in the petitioning creditor's application was a bogus debt and that consequently there was abuse of the process of the Court. The learned District Judge dismissed the petition for a reason which cannot be supported. The order is worded as follows:

---

[1] Gopalakrishnan v. Official Liquidator, Travancore, National and Quilon Bank Ltd., (1939) 26 A I R Mad 337=183 I C 203=(1939) 1 M L J 209=1938 M W N 1337.

> The petitioner is practically trying to make me review the order of the District Judge who adjudicated the respondent insolvent. I do not think he can be allowed to do so and that his real remedy lies in having the debt declared void or annulled by appropriate action. The petition is dismissed. All parties to bear their own costs.

The learned advocate for the appellant very rightly comments on the wrong view taken by the learned District Judge. The respondents' learned advocate while conceding that the reason given in the order may not be quite satisfactory, contends that in substance the order is correct though in form it looks unsatisfactory. The question therefore for determination is whether in substance the order made by the Court below is correct and warranted by law. It is first necessary to bear in mind an important feature which the respondents' learned advocate has pointed out in the course of his arguments, namely that before the petitioning creditor in this case filed his petition for adjudicating respondent 2 insolvent, the appellant before this Court had himself presented a similar petition on 29th July 1935 in the Court of the Subordinate Judge of Bezwada asking for a similar relief. Since the order of adjudication was made by the District Court of Kistna on the petitioning creditor's application prior to the disposal of the present appellant's application filed in Bezwada, that petition does not seem to have been pressed. The learned advocate for the respondents argues with considerable force that it does not lie in the mouth of the present appellant now to say that at the time defendant 2 was adjudicated insolvent, the adjudication ought not to have been made.

The learned advocate for the appellant argues that S. 9, Provincial Insolvency Act, prescribes the conditions that should be fulfilled to entitle a creditor to present an insolvency petition against a debtor and he points out that the main condition is the existence of a debt due to that creditor to the extent of at least Rs. 500. Therefore if on a petition presented by a creditor, an adjudication is made, if it is possible to establish subsequently, that on the date of that petition, there was no genuine debt due to that creditor, then that is a fit case in which the adjudication should be set aside under S. 35 on the ground that the debtor ought not to have been adjudged insolvent. This contention I am not able to accept as well founded. There is no doubt that but for the petition presented by the creditor, the adjudication would not have taken place but once an adjudication takes place, all the other creditors of the debtor become interested in the matter and unless the appellant here is able to show that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court, it is not open to him to contend that it is a case in which the order of adjudication ought not to have been made.

The learned advocate for the respondents cites the decision reported in (1883) 52 L J Ch 48,[1] where the facts were similar to the facts in the present case. Under the English law, it is only if a debt of £50 is due by the debtor that the creditor to whom such a debt is due can validly file a petition for adjudicating the debtor insolvent. In that case, after the adjudication, the debtor came forward and satisfied the Court that made the order of adjudication that the debt due to the petitioning creditor was below £50. Thereupon the County Court Judge annulled the order of adjudication but the Court of Appeal reversed this decision. The following sentences that occur in the judgment of Bacon C. J., are relied on by the learned advocate for the respondent:

> Proceedings in bankruptcy are for the benefit not only of the petitioning creditor but of all the creditors . . . It is no reason, even if the petitioning creditor's debt is not established, that the other creditors should be deprived of their rights.

This decision seems to me to be strongly against the appellant in the present appeal. The learned advocate for the appellant cites the following decisions in support of his contention: A I R 1935 Rang 276,[2] (1879) 48 L J Bk 43;[3] (1938) 2 M L J 385;[4] A I R

---

1. Exparte French, In re Trim, (1883) 52 L J Ch 48=47 L T 339.
2. Koya Mohideen v. Hashim Khan, (1935) 22 A I R Rang 276=158 I C 333.
3. In re Whelan: Exparte Sadler, (1879) 48 L J Bk 43=36 L T 361=27 W R 156.
4. Kumarappa Chettiar v. Chidambaram Chettiar, (1938) 25 A I R Mad 898=178 I C 737=(1938) 2 M L J 385.

1928 Mad 394;[5] 24 M L W 486.[6] In the case reported in A I R 1935 Rang 276,[2] during the temporary absence of the debtor, a person who said he was a creditor filed a petition and got the debtor adjudicated insolvent. The debtor on coming to know of this order of adjudication applied for its annulment and he succeeded in showing that it was not competent to the creditor to obtain the order of adjudication. What is significant in the report of this case is that there is nothing in it to show that there were other creditors who were interested in the proceedings. In the case in (1879) 48 L J Bk 43[3] it was shown that there was no debt to the extent of £50 due by the debtor to the creditor. In (1938) 2 M L J 385[4] the petition that was filed for adjudication showed on its face that there was no act of insolvency committed by the debtor within three months before its date. In A I R 1928 Mad 394[5] it was held that the debtor was in a position to discharge his debts in full and therefore it was an abuse of the process of Court to apply for and obtain an order of adjudication. In the case in 24 M L W 486,[6] it was found that there was no allegation of any act of insolvency when the petition was filed for adjudication. These cases cannot, in the circumstances mentioned above, be regarded as authorities for the proposition that the learned advocate for the appellant wants the Court to accept, namely that if the appellant merely proves that there was no binding debt due to the petitioning creditor then the Court is bound under S. 35 to set aside the order of adjudication on the ground that the order ought not to have been made. In my opinion, the allegations contained in the affidavit filed by the appellant in the Court below in support of his contention that the adjudication should be annulled were not sufficient for such annulment. In these circumstances, the conclusion arrived at by the lower Court is correct although the reasons given in its order cannot be supported. The appeal therefore fails and must be dismissed with costs (one set).

C.R.K./G.N. *Appeal dismissed.*

---

[5] Alamelumangathayarammal v. Baluswami, (1928) 15 A I R Mad 394=108 I C 208.

[6] Karuthan Chettiar v. Raman Chetti, (1926) 13 A I R Mad 1159=97 I C 590 = 24 M L W 486.

A. I. R. 1940 Madras 153

LEACH C. J. AND KUNHI RAMAN J.

Abdul Hameed — Appellant.

v.

Mohammad Yoonus (Petitioner) and others — Respondents.

Appeal No. 14 of 1938, Decided on 5th September 1939.

(a) Cutchi Memon—Wills—Law applicable.

Where the testator is a Cutchi Memon the provisions of the Mahomedan law with regard to wills apply : *A I R 1919 Bom 80, Rel. on.* [P 154 C 2]

(b) Mahomedan Law — Will — Writing or particular form of verbal declaration is not necessary as long as intention is ascertainable—Letter and telegram held could be admitted to probate.

Under the Mahomedan law no writing is required to make a will valid and no particular form of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. Hence, where the testator having decided to make certain alterations in his will and after having received the draft codicil instructed, by a letter and a wire, his solicitors to amend it by inserting a provision cancelling the directions he had given in his will with regard to the school fees of his grandchildren, the letter of instructions and the wire form part of the will and can be admitted to probate : *A I R 1919 Bom 80; 25 W R 121 and 21 All 91, Rel. on.* [P 154 C 2; P 155 C 2]

P. K. Janakiram — *for Appellant.*

T. A. Rangachari, V. Subramaniam, D. Narsaraju and V. Satyanarayana — *for Respondents.*

Leach C. J. — Hajee Sir Ismail Sait, a member of the Cutchi Memon community and a resident of Bangalore, died on 24th April 1934 in the Tuberculosis Sanitorium at Arogyavaram, Chittoor District. He was survived by a widow, five sons (the appellant and respondents 1 to 4) and a daughter (respondent 5). He had sixteen grandchildren, who are respondents 6 to 21. He left a will dated 19th March 1934, and the present appeal arises out of an application which was made by the executor for the grant of probate. By his will the testator provided for the education of his grandsons. For some of them he made special provisions with regard to their education and maintenance. While he was in the Sanitorium he decided to fix the allowance which his sons and daughter were to receive under his will and he directed his solicitors, Messrs. Moresby and Thomas, Madras to draw up a codicil to give effect to his intentions in this respect. The instructions to draft the codicil were embodied in a letter dated 5th April 1934 and signed on the testator's behalf by respondent 1. Messrs. Moresby and Thomas prepared a draft and sent it to him on 6th April. Two of the testator's grandchildren had been at school at Aligarh. One died while at school and the other was consequently withdrawn from the school. On 13th April 1934 the testator directed respondent 1 and his agent D. L. Narasappa to write to Messrs. Moresby and Thomas in these terms :

> I beg to acknowledge the receipt of your letter of the sixth instant with the draft codicil. I am grieved to inform you that since the receipt of this codicil my grandson, Abdul Sammad, suddenly died at Aligarh University. I have withdrawn my other grandson from school and have decided to cancel the allowances provided for school fees. I have therefore wired you as under: 'Your letter, sixth; since my grandson Abdul Sammad died have therefore decided omit also school fees — Don't delay—Ismail,' which I beg to confirm.

Respondent 1 who applied for probate of the will also asked that the telegram referred to in this letter and the letter should be read as parts of the will and admitted to probate. The learned Judge who heard the application, (Wadsworth J.) granted probate of the will, but refused to admit to probate the telegram and the letter. The appeal concerns the question whether this decision is right. The refusal of the learned Judge to admit these documents to probate was based on the opinion which he formed that they were only intended to provide material for the preparation of a draft codicil which the testator was to settle later.

Although according to the oral evidence the testator was in clear mind until two days before he died, he was undoubtedly seriously ill when he instructed respondent 1 and his agent to write to Messrs. Moresby and Thomas on 13th April 1934, and from the documentary evidence it is quite evident that soon afterwards he became too ill to attend to his affairs. On 14th April, Messrs. Moresby and Thomas wrote to him acknowledging receipt of his telegram instructing them to omit from the will the provisions made for school fees but asked for further instructions in order to clear up a doubt which they felt with regard to the extent of the instructions. By cl. 14 (a) of the will the testator provided for the maintenance and education of the five sons of respondent 2, including provision for the pursuit of studies in England or America. In cl. (b) he made a similar provision for the education of any sons who might subsequently be born to the second respondent, and in cl. (f) he made provision for the education and maintenance of Sulaiman, the son of the appellant. Sulaiman was then reading for the bar in England. In their letter asking for further instructions Messrs. Moresby and Thomas referred to the fact that Sulaiman was in England and observed that probably the testator did not wish to make any alteration in the clause relating to him but they would be glad to know by return whether he wished them to strike out from the will cls. 14 (a) and 14 (b). In addition to writing this letter Messrs. Moresby and Thomas sent him a telegram asking for instructions. The telegram and the letter were not replied to and it is obvious that this was because the testator was too ill to give instructions. On 12th April Messrs. Moresby and Thomas submitted a bill of costs to the testator and on 21st April the first respondent wrote to them stating that his father was not well enough to go through their letter in consequence of which it had not been placed before him.

The testator being a Cutchi Memon the provisions of the Mahomedan law with regard to wills apply. That a Cutchi Memon is governed by the Mahomedan law in this respect was held in 43 Bom 641,[1] and the contesting respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Mahomedan law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained: *see* 25 W R 121.[2] The appellant says that the telegram and the letter which he asks to be admitted to probate embody a definite decision by the testator that the provisions which he had made in his will with regard to school fees should be cancelled. If that is the position there can be no doubt that the telegram and the letter should be admitted to probate. The contesting respondents however say that the learned Judge was correct in treating the telegram and the letter as being material for the preparation of a draft and that the testator left open the definite position until the draft had been submitted to him. The case in 43 Bom 641[1] has direct bearing on this appeal. In that case a Cutchi Memon wrote to his brother-in-law, Bhai Abdullabhai, as follows:

---

1. Sarabai Amibai v. Mahomed Cassum Haji Jan Mahomed, (1919) 6 A I R Bom 80=49 I C 637 =43 Bom 641=21 Bom L R 49.
2. Mahomed Altaf Ali Khan v. Ahmed Buksh, (1876) 25 W R 121.

> In the will which you will get made tomorrow and give me, be kind not to forget (to add) my 'mukhatyari' so long as I am alive and after me my wife's 'mukhatyari.' Whatever costs may be incurred I will pay you. Written by your servant, Mahomed Hasam Haji.

On the other side of this document were the words "Bhai Abdullabhai", the name of the brother-in-law. "Mukhatyari" means absolute ownership or full power. The document was unattested. The intention was that the brother-in-law should instruct a solicitor to draw up a will embodying the intentions of the deceased. It was held that the document was in the nature of instructions to his legal adviser with regard to the disposition of his property and that under Mahomedan law the document operated as a valid will which might be admitted to probate. The deceased died before the will was drawn up. Marten J. cited with approval the following statement from Mayne's Hindu Law, Edn. 8, page 588:

> So, a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial.

He also referred to the case in 25 W R 121.[2] In that case the Privy Council held that a document which was a power of attorney containing an expression of what was to be done with property after the death of the donor of the power operated as a will. In 21 All 91[3] the Privy Council held that a letter operated as a will. The letter contained this statement:

> You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in para. 3.

The letter was addressed to the writer's agent. Now what is the position here? The testator having decided to make certain alterations in his will and after having received the draft codicil instructed his solicitors to amend it by inserting a provision cancelling the directions he had given in his will with regard to the school fees of his grandchildren. He wrote: "I . . . . have decided to cancel the allowances provided for school fees" and sent a telegram also couched in language equally clear. The testator had made up his mind what was to be done and he gave definite instructions to this end. The fact that the solicitors were not certain whether the instructions affected the grandson who was studying for the Bar in England did not alter the nature of the instructions. In these circumstances the letter and the telegram cannot be regarded as being instructions to the solicitors to submit a draft the provisions of which were to be deemed to be merely tentative. The learned Judge formed the opinion that the letter and the telegram were instructions merely for the preparation of a draft codicil which the testator would settle after perusal, but there is no evidence to be found in support of this. I can see no difference in principle between this case and the case in 43 Bom 641[1] and I accept the judgment in that case as correctly deciding the question under discussion.

For the reasons indicated I consider that the appeal should be allowed and the telegram and the letter admitted to probate. It is not necessary to inquire what will be the effect of admitting these documents to probate. That question will be decided if and when it arises in proper proceedings. The costs of all the parties who have appeared before us will be paid out of the estate, but not on the advocate and client basis.

Kunhi Raman J.— I agree with my Lord.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 155

LAKSHMANA RAO J.

In re J. S. Dhas and another
Appellants.

Criminal Appeal No. 363 of 1938, Decided on 26th September 1939, against order of Sess. Court, Coimbatore Division, in C. C. No. 77 of 1938.

Penal Code (1860), Ss. 420 and 120-B — Conspiracy to cheat — Grant of false transfer certificate by clerk of Tea Licensing Committee — Grantee enabled to transfer export quota rights in excess of quota to the credit of his estate — Both clerk and owner of estate held guilty under S. 420 read with S. 120-B.

An application for transfer of export quota rights was made by the owner of a tea estate. The applicant mentioned the export quota far in excess of what was fixed to his credit by the Tea Licensing Committee. The clerk of the Tea Licensing Committee whose duty was to check whether the transferor in fact had the necessary quota sought to be transferred to his credit initialled the application and wrote the word 'available' on the application indicating that the transferor had the necessary quota to his credit. In consequence of the false endorsement by the clerk the transferor was granted the quota transfer certificate whereby he was enabled to transfer export quota rights far in excess of the quota to his credit and made a huge wrongful gain. The clerk failed to explain the false endorsement:

---

[3] Mazhar Husen v. Bodha Bibi, (1899) 21 All 91 =25 I A 219=7 Sar 304 (P C).

Held that fraud was committed at the instance of the transferor and the quota transfer certificate having independent value and being document of title both the transferor and the clerk were guilty under S. 420 and S. 120-B, Penal Code: *A I R 1936 Cal 403 ; A I R 1920 Mad 121 and (1901) 1 Weir 28, Rel. on.* [P 157 C 2]

K. S. Jayarama Iyer, E. Antony Lobo and G. Gopalaswami—*for Appellants.*

Public Prosecutor — *for the Crown.*

Judgment.—Appellant 1 was the ledger clerk of the Tea Licensing Committee at Coonoor and appellant 2 is the proprietor of the Kudikadu Estate. Both have been convicted under S. 120-B read with S. 420, I. P. C., of the offence of conspiracy to cheat and obtain tea export quotas of the value of Rs. 22,523-15-0 and sentenced to rigorous imprisonment for two years. The Tea Licensing Committee was constituted in 1933 for regulating the export of tea from India to foreign countries, and the Office of the Committee for Southern India was located at Coonoor. It consisted of P. W. 5, the joint controller, and P. W. 7, the assistant joint controller, with an establishment, and it was the function of the committee to distribute the right of exporting the quantity allotted to Southern India to the various estates in Southern India according to productive capacity, and issue licenses to export the tea. Sales of export quota rights were permitted and it was part of the duty of the committee to facilitate them. The vendor had to submit an application in the prescribed form signed by himself and the vendee, and on receipt, the application would go to the transfer clerk to ascertain whether the transferor and transferee were on the books of the committee. The application would then go to the accountant to verify whether the necessary fees had been paid by the parties and it would then be sent to appellant 1, the ledger clerk, to ascertain whether the transferor had to his credit the export quota rights intended to be transferred. It was the duty of appellant 1 to write the word 'available' on the form if the transferor had to his credit the export quota sought to be transferred, and the application would then go to the transfer clerk for preparing the quota transfer certificates in triplicate. The transfer certificates and the application would then be sent to P. W. 7, the assistant joint controller and he would initial the certificates if the word 'available' is found written on the application by appellant 1. The transfer certificates without the application form would then go to P. W. 5 and they would be signed by him if P. W. 7's initials are seen there. The certificates would then be sent to the despatching clerk and one copy of the certificate and duplicate copy of the application would be sent to the transferor. Another copy of the certificate would be sent to the transferee and the third copy and the original application would be retained in the office. The necessary debit and credit entries would be made in the ledgers and a cursory glance at the ledgers would show the amount of export quota to the credit of the respective estates. Appellant 1 was in sole charge of these ledgers and the transactions had also to be entered in a transfer register, Ex. F. There was also "the main controlling account" which used to be written by appellant 1, and P. W. 7 used to act as joint controller during the absence of P. W. 5 on leave. Appellant 1 used to act as assistant controller in addition to his duties as ledger clerk and the dealings of Kudikadu Estate were carried on by appellant 2.

The joint controller went on leave from April to October 1937 and P. W. 7 was acting for him. Appellant 1 was acting as assistant joint controller in addition to his duties as ledger clerk and Exs. B-3, B-5, B-7, B-9, B-11, B-13, B-14, B-16, B-17, B-19, B-21, B-23 and B-25, the transfer applications, were received from appellant 2. The word 'available' was written on them by appellant 1 though the estate had not the necessary quota to its credit and Exs. B-6, B-8, B-10, B-12, B-13, B-20, B-22 and B-24, the quota transfer certificates, were prepared. Appellant 1 initialled them as acting assistant joint controller, and they were signed in the usual course by P. W. 7 the acting joint controller and issued to the parties. P. W. 5, the joint controller, called for the ledgers for his customary check, on his return in October, and appellant 1 stated that he was writing them up. They were called for again a few days later and appellant 1 replied that it would take some days to bring the balance up to date. Appellant 1 reported later that the ledgers had disappeared from the office, and a new set of ledgers were compiled under his direction from the office records including Ex. F, the transfer register which was not in his custody. The balance would not tally and appellant 1 went on leave. P. W. 6, the accountant, was asked to verify the figures and Ex. A-1, the wrong credit entry for 63,597lbs. of export quota rights transferred by the Achankoil estate to the Denington

Estate on 4th June 1937, was discovered in the re-constructed ledger of the Kudikadu Estate. The relative folio number was found altered in the transfer register, and Ex. C-2, the credit entry for 63,597lbs. of export quota rights in the handwriting of appellant 1, was found interpolated in the reconstructed ledger of the Denington Estate. The failure to balance the figures was due to Ex. A-1, the wrong credit entry in the reconstructed ledger of the Kudikadu Estate, and it transpired that appellant 2 had been enabled to transfer 48,249lbs. of export quota rights in excess of the quota to the credit of the Kudikadu Estate and make a wrongful gain of Rs. 22,523-15-0. Appellant 1 was summoned by the joint controller but he made himself scarce.

That appellant 2 transferred 48,249lbs. of export quota rights on behalf of the Kudikadu Estate in excess of the quantity to the credit of that estate and made a huge wrongful gain is beyond question, and it was not suggested that the account was overdrawn by any arrangement with the Tea Licensing Committee. That some others were permitted to transfer quota rights in anticipation of acquisition of rights has no bearing and it was not disputed in this Court that P. W. 7, the acting joint controller, would not have signed the quota transfer certificates but for the word 'available' written on the application forms by appellant 1 as ledger clerk and his initials thereon as acting assistant joint controller. It was not suggested hitherto that appellant 1 wrote the word 'available' and put his initials in ignorance of the state of accounts and his statement in answer to a Court question that he must have got the permission of the joint controller to do so is unfounded. The disappearance of the accounts, not to mention the subsequent conduct of appellant 1 belies it, and there is no ground for dissent from the conclusion of the learned trial Judge that the quota transfer certificates were obtained by cheating. There was no occasion for such fraud except it be for consideration, and the fraud must have been committed at the instance of the person benefited by it. Appellant 2 had dealings with appellant 1 direct as appearing from Ex. M-1 and he had contracted to transfer 59,000lbs. of export quota rights in excess of the quantity to the credit of his estate on 31st May 1937. Copies of the quota transfer certificates used to be sent to the parties and Ex. H series show that appellant 2 knew the state of the account of the Kudikadu Estate in June 1937. But the contracts entered into without the necessary export quota rights to the credit of the estate had to be fulfilled and as pointed out by the trial Judge in para. 21 of the judgment appellant 2 was in desperate straits. The conclusion is therefore irresistible that the fraud was committed at his instance and the appellants would undoubtedly be guilty under Ss. 415 and 120-B, I. P. C. : *vide* I L R (1937) 1 Cal 71.[1] The quota transfer certificates are by themselves property (*vide* 11 M L W 368[2] and 1 Weir 28[3]) and even otherwise, what was transferred was not a "power" and the evidence is that export quota rights have an independent value. The quota transfer certificates would also be documents of title, and the appellants would be guilty under Ss. 420 and 120-B, I. P. C. The conviction is therefore correct and it would make no difference in the sentence even if the conviction should be under Ss. 415 and 120-B, I. P. C. The conviction of the appellants is therefore confirmed and having regard to the nature and extent of the fraud the sentence is not excessive. The sentences too are therefore confirmed and the appeal is dismissed.

C.R.K./G.N. *Appeal dismissed.*

---

[1] Aswini Kumar Gupta v. Emperor, (1936) 23 A I R Cal 403=1936 Cr C 655=165 I C 505=37 Cr L J 1156=40 C W N 956=I L R (1937) 1 Cal 71.

[2] In re Packinathan, (1920) 7 A I R Mad 131=56 I C 510=21 Cr L J 478=11 M L W 368.

[3] Ramaswami Ayyar v. Vaithilinga Mudali, (1901) 1 Weir 28.

A. I. R. 1940 Madras 157

GENTLE J.

In the matter of Travancore National and Quilon Bank Ltd.: S. Barkatally and others — Petitioners.

K. Anantaraman — Debtor — Applicant.

v.

James Voce Pirrie and Cyril Gill — Official Liquidators — Respondents.

Appln. No. 2008 of 1938 in O. P. No. 158 of 1938, Decided on 14th October 1938.

(a) Company— Liquidation — Debt although not presently payable can be set off against money owing to company.

A debt, although not presently payable, can be set off against moneys owing to a company in liquidation. Such set off would not amount to a fraudulent preference: *(1893) 3 Ch 95, Disting.* [P 158 C 2; P 159 C 2]

(b) Transfer of Property Act (1882), S. 130 —Fixed deposit receipt—Endorsement on back —Effect.

The fixed deposit receipt is not a negotiable instrument and an endorsement on the back does not have the same effect as an endorsement of a bill of exchange or promissory note. [P 159 C 1]

K. S. Sankara Iyer and M. Sundaram — *for Applicant.*

C. Krishnaswami Iyer — *for Respondents.*

Judgment.—The applicant is a debtor of the company in liquidation. On 17th February 1938, he borrowed from this banking company a sum of Rs. 1000, and as security for his loan he deposited 450 shares of two other companies. On 30th May 1938, repayment of this loan was demanded by the company. The applicant wrote a letter to the agent of the company on 4th June 1938. This letter is not available, but the contents are set out in the applicant's affidavit in support of his application in para. 4, and it is not controverted that his recollection in regard to the contents is accurate. The letter was to the effect that the applicant was the holder in due course of a fixed deposit receipt with the Bank for a sum of Rs. 1000 standing in the name of Sri Bageerathi Ammal maturing on 28th July 1939, and he requested an adjustment of this debt from the company against the amount due from the applicant. An interview took place on the day of, or shortly after, the letter I mentioned, between the applicant and the agent. The substance of this interview is set out in para. 3 of the counter-affidavit and is not challenged by the applicant in his reply. At this interview, the applicant informed the agent that the depositor of Rs. 1000, the subject of the fixed deposit receipt, had attempted to obtain payment from the company for the amount covered by the receipt but was unsuccessful, and the applicant requested that he should be allowed to set off against his debt to the company the debt which was maturing in favour of the depositor. The recollections of the applicant and the agent are now at issue in regard to what subsequently transpired. The applicant says in his affidavit that the agent promised to allow a set off; on the other hand, the Official Liquidator in his affidavit says that he was informed by the agent that he promised, on being given the fixed deposit receipt signed by the depositor, to place the matter before the management and ascertain their views. Whatever may have been said, in my view, it is quite clear from the letter of the applicant dated 18th June 1938 what was the position he accepted. Two days previously, he had been told by the company that an adjustment could not be allowed against his debt before the date of maturity of the fixed deposit receipt but that this was being held as collateral security for the loan. The applicant's reply in his letter of 18th June 1938 was that he had paid the depositor the purchase consideration and he requested that the fixed deposit should be transferred to his name if it were not possible for the company to reconsider his original request to be allowed to set off. He also asked for return of the share certificates deposited as security. It is quite clear that, whatever may have been stated, he accepted the position that on that day there was no set off and the debt due from him was still outstanding to the company.

It is urged on behalf of the applicant that no matter what may have transpired in June 1938, he is now entitled to set off against moneys due from him the moneys which ordinarily would have become due on the maturity of the fixed deposit receipt. In the light of the admissions and concessions which Mr. Krishnaswami Ayyar has made on behalf of the Official Liquidators, it is not necessary for me to go into the question of the right to set off. It is conceded that a debt, although not presently payable, can be set off against moneys owing to a company in liquidation. The application of the applicant was opposed on these grounds: (1) that there was no valid assignment; and (2) if there was, to allow a set off would amount to a fraudulent preference. It is now conceded that if the assignment in favour of the applicant is binding and established, then the applicant is entitled to set off. What is disputed is whether there was a valid assignment in law.

There was a loan made to the applicant which he was requested to repay. At about the date when repayment was demanded, the depositor of the Rs. 1000 endeavoured to obtain repayment of the money, the subject of the receipt from the bank. It was then that the applicant commenced his negotiations to set off against his debt the moneys deposited with the company by the depositor. The only documents supporting an assignment are, (a) the deposit receipt which on the back bears the signature of the depositor which signature is merely one evidencing discharge of the moneys due from the bank; (b) a letter dated 16th June 1938 signed by the depositor and addressed to the company in which it is stated that the depositor had assigned her rights in the fixed deposit receipt to the applicant and authorized the company to apply the amount towards the applicant's loan account. In the affidavit supporting this application the applicant contents himself with saying that he was the holder of this fixed deposit receipt in due course. In the counter-affidavit, in para. 10, it is stated that the Official Liquidators do not admit and put the applicant to strict proof that he is a bona fide assignee for value of the amount covered by the fixed deposit. In his reply the applicant merely says that he is a bona fide assignee for value. Seeing that it is contested that he is a bona fide assignee of this deposit receipt, one would have thought in his reply he would have set out the consideration which he paid. There is not a word about that. Learned counsel on behalf of the applicant has referred me to Sec. 130, sub-s. (1), T. P. Act 1882, which provides that

> a transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent.

There is no such document, although counsel informed me that the assignment was effected by means of a written document. The letter written by the depositor dated 16th June 1938 to the bank to which I have referred is not an assignment. It is merely a notice to the bank that an assignment has been made. The fixed deposit receipt is not a negotiable instrument and an endorsement on the back does not have the same effect as an endorsement of a bill of exchange or promissory note. It has been argued on behalf of the applicant that the company before the winding up, accepted him as the assignee inasmuch as, having been given the fixed deposit receipt with the signature of the depositor upon the back it retained this document as a collateral security. In my view, one cannot infer from this that an assignment had been recognized. It is not infrequent that third parties' property or documents are held as security against a loan. On the one hand, the depositor was trying to obtain the amount of the deposit from the bank, upon which there was a run at the time; on the other hand, the applicant had borrowed money from the bank which he was being asked to repay. The company did not repay its debt upon the unmatured fixed deposit receipt nor did the applicant return to the bank the money he borrowed. When the Official Liquidators stepped in, having been appointed provisionally in the first instance, negotiations took place between the applicant and the liquidators, as set out in para. 7 of the counter-affidavit, which is not disputed.

On 25th July the applicant wrote to the provisional liquidators asking them to make necessary adjustments in the loan account and to return to him the share certificates held by the bank as collateral security. The liquidator replied on the same day regretting that they were unable to comply with his request; on the 30th, the applicant wrote that the depositor was willing to give another fixed deposit receipt in substitution for the earlier one, the other fixed deposit receipt maturing on 28th July 1938. It seems strange that if there had been an absolute assignment of the fixed deposit receipt, which is being questioned in this application, why this lady was willing to exchange it for another maturing at an earlier date. It seems to me that what had happened was that there had been an understanding between the depositor and the applicant for their mutual benefit. It is significant that no reference has been made by the applicant to the consideration which had passed. I can only assume that there was none. There is no assignment in writing as required by Sec. 130, T. P. Act, and quite apart from that, the applicant has been put to strict proof and, it is insufficient for him to say "I am a bona fide assignee," and nothing more. Bearing all these circumstances in mind, in my view, the applicant has not satisfied me that he is or ever was an assignee at all. The result is that this application fails.

There has been addressed to me on behalf of the Official Liquidators an argument that if a set off were allowed, it would amount to a fraudulent preference. In my view that argument is unsound. In support of it there was cited to me (1893) 3 Ch 95.[1] In my view, that case is not in point in the present instance. In the case cited, a shareholder, holding shares in respect of which calls upon unpaid share moneys were due, purported to have liquidated this by means of a transaction which in effect was setting off against the calls moneys due to him. Since there is no set off in respect of unpaid calls upon shares due from contributories, the transaction was held to be a fraudulent preference. No question of calls upon shares arises in the present case, and in my view, if the assignment had been established, a set off should have been allowed in respect of the applicant's debt. However, the result is that this application is dismissed with costs. Certified for counsel.

---

[1] In re Washington Diamond Mining Co., (1893) 3 Ch 95 = 62 L J Ch 895 = 69 L T 27 = 41 W R 681.

C.R.K./D.S. *Application dismissed.*

A. I. R. 1940 Madras 160

WADSWORTH J.

Dasari Ammanna — Appellant.

v.

Mirtivada Raja Reddi and others — Respondents.

Appeal No. 216 of 1936, Decided on 3rd August 1939, against order of Dist. Court, East Godavari at Rajahmundry, D/- 6th December 1935.

Madras Agency Tracts Interest and Land Transfers Act (1 of 1917), S. 5—S. 5 does not abrogate powers of Civil Courts to try suits relating to property within jurisdiction — Civil Court has jurisdiction to try suit on mortgage of property within its jurisdiction though party is member of hill tribe.

Section 5 indicates an intention that, the personal liabilities of members of hill tribes resident within the Agency shall be decided only by the Agency Court, but there is no clear indication that this Section is intended to abrogate the ordinary powers of a Civil Court to deal with suits relating to immovable property situated within its jurisdiction merely because one party is a member of a hill tribe. Hence, a Civil Court has jurisdiction to try a suit on mortgage of property which is within its jurisdiction though one of the parties is a member of the hill tribe. [P 160 C 2 ; P 161 C 1]

P. Somasundaram — *for Appellant.*

P. V. Vallabhacharyulu — *for Respondents.*

Judgment. — This appeal arises out of a suit on a mortgage of property situated within the East Godavari District. It is conceded that none of the property covered by the mortgage is situated within the Agency Tracts. A preliminary objection was taken to the jurisdiction of the learned District Judge with reference to the terms of S. 5, Agency Tracts Interest and Land Transfers Act, I of 1917, which runs as follows:

> Notwithstanding the provisions of any law to the contrary, every suit against a member of a hill tribe instituted after the commencement of this Act shall be instituted in the Courts of the Agency Tracts.

It is conceded that the defendants are members of a notified hill tribe and ordinarily resident in the Agency, so that they come within the definition of "hill tribe" in the Act. Reading S. 5 in its literal sense it would therefore appear that Courts other than the Agency Courts have no jurisdiction to deal with any suit against them whatever is the subject-matter of the suit and wherever it be situate. I am constrained to hold that this interpretation of the Act cannot be correct interpretation. In the first place, it results in the anomalous position that when a member of a hill tribe acquires land in the plains, no Court would have jurisdiction to entertain any suit relating to that land, for clearly the Agency Courts cannot by virtue of this Act be deemed to have acquired a local jurisdiction over properties situate outside the limits of the local jurisdiction of those Courts and inside the local jurisdiction of the ordinary Civil Courts. Ordinarily speaking, under Sec. 16, Civil P. C., a suit relating to immovable property including a suit for foreclosure, sale or redemption of mortgaged property must be instituted in the Court within the local limits of whose jurisdiction the property is situate. The law relating to the Agency Tracts has no application to suits relating to rights in property situated outside the Agency. If therefore the Civil Courts of the Godavari District have no jurisdiction to deal with suits relating to immovable property, including mortgaged property, within their local jurisdiction, belonging to a hill tribesman, then no Court can try those suits at all. That is an absurd position which cannot be deduced from a statute unless the statute is quite plainly capable of no other meaning.

Now, this Act is described as an Act to regulate the rate of interest and the transfer of land in the Ganjam, Vizagapatam and Godavari Agency Tracts which are quite clearly nothing more than the scheduled areas included within the districts of Ganjam, Vizagapatam and Godavari. S. 4 indicates an intention in the Act to control the transfer of immovable property situated within the Agency Tracts by a member of a hill tribe. There is no indication of any intention to control the transfer of immovable property situated outside the Agency Tracts, but owned by a member of a hill tribe. S. 5 clearly indicates an intention that the personal liabilities of members of hill tribes resident within the Agency shall be decided only by the Agency Courts, but there is no clear indication that this Section is intended to abrogate the ordinary powers of a Civil Court to deal with suits relating to immovable property situated within its jurisdiction merely because one party is a member of a hill tribe. Having regard to the fact that the interpretation of S. 5 as taking away jurisdiction from the ordinary Civil Courts over immovable property with reference to which no jurisdiction exists in any other Court, would result in a denial of justice and the existence of a wrong without a remedy, I am of opinion that we must interpret S. 5 as intended to relate only to suits which are within the cognizance and jurisdiction of an Agency Court. Applying the Section as so interpreted to the present case, it follows that the Court of the District Judge of East Godavari has jurisdiction to entertain the suit so far as it is a suit relating to immovable property, though the personal remedy against the mortgagors is one which may with reference to the terms of Sec. 5 be pursued in the Courts of the Agency.

There is, however, another objection, namely that the defendants come within the exception to the definition of "hill tribe" in that they are landholders as defined in the Madras Estates Land Act. The learned District Judge has rejected this plea on the ground that Ex. 1, the instrument confirming their status as mittadars itself affords sufficient proof that defendant 1 is not a landholder within the meaning of the Madras Estates Land Act. I have been through Ex. 1 and I am unable to find in that document the proof to which the learned District Judge refers. It is however desirable that evidence should be taken on this question. If as a result of that evidence the learned District Judge is of opinion that defendant 1 is not a landholder, then the plaintiff must be referred to the Agency Court for his personal remedy against defendant 1 and the District Judge will proceed only with the trial of the mortgage claim proper. If the finding regarding the position of the defendants as landholders is such as to exclude them from the provisions of the Act referred to, the learned District Judge can dispose of the whole of the suit. The appellant will be entitled to his costs in this appeal including the costs of the Court-guardian. Costs in the lower Court to be provided for in the decree of that Court.

C.R.K./D.B. *Order accordingly.*

---

* A. I. R. 1940 Madras 161

BURN AND STODART JJ.

Mythili Ammal — Appellant.

v.

Janaki Ammal and another — Respondents.

Appeal No. 470 of 1937, Decided on 1st September 1939, against order of District Court, South Arcot, D/- 29th September 1937.

(a) Estoppel — Suit by husband against wife for restitution of conjugal rights — Wife in written statement stating that house in which her husband was living was his mother's house —Statement held did not estop her from setting up her husband as owner of house.

In a suit by husband against his wife for restitution of conjugal rights, the wife in the written statement made a statement that her husband's mother had asked him to leave her house :

Held that the wife was not estopped by this statement from setting up her husband as the owner of the house. Nevertheless, having made the statement it was a weakness in her case if she did not go into witness-box to explain what had caused her to change her opinion as to the ownership of the house. [P 163 C 1, 2]

*** (b) Evidence Act (1872), S. 65—Secondary evidence of income-tax returns is inadmissible.**

Income-tax returns are confidential. It is the policy of the law that statements made in these returns shall not be brought up in Court against the person making them or for that matter against anyone else. The Income-tax Officer in whose custody the documents are, is subject to the process of the Court. He can be summoned to attend the Court although he cannot be required to produce these documents, which are classed as confidential by the Income-tax Act. Again, the Income-tax Officer cannot be described as a person legally bound to produce such documents. Hence, income-tax returns cannot be proved by secondary evidence under S. 65 (a). Neither can they be proved by secondary evidence under S. 65 (e) as the return made by the assessee is neither part of the act of the Income-tax Officer nor part of the record of the act of that officer. [P 164 C 1]

T. R. Venkatarama Sastry and T. V. Rajagopalan — *for Appellant.*

K. Srinivasan — *for Respondents.*

Judgment. — This appeal is against an order made in execution of the decree in O. S. No. 10 of 1924 on the file of the Subordinate Judge's Court, Cuddalore. The subject of the petition is a house No. 40, South Car Street, Chidambaram. Mythili, the decree-holder, was entitled under the decree to recover Rs. 5,800 from her husband Mahadevan, the judgment-debtor. To realize this sum she attached the aforesaid house as belonging to her husband. Janaki Ammal, mother of Mahadevan, filed a claim praying that the attachment should be raised on the ground that the house was her own. This claim was tried by the learned District Judge, South Arcot, who held that the house did belong to Janaki. Hence this appeal by Mythili, the decree-holder. The learned District Judge chiefly addressed himself to the question whether the purchase money for the house which was purchased in Janaki's name came out of Mahadevan's estate or was furnished by Janaki. He held that, apart from the oral evidence of Janaki, there was no evidence that the purchase money was paid by Janaki out of her own funds but that, on the other hand, there was evidence that it did not come out of the estate of Mahadevan. The points chiefly urged by learned counsel for the appellant are : (1) that the learned Judge did not appreciate the evidence properly and (2) that he shut out evidence which was produced by Mythili which if taken into account materially helped her case.

The circumstances attending the purchase of this house and the payment of the purchase money are as follows : In February 1918 when the house was purchased the parties lived at Cuddalore. Janaki had been left a widow in 1913. Her husband had left a large estate estimated to be worth two lakhs which devolved on his son Mahadevan, then aged 13. Janaki managed this estate on his behalf. In February 1918 this house at Chidambaram was conveyed to Janaki for Rs. 6750, the bulk of the consideration being the discharge of a mortgage on the house, for Rs. 6350. In April 1918 Mahadevan came of age. In the latter half of 1918 and the first half of 1919 repairs to the extent of about Rs. 1800 were done to the house and on 14th June 1919 the mortgagee, a vakil living in Madras, was paid Rs. 7100 in full discharge of his mortgage. Some little while before that, the family consisting of Janaki, her son Mahadevan and the latter's wife Mythili had moved to Chidambaram and taken up their abode in the suit house.

The argument now advanced on appeal is that the learned Judge should have held that the cost of repairing the house in 1918, 1919 and the money for the discharge of the mortgage paid on 14th June 1919 and the balance of the consideration for the purchase, namely Rs. 400, which was paid on 1st June 1921 all came out of the funds of Mahadevan's estate. And that from this the learned Judge should have inferred that the house was purchased benami for Mahadevan. Account books relating to her husband's estate for the relevant period were filed as exhibits by the appellant. Expenditure on the repairs to the house are found in these accounts and certain other entries are relied upon as relating to the payment of consideration for the sale. The learned District Judge held that the account books were not such regularly maintained accounts that the entries by themselves can be taken as prima facie proof of the expenditure. One of the questions now raised and which we have to decide in this appeal is whether the learned District Judge was wrong in not accepting the evidence furnished by the account books. Again, the appellant sought to exhibit certain income-tax returns made by Janaki on behalf of Mahadevan, in which mention is made of the house. The learned District Judge rejected these returns. It is not objected that he was wrong in doing so and that these returns are powerful evidence in support of the appellant's case.

Before discussing these points in detail, we observe that the conduct of the parties is inconsistent with the ownership of the house being in the appellant's husband. Appellant and her husband lived in this house along with the petitioner till nearly the end of 1920. Then Mahadevan fell out with his mother. He and his wife removed to Gavrapet, four miles away, and lived in the ancestral house there. Janaki continued to live in the house No. 40, South Car Street, Chidambaram, paying the Municipal taxes and appearing to the outside world as the owner. Mention was made of the house in the course of the litigation which ensued between Mahadevan and his mother and between Mahadevan and his wife. At the end of 1920 he had charged his mother with misappropriating large funds belonging to his estate during her management between 1913 and 1918, and with failing to render to him accounts of the estate when she had handed over the estate to him. She replied at once repudiating these charges. Nothing came of these notices and counter notices however and they are not relevant here except in so far as the house in Chidambaram is not mentioned in them. Fifteen months later, in March 1922 Janaki applied to Mahadevan for separate maintenance and in April 1923 she filed a suit to obtain separate maintenance. In her plaint she described herself as living at No. 40 South Car Street, Chidambaram and stated that she made no claim to be provided with a residence as she had a house of her own.

Mahadevan in his written statement dated 10th November 1923 declared that this was a gross lie. The house has been purchased in plaintiff's name and improved subsequently with moneys belonging to this defendant and for his benefit. The plaintiff has only a right to reside therein.

Here for the first time the ownership of the house was put directly in issue. Nevertheless, in the compromise by which the suit was ended in August 1924 neither the title to the house, nor Janaki's right to reside in it during her lifetime was mentioned. At the same time as he was defending this suit against his mother, Mahadevan was also engaged in litigation with his wife, the present appellant. We have seen how they left Chidambaram and settled in Gavrapet in the latter half of 1920. In March 1921 appellant ran away but later was reconciled, and a child was born. In August 1923, she again left Mahadevan and in January 1924 she filed a suit for separate maintenance. Referring to the house in Chidambaram she stated in para. 5 of her plaint that defendant 1's mother purchased the house in "her own name with family funds in 1918." This of course is not strictly accurate since no money was paid for the house in 1918. In a later paragraph describing the quarrel of 1920 she said, defendant 1's mother became thoroughly disgusted with him and asked him to leave the house which was her own and not to enter it any more. And in the long list of her husband's properties on which in this suit appellant claimed that her maintenance should be charged, appellant did not include this house in Chidambaram. It is on foot of the decree in this suit that the respondent has now attached the house. In this same year, 1924, Mahadevan filed a suit against the appellant for restitution of conjugal rights. In December 1924 appellant filed a written statement alleging that she had left her husband on account of his gross and continued cruelty. Answering the charge that her own father was responsible for the estrangement between Mahadevan and his mother and referring more particularly to the quarrel of 1920 she said :

> After some time the plaintiff's mother became thoroughly disgusted with his low habits and drink and other vices, and asked him to leave her house at Chidambaram. That was how the plaintiff separated from his mother.

Appellant is not of course by these statements estopped from setting up her husband as the owner of the house. Nevertheless having made them it is a weakness in her case that she has not gone into the witness box to explain what has caused her to change her opinion as to the ownership of the house. Coming now to the main argument advanced by learned counsel for the appellant there is first the argument which is based on the accounts. The accounts of Mahadevan's estate show (i) that money of his estate was used to buy the stamp paper for Ex. A by which the house was purchased by Janaki in February 1918, (ii) that money of the estate was spent on effecting repairs to the house between February 1918 and June 1919 and (iii) that the 'grahapravesham' ceremony was performed at the cost of the estate. Taking these entries as a correct representation of the facts they do not by themselves indicate that the house belonged to Mahadevan. In the first place Mahadevan was of age when this expenditure was incurred. It is stated that his mother retained control of his estate till June 1920. But that is not the same thing as saying that this expenditure was incurred without his knowledge and approval; nor can it be alleged as a strange or unusual thing that a house the property of his mother was put into a state of good repair at his expense. In the second place there is the fact that at this time the estate was indebted to Janakiammal. She had been left a legacy of Rs. 5000 under the will of her husband. Of this she had drawn only Rs. 3000 from the estate. And see the compromise decree in her suit for maintenance. Therein it is stated—so late as August 1924 — that some money was still due to her under the will and for jewels. (After examining certain entries his Lordship concluded as follows.) Our conclusion therefore is that the learned District Judge was correct in holding that the accounts of the estate do not prove that the money paid as consideration for the purchase of the house came out of the estate of Mahadevan, husband of the appellant.

The only other point which we have to decide arises on the contention of learned counsel for the appellant that the learned District Judge was wrong in shutting out the income-tax returns filed by Janaki when she was in control of Mahadevan's estate. The original returns are of course in the office of the Income-tax authorities. Their contents were sought to be proved by certified copies. The contention of learned counsel is, that in these returns, Janaki has made statements about this house, inconsistent with her present claim to be the owner of it. Now, what Janaki said in the return submitted to the income-tax authorities can be proved by exhibiting the returns themselves. This has not been done. And it is difficult to see how it could be done since such returns are confidential. It is the policy of the law that statements made in these returns shall not be brought up in Court against the person making them or for that matter against anyone else. But learned counsel contends that income-tax returns can be proved by secondary evidence. As we read S. 65, Evidence Act, we do not find it possible to accede to this contention. S. 65 enumerates the cases in which the contents of a document may be proved by secondary evidence. Sec. 65 (a) does not apply, (i) because the documents now in question are not in the possession or power of Janaki against whom they are sought to be proved, (ii) the documents are not in the possession or power of a person not subject to the process of the Court or legally bound to produce them who having been given notice to produce has refused to do so. The Income-tax Officer in whose custody the documents are, is subject to the process of the Court. He can be summoned to attend the Court although he cannot be required to produce these documents which are classed as confidential by the Income-tax Act. See S. 54 of the Act. Again, the Income-tax Officer cannot be described in the circumstances just explained as a person legally bound to produce such documents. Learned counsel faced with this difficulty falls back on S. 65 (e), Evidence Act by which secondary evidence is allowable of the contents of a public document. "Public document" is defined in Sec. 74, Evidence Act, and means a document forming the act or record of the act, (1). of the Sovereign authority, (2). of Official bodies and tribunals, (3). of public officers legislative, judicial and executive. It is urged upon us that the income-tax return inasmuch as it is made in compliance with a notice issued under S. 22 (2), Income-tax Act, and when made becomes the basis of an assessment made under S. 23, is therefore part of the record of the act of assessment. We do not agree in this view. S. 23 of the Act is :

> If the Income-tax Officer is satisfied that a return is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return.

We think this Section is perfectly clear. In the matter of assessing a person to tax, when does the Income-tax Officer perform an act within the meaning of S. 74, Evidence Act? The answer can only be when he assesses the income of that person and determines the sum payable. And the record of that act is the notice of demand made in the prescribed form under S. 29, Income-tax Act, in which the Income-tax Officer communicates his decision to the assessee and requires him to pay the tax. We find it quite impossible to infer from the words of the Act that the return made by the assessee is either part of the act of the Income-tax Officer; indeed, we think that such a proposition is absurd on the face of it—or that it is part of the record of the act of that officer. And indeed a reference to S. 54, Income-tax Act demonstrates that a return made by an assessee cannot possibly be part of the record of the act of the Income-tax Officer. In that Section such returns are made confidential. No Court can require any public servant to produce them before it. A public servant who discloses the contents of such returns except in certain special circumstances is punishable with imprisonment which may extend to six months and is also liable to fine. But if the return is, as now argued, a public document, anyone who happens to come into possession of a certified copy of it can produce that copy into Court, and so prove the contents of the return, thus defeating the express provisions of Sec. 54. From the fact that certified copies of the returns made by Janaki have been tendered in evidence in the present case, we presume that the granting of certified copies is in certain circumstances permissible by some rule made under the Income-tax Act. Most probably they can be granted to the person who has made the return, for his own private information since that would not come under the head of disclosure under S. 54 (2). But that does not mean that a third party who has, in some way, come into possession of the certified copies can use them to his own advantage. If it did, then we would be faced with the ludicrous position that the Income-tax Officer, though forbidden to disclose the contents of the returns could by furnishing certified copies facilitate such disclosure. We agree with the learned District Judge that these certified copies—they were actually marked as exhibits in the lower Court and numbered 35 and 35-A—are not admissible in evidence.

On the merits of the case we have been taken very carefully through the evidence by learned counsel on both sides and we think the conclusions of the learned District Judge are correct. We would only add that it has not been shown that in February 1918 when Janaki bought this house, she had any reason to deceive her son or to act prejudicially to his interests. On the contrary, the evidence is that at that time she was much attached to him. If she had intended to buy the house for him and not for herself there was no reason whatever why she should not have bought it in his name. We dismiss this appeal with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 165

ABDUR RAHMAN J.

Pandyappa Arasu Binnani — Appellant.

v.

Chennappa Hegde and others — Respondents.

Appeal No. 83 of 1936, Decided on 18th November 1938.

(a) Malabar Law — Tarwad — Karnavan — Debt incurred by karnavan for family benefit — Decree against karnavan can be executed against family property of tarwad.

In the case of a decree against the karnavan of a Malabar tarwad the substance of the claim has to be looked at and a decree cannot be unenforceable against the family property of a tarwad or not binding on the other members of the family if the debt, in regard to which a suit has been filed against the karnavan or the manager was incurred for a family benefit. After all it is open to the manager to dispose of the family property for the family benefit and there is no reason to hold that the family property would not be liable if the suit were filed against him for a debt similar to the one for which the property could have been sold by him. It is immaterial if the other members of the family are not impleaded as parties to the suit. The manager holds a representative capacity and when he is sued for such a debt, it may be taken that the whole of the tarwad has been sued, although all the members of the tarwad may not have been specifically named. It is also unnecessary that the karnavan or the manager should have been described as such, either in the plaint or even in the decree, if it is found as a fact that the karnavan or manager was conducting litigation not merely on his own behalf but on behalf of the family. He should be presumed to be doing so on behalf of the family of which he is the head if the liabilities incurred by him are for family benefit or necessity: *27 Mad 375 ; A I R 1926 Mad 991 ; A I R 1936 Mad 861 ; A I R 1937 Mad 438 and A I R 1937 Mad 610 (FB), Rel. on.* [P 166 C 1]

(b) Civil P. C. (1908), S. 47—Decree against karnavan as manager of Malabar tarwad — Executing Court has jurisdiction to determine decree-holder's right to execute decree against other members of tarwad.

Where a karnavan of Malabar tarwad is sued in his capacity as manager, the whole of the tarwad consisting of all its members, whether major or minor, should be held to have been sued and the decree consequently passed against all of them. Therefore, the executing Court cannot be said to be going behind the decree if it holds an enquiry with the object of making other persons, whose names do not appear in the decree, liable. This is really a matter of execution and falls within the purview of S. 47, Civil P. C.: *10 Mad 283 (FB), Disting.* [P 166 C 2 ; P 167 C 1]

K. Y. Adiga and S. Ramayya Nayak — *for Appellant.*

P. Sridhara Rao — *for Respondents.*

Judgment. — A suit on the basis of a mortgage was filed against 22 persons who were members of a Malabar tarwad. The managers of the family, both de facto and de jure, were impleaded as defendants. The suit was decreed and it was held that the mortgage was effected for the family benefit. After the mortgaged properties were sold in execution, the decree-holder applied for a personal decree against the defendants and wished to proceed against the other family property, (R. I. A. No. 694 of 1924). The first Court dismissed the petition but the order was reversed by the District Judge of South Kanara on 18th December 1930. While accepting the appeal, he happened to make the following remark in his judgment:

> I am not at all deciding now, nor is this a proper stage to decide, whether this personal decree against some of the mortgagors will operate not merely against themselves individually but also against the family assets in their hands. This is a matter in execution with which I have nothing whatever to do now. (Ex. E).

It was therefore not surprising to find that when an application was made on behalf of the decree-holder to proceed against the properties of the family, he was permitted by the executing Court to do so. This order was passed on 12th February 1935 and an appeal was preferred against it. Adverting to the order passed by his predecessor, which has been quoted above, the learned District Judge stated in his order, now under appeal, that it was not clear why his predecessor had not decided the point but had left it to the executing Court. Applying the principle that an executing Court could not go behind a decree or enlarge its scope, he came to the conclusion that the executing Court's decision to attach the family properties was incorrect. The appeal was therefore accepted and the order of the executing Court vacated. This has led to the present appeal. The result of the order passed by the learned District Judge is that while his predecessor had held that the question relating to the liability of the family property would be gone into in execution and this order had become final, he has refused to go into the matter at this stage and has held that it should have been decided by his predecessor. The matter thus remains undecided altogether and an impasse has been created. This should have been avoided.

It is unnecessary for me to rest my decision on this ground although in view of the order passed on 18th December 1930, the present order cannot possibly be sustained. It is unfortunate that the learned District Judge was led by the words of the decree and did not bestow more attention upon the matter. Had he done so, he would have found that the decree-holder's contention was supported by a number of cases decided both in regard to decrees passed against managers of joint Hindu families and karnavans of Malabar tarwads. In a case of this kind the substance of the claim has to be looked at and a decree cannot be held to be unenforceable against the family property of a tarwad or not binding on the other members of the family if the debt, in regard to which the suit has been filed against the karnavan or the manager was incurred for a family benefit. After all it was open to the manager to dispose of the family property for the family benefit and there seems to be no reason to hold that the family property would not be liable if the suit were filed against him for a debt similar to the one for which the property could have been sold by him. It would be immaterial if the other members of the family were not impleaded as parties to the suit. The manager holds a representative capacity and when he is sued for such a debt, it may be taken that the whole of the tarwad has been sued, although all the members of the tarwad may not have been specifically named. It is also unnecessary that the karnavan or the manager should have been described to be such either in the plaint or even in the decree if it were found for a fact that the karnavan or the manager was conducting litigation not merely on his own behalf but on behalf of the family. He should have been presumed to be doing so on behalf of the family of which he was the head, if the liabilities incurred by him were for family benefit or necessity. A number of cases of this Court have affirmed this principle. *See* 27 Mad 375;[1] 51 M L J 282;[2] 44 M L W 623;[3] A I R 1937 Mad 438[4] and 46 M L W 112.[5] The learned counsel for the respondent has however urged that the question relating to the liability of persons against whom a decree has not been passed, cannot be determined by an executing Court. He contends that an execution Court cannot be permitted to go behind the decree and would be doing so if it held an enquiry with the object of making other persons, whose names do not appear in the decree, liable. Reliance has been placed by him in this connexion on 10 Mad 283[6] where it was held that a son would not be liable to pay for his mother's maintenance when the decree was passed against his father and he was impleaded for the first time in execution proceedings. It is unnecessary to go into this case or other cases which followed it as they gave effect to the principle of Hindu law that a son in a joint Hindu family did not inherit any property from his father but took it by survivorship, or in other words, the father's interest in the property lapsed on his death. The application of this principle led to considerable hardship and the Code of Civil Procedure had to be amended in this respect. S. 53 of the present Code now makes the property in the hands of a son or other descendants liable for the payment of a deceased ancestor's debt and the plea that he took his father's property by survivorship would no longer be of any avail to him. These cases have therefore no application to the facts of the present case and are not relevant to the question which has to be decided here. There is no force in the objection that an executing Court would be going behind the decree, if it proceeds to determine the decree-holder's right to execute his decree against the other family property. The manager or karnavan had a right, as stated above, to alienate the whole of the property for the family benefit or necessity. In doing so, he must be held to be dealing not only with his own shares but the shares of all the other members. Similarly, if a decree for a debt which is incurred on behalf of the family is passed against the manager, it would necessarily follow that the whole of the family property would be liable and not only his own share. Having been sued in his capacity as manager, the whole of the tarwad consisting of all its members whether major or minor, should be held to have been sued and the decree consequently passed against all of them. New persons who were not parties to the decree are now being attempted to be brought in but their names which must be taken to have been included in or covered by the manager's name from the very beginning are being asked to be specified and the family property of the tarwad which was represented by the manager is being asked to be declared liable. This is really a matter of execution and falls within the purview of Sec. 47, Civil P. C.

---

[1] Manakat Velama v. Ibrahim Lebee, (1904) 27 Mad 375.

[2] Vasu v. Kannamma, (1926) 13 A I R Mad 991 =97 I C 551=51 M L J 282.

[3] Narayani v. Sankunni Mannadiar, (1936) 23 A I R Mad 861=165 I C 690=71 M L J 545 =44 M L W 623.

[4] Pappi Amma v. Rama Iyer, (1937) 24 A I R Mad 438=173 I C 147.

[5] Venkatanarayana Rao v. Venkatasomaraju, (1937) 24 A I R Mad 610=171 I C 101=I L R (1937) Mad 880=(1937) 2 M L J 251=46 M L W 112 (F B).

[6] Muttia v. Virammal, (1887) 10 Mad 283 (F B).

I must therefore hold that the order passed by the lower Court cannot be sustained. The debt was found to have been incurred for the family benefit in the decree itself. Defendants 1 and 7 are admittedly de jure and de facto managers and must be deemed to have represented all the members of the tarwad. They must also be presumed to have conducted the litigation on behalf of the tarwad. The family property would therefore be obviously liable and the objection that the other members of the family were not impleaded is not a valid objection, and should not have been allowed to prevail. The appeal is therefore accepted with costs both in this and in the lower appellate Courts. Leave refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 167

WADSWORTH AND VENKATARAMANA RAO JJ.

Khaji Muhammad Hussain Sahib — Appellant.

v.

Majiday Mahmood Jamait Managing Committee, Puddupet—Respondents.

City Civil Court Appeal No. 36 of 1935, Decided on 6th September 1939, against decree of City Civil Judge, Madras, in O. S. No. 926 of 1932.

(a) Societies Registration Act (1860), Preamble and S. 20—Charitable purposes—Meaning — Society whose paramount object is charitable is not rendered any the less charitable by the fact that some of its purposes are not strictly charitable but religious — Society for improvement of Islamic education and rendering pecuniary help to musaffars held to be society for charitable purposes and fact that one of its purposes was management of affairs of mosque cannot change its character.

Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious does not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. [P 170 C 2]

Therefore a society formed for purposes of the improvement of Islamic education and rendering pecuniary help to the poor musaffars is a society whose paramount object is charitable and therefore the fact that one of the purposes is the management of the affairs of the mosque which does not involve the performance of any religious service by the members of the society, cannot render the society, a society formed for religious purposes. [P 170 C 2; P 171 C 1]

(b) Mahomedan Law — Wakf — Mutwalli — Right of, can be acquired by prescription—Even society can be mutwalli.

A mutwalli according to Mahomedan law is only a manager or a superintendent of a religious institution administering its temporal affairs. A mutwaliship can be held by a single individual or two or more individuals or a society. The right to manage a religious institution is recognizable and enforceable in a Court of law. Such a right can be acquired by prescription: *18 M L T 48 and 18 Bom 401, Rel. on.* [P 171 C 1]

Where a society has been for a period of fourteen years in undisputed management of a mosque in derogation of the right of the previous mutwalli, it should be deemed to have acquired the right of mutwalli by prescription : *A I R 1938 Lah 869, Rel. on.* [P 171 C 1]

K. Rajah Ayyar — *for Appellant.*

V. T. Rangaswami Ayyangar and S. K. Ahmed Meeran—*for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment and decree of the learned City Civil Judge restraining the defendant by a perpetual injunction from interfering with the plaintiff's right of management, control and possession of the mosque, Majiday Mahmood Jamait situate in Pudupet, Madras. The facts relating to the suit out of which this appeal arises may be briefly stated. The said mosque was founded about 85 years ago. It is the plaintiff's case that it was built out of public subscriptions collected from the residents of Pudupet and was primarily intended for the benefit of the residents of the said locality. The defendant's case is that it was built by one Gulam Mohammad, but there is no reliable evidence in support thereof except some evidence of tradition. But it is immaterial who founded it because the evidence establishes that it was the Mahomedan residents of the locality who were taking interest in the said mosque and contributing to its upkeep. There is no deed of foundation prescribing any rules for the management of the affairs of the mosque and for the appointment of a muthavalli or any servant of the mosque. From a document of 1863 Ex. 7, it is evident that there was a muthavalli to the mosque and he was one Kasim Ali who is the maternal grandfather of the defendant. Kasim Ali appears to have died in 1888. The defendant states that a year before his death the said Kasim Ali executed a will Ex. 1 in favour of the defendant in and by which he appointed the defendant as the muthavalli and on the death of Kasim Ali in pursuance of the will the defendant succeeded to the office of muthavalli and was functioning as such.

It appears from the evidence that Kasim Ali was the Pesh Imam of the mosque and on his death the defendant continued to be the Pesh Imam and was doing the duties as such till the date of suit. The genuineness of Ex. 1 is challenged by the plaintiff. The learned City Civil Judge did not record any finding in regard to it but in a later suit between the parties it was found not to be genuine. It is no doubt a document more than thirty years old, but there are certain improbabilities which cast some doubt on the genuineness of the document. It is stated that the defendant was appointed muthavalli with the consent of Ghulam Mohammad who is alleged to have signed the document. From the stone inscription, a copy of which has been filed as Ex. B in the case, the mosque appears to have been built in 1849 and Ex. 1 is dated August 1887. It is very improbable that Ghulam Mohammad was alive on that date and there is no reliable evidence of his having been alive on that date. The defendant was admittedly a minor of 12 or 13 in 1887 and it is hardly likely that a minor was appointed either as a muthavalli or Pesh Imam and under Mahomedan law such an appointment would be invalid. Further, if Ghulam Mohammad had been alive, there is no necessity for Kasim Ali to make the appointment and the appointment could have been made by Ghulam Mohammad himself. Some of these improbabilities render it unsafe for any Court to act on it. If this document cannot be relied on, there is nothing to show how the defendant came to be appointed and was functioning as muthavalli and Pesh Imam. The probabilities are that he being the daughter's son of Kasim Ali was permitted by the congregation of Pudupet to do the duties of the said offices. There is no denying the fact that at any rate from 1890 until 1918 for a period of nearly 30 years the defendant was managing the affairs of the mosque and collecting subscriptions and making disbursements thereof and generally attending to the affairs of the mosque. He was also functioning as Pesh Imam.

In 1918 the then circumstances necessitated a change of management of the mosque and it was thought desirable by the Jamait or congregation of Pudupet to have the management put on a sound and legal basis. The main reason which apparently led to it was the trouble they had from the Hindu residents of the locality who wanted to put up a Bajana Mandir near the mosque in respect whereof a litigation was commenced: O. S. No. 484 of 1918 on the file of the High Court, Madras. The plaint in the said suit was filed on 11th November 1918. In view of this common danger everybody including the defendant conceived the idea of forming a society and getting it registered under the Societies Registration Act, and vesting the management of the mosque in a governing body of the society. Accordingly a society was formed and registered under the name and style of Masjiday Mahmood Jamait Managing Committee with twelve members, the defendant being one of them. It was registered on 2nd December 1918. The memorandum of association is marked as Ex. A-2 in the case and the rules and bye-laws, Ex. A-3. It is clear from them that one of the main objects of the association was to conduct the affairs of the mosque by collecting subscriptions, pay the salaries of the servants and incur expenses for the upkeep of the mosque and do everything which a manager of a mosque is required to do. From the date of the incorporation down to the date of the suit the said society was in undisputed management of the affairs of the mosque and the defendant ceased to function as muthavalli. It was the society that was collecting subscriptions, paying salaries of the Pesh Imam Muzzein Sahib and the sweeper and directing the performance of the services in the mosque and paying taxes, effecting repairs and generally doing everything which a manager or a muthavalli of a mosque would do. The defendant was only acting as a Pesh Imam under directions given by the society from time to time and he or his son was for some time acting as a bill-collector. In or about June 1932, misunderstandings arose between the defendant and the secretary of the society apparently due to the fact that the Shafi element in the Committee became predominant and wanted to control the institution. At the inception of the society and for some time thereafter the

Committee members consisted of equal numbers of representatives from each of the two sects, namely Hanafi and Shafi.

In consequence of the preponderance of the Shafi element in the Committee, there seemed to have been some attempt at innovation in regard to the recitation of prayers which was resented by the Hanafi Section to which the defendant belonged. Ultimately the disputes between the Committee members led to the resignation of the defendant from the membership of the society. He tendered his resignation on 5th July 1932 and began to dispute the authority of the Committee and purported to abolish it. It may also be noted that meetings and countermeetings were held by two factions in the Committee and one of the factions purported to call a meeting of the Jamayat and abolish the Committee: *vide* Ex. 31. In consequence of these disputes, the plaintiffs had to file this suit because the defendant began to interfere in the management of the affairs of the mosque by asserting his powers as muthavalli. The defendant's case is that it was only with his consent that the society was formed and it could not have been constituted the sole and exclusive manager of the mosque in derogation of his rights as muthavalli, that he was the duly constituted muthavalli and continued to be such. The society according to him was not a validly incorporated society and the initial registration thereof under Act 21 of 1860 was illegal and ultra vires; further he says that as the Committee had been abolished, even if he ceased to function as muthavalli during the period the Committee was in management, his powers of muthavalli never terminated and therefore he could function as such and nobody has any right to interefere with his management. He further submits that the Committee has also become defunct because the original members who formed the society are all dead and they have not been validly replaced.

The plaintiff's case is that the society is a duly incorporated body and that the defendant not having exercised the management for a period of six years from 1918 his rights as muthavalli, if any, were lost, that he accepted the subordinate position of a servant under the mosque while continuing to be a member of the Committee and that he is estopped from questioning the right of the plaintiff to manage the mosque. On the evidence the learned City Civil Judge came to the conclusion that the plaintiff society was properly registered under Act 21 of 1860, that the defendant lost his rights as muthavalli and that the plaintiff would therefore be entitled to the injunction prayed for.

The main ground on which Mr. Rajah Iyer, the counsel for the defendant-appellant, assailed the decision of the learned City Civil Judge is that the plaintiff society is not competent to sue for or claim the relief sought in the plaint. He formulated his contention thus: (1) the society was a religious society and therefore incapable of incorporation under the Societies Registration Act as only charitable societies could be incorporated thereunder; and (2) even if the society was a validly incorporated society it could not acquire by prescription the office of muthavalli, as the right of a muthavalli is a personal right which the muthavalli is incapable of surrendering or relinquishing and the defendant never divested himself of it. In regard to the first contention, Mr. Rajah Iyer submits that both according to the Preamble and S. 20 of Act 21 of 1860, it is only a society formed for a charitable purpose that could be validly registered under the Act, that the plaintiff society was formed for a religious purpose, namely the management of the affairs of the mosque, and that the purpose being solely religious, the society can in no sense be considered to be a society formed for a charitable purpose or a charitable society within the meaning of the Act. He was frank enough to bring to our notice a decision of the Allahabad High Court reported in 28 All 384[1] which is against the view he is contending for. That was a case of a religious society called the Anjuman Islamia of Muttra registered under Act 21 of 1860. It was contended in that case that the registration of the society was not legal because it was a society formed for religious purposes and not for charitable purposes. This contention was negatived and it was held that a society for religious purposes would ordinarily be a society for charitable purposes and the society in question was a society for charitable purposes and therefore the registration of the said society was legal. Mr. Rajah Iyer however submitted that that case proceeded upon a view which is not tenable, namely that the Indian Legislature made no distinction between religious and charitable purposes. In support of his contention that this view is erroneous he referred to a number of statutes framed by the Indian Legislature subsequent to 1860 where the Legislature drew a distinction between charitable and religious purposes in drafting for the purpose of those enactments.

---

[1] Anjuman Islamia of Muttra v. Naziruddin, (1906) 28 All 384=3 A L J 124=1906 A W N 59.

The question therefore for our decision is whether the plaintiff society is a charitable society or a society formed for charitable purposes within the meaning of Act 21 of 1860. We are not sure that the Legislature in using the word "charitable" in the Act meant to draw a distinction between a charitable purpose and society and a religious purpose and society. The Act was passed in 1860 when according to English law a gift for the advancement of religion or promotion of public worship or providing or maintaining a place of public worship would be a charitable purpose and a society formed for such a purpose would be a charitable society. According to that law therefore a religious society would be a charitable society; the only condition required was that it should be for the benefit of the public. Most of the enactments relating to that period were framed by English lawyers well conversant with English law. The Indian enactments which related to the charitable and religious endowments before 1860 were the Bengal, Bombay and Madras Regulations, the Madras Regulation being Reg. 7 of 1817. In the heading of the Madras Regulation, the language used is "for the support of the mosques, Hindu temples and colleges or other public purposes" and in the Preamble 'for the support of mosques, Hindu temples, colleges and choultries, and for other pious and beneficial purposes.' It will be seen from the context that the words 'public' and 'pious' were meant to connote both religious and charitable institutions. In 1817 according to the law of England public purposes connoted charitable purposes including religious purposes and the word 'pious' was not confined purely to religious purposes because religious purposes were one class of charitable purposes: *vide* (1891) A C 531[2] at pp. 558 and 559. No doubt in statutes enacted subsequent to Act 21 of 1860 the Legislature used both the words 'charitable' and 'religious' but the definition of those words was expressly stated to be for the purpose of those Acts. The subsequent legislation could hardly therefore be a guide for the interpretation of the term 'charitable' in Act 21 of 1860. The question is, what did the term mean in 1860? We however think it unnecessary to go into the question whether an exclusively religious purpose is a charitable purpose and whether a society formed for such a purpose would be a charitable society within the meaning of the Act because in our opinion where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. In the present case the objects of the society are outlined in paras. 2 and 3 of Ex. A-2 thus:

> Towards the expenses for conducting all the affairs of the said Masjiday, the Jammaitdars capable of giving subscriptions for ever, must pay subscriptions for the maintenance of Masjiday.
>
> For the amount of the subscriptions received from the Jamaitdars the expenses mentioned in cols. 1 and 2 should be met with, and the remaining balance amount should be utilized for the propoganda of Islamic education, for rendering possible pecuniary help to the poor, musaffars and worthy alims and Ulemas, for removing their difficulties, for other necessary and proper charities, settled then and there by Hanafi and Shafi and for conducting all affairs and for purchasing immovable properties for the perpetual maintenance of the said Masjiday.

It cannot be denied that the improvement of Islamic education and rendering pecuniary help to the poor musaffars etc., are charitable purposes. The fact, that one of the objects of the society was also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members of the society cannot render the society a society formed for religious purposes. The society concerns itself only with the management of secular affairs of the institution. So far as religious services are concerned which only consist in the recitation of prayers in the mosque, they are done through the Pesh Imam who is paid a salary. What the society does is what exactly a muthavalli could have done and a muthavalli is only concerned with the management of the secular affairs of the mosque. The society itself does not concern itself with the performance of prayers, There can therefore be no doubt that the paramount object of the society is charitable and therefore the fact that one of the purposes is the management of the affairs of the mosque cannot take away from it the character of the society as a charitable society. We are therefore of the opinion that the plaintiff society is a charitable society within the meaning of the Act and the registration thereunder is perfectly legal and valid.

---

[2] **Commrs. for Special Purposes of Income-Tax v. John Frederick Pemsel, (1891) A C 531= =61 L J Q B 265=65 L T 621=55 J P 805.**

In regard to the second point that the plaintiff society has not acquired right of management we are equally of the opinion that it is also untenable. A muthavalli according to Mahomedan law is only a manager or a superintendent of a religious institution. As already pointed out, he administers the temporal affairs of the institution. His liability is that of a trustee. A muthavalliship can be held by a single individual or two or more individuals, 18 M L T 48[3] at 53, or by a body of persons constituting a Committee. (*Vide* Tyabji's Mohamadan Law, Edn. 2, S. 499 at p. 607.) In 18 Bom 401,[4] a committee of ten persons was entrusted with the management of a mosque with rules framed to fill up vacancies on the death or removal of any one of them. Therefore there is nothing to prevent an incorporated body performing the functions of a muthavalli. A corporation can be a trustee of a charity : *vide* Tudor on Charities, page 284. It is conceded by Mr. Rajah Iyer that the right of muthavalli can be lost by adverse possession. There can be no doubt in this case that the defendant has lost his right. It is also not disputed by Mr. Rajah Iyer that the right to manage a religious institution is a right which is recognizable and enforcible in a Court of law. Such a right can be acquired by prescription. The plaintiff society, having been for a period of 14 years in undisputed management of the mosque in derogation of the right of the defendant, must be deemed to have acquired the said right. Having surrendered his right in favour of the plaintiff and lost it, the defendant is not entitled to interfere with the plaintiff's management : *vide* A I R 1938 Lah 869[5] at p. 877. Another contention that was advanced was that the society must be deemed to have become defunct because most of the original members died and there is no rule providing for filling up vacancies in case of death. It was contended that the only rule for filling up vacancies was R. 6 which does not provide for the contingency of death. We are not inclined to agree with this contention. R. 6 runs thus :

> At the desire of two-thirds of the members of the Committee, and on a motion made by one jamaitdar and seconded by the others, the Committee shall have power to remove one person from one of such sides and appoint another person in in his place.

What is contended is that this only confers power of removal and appointment in the vacancies resulting from that removal. It seems to us that the principle underlying this rule is that a power is vested in the Committee to co-opt the members who are liable to be removed, no matter for what cause ; it may be death. In fact from time to time vacancies were filled up and the Registrar of the Joint Stock Societies was informed of the change in the membership. The defendant himself was a party to several resolutions filling up vacancies in case of death. We must presume that it was done in pursuance of the power conferred on the Committee by R. 6. We must therefore overrule this contention also.

Lastly it was urged that the understanding come to when the society was formed was that equal numbers of Shafis and Hanafis should be members of the Committee but now the Shafi element preponderates and dissensions have arisen which if allowed to continue would be the ruin of the society and it was contended that there is no provision in the rules as to what should be done in case of dissensions and how the matter should be regulated. All these are matters with which we have no concern. They may be properly agitated before the learned Judge who would be trying the suit which has been filed under S. 92 for framing a scheme for the proper management of the mosque. It is open to the learned Judge to take note of all the facts and circumstances and consider whether it would be in the interests of the mosque that this society should be allowed to continue in management or whether any scheme should be framed vesting the management in a Committee of individuals instead of in an incorporated society. (*Vide* Tudor on Charities, p. 581.) In the result the appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[3] Mohammad Ghouse v. Sheik Moideen, (1915) 2 AIR Mad 1044=29 I C 849=18 M L T 48.

[4] Advocate-General of Bombay v. Abdul Kadir, (1894) 18 Bom 401.

[5] Jamait Damat v. Mohammad Sharif, (1938) 25 AIR Lah 869=180 I C 799.

A. I. R. 1940 Madras 172

VENKATARAMANA RAO J.

A. M. K. M. K. Karuppan Chettiar and another — Plaintiff — Appellants.

v.

Rajangam and others — Defendants — Respondents.

Second Appeal No. 51 of 1935, Decided on 24th October 1938, against decree of Sub-Judge, Kumbakonam, in A. S. No. 29 of 1934.

Civil P. C. (1908), O. 21, R. 57—Attachment —Termination of—Application for execution in which attachment made not dismissed — Dismissal of interlocutory application by decree-holder or his procuring fresh attachment does not terminate original attachment.

Where no final orders on an application for execution in which attachment is made are passed and the proceedings are merely shelved for a time, the attachment subsists and the dismissal in default of an interlocutory application by decree-holder for bringing the legal representatives of judgment-debtor on record and praying for sale of the property does not terminate the attachment originally made and a sale executed by judgment-debtor during pendency of the attachment is void and does not affect the rights of the decree-holder. Nor is a subsisting attachment terminated by the decree-holders' obtaining a fresh attachment through mistake or ignorance of legal rights. [P 173 C 1]

M. S. Venkatarama Iyer—*for Appellants.*

A. V. Viswanatha Sastri — *for Respondents.*

Judgment.—This second appeal arises out of a suit filed under O. 21, R. 63, Civil P. C., by the plaintiffs for a declaration that they are entitled to sell the properties in suit in execution of a decree obtained by them in O. S. No. 371 of 1919 on the file of the District Munsif of Valangiman against defendant 2's father and that the deed of sale executed by defendant 2's mother as guardian dated 17th August 1927 in favour of defendant 1 is a sham and nominal transaction executed with a view to defeat and defraud their rights. The plaintiffs also attacked the deed on the ground that it was executed during the pendency of a subsisting attachment issued in execution of their decree. The sale deed in favour of defendant 1 was for a sum of Rs. 8000, part thereof, namely, Rs. 6500 represented the amount due under a mortgage in his favour, dated 25th October 1921, executed by defendant 2's father and the balance Rs. 1500 represented in part the amount due under a promissory note dated 7th November 1921, also executed in his favour by defendant 2's father. Both the lower Courts took the view that the alienation was not invalid on the ground that it was made during the pendency of a subsisting attachment but they differed on the question whether the sale deed was executed in order to defraud the plaintiff's rights. The learned District Munsif took the view that it was a sham and nominal transaction, but the learned Subordinate Judge held that it was a bona fide transaction intended to pass title.

This appeal is by the plaintiffs and Mr. Venkatarama Iyer on their behalf urged before me two contentions, viz., (1) that the deed of sale is void having been executed during the pendency of a subsisting attachment, and (2) that it was executed in order to defeat and defraud the plaintiffs' rights. If the first contention is answered in plaintiffs' favour, it would be unnecessary to go into the other. I therefore propose to deal with the first contention. A few facts are necessary to appreciate it. On 16th September 1923 plaintiffs filed an application (E. P. No. 559 of 1923) and obtained an order for attachment of the suit properties. Then they obtained an order for sale and the date of the sale was fixed for 14th February 1924, but later adjourned to 29th March 1924. Defendant 2 filed a suit against his father Venkata Reddi for partition and in that suit he obtained an injunction for stay of execution of the said decree. The sale was accordingly not held and that fact was recorded in E. P. No. 559 of 1923. But the execution application was pending and no final orders were passed thereon. The suit filed by defendant 2 was dismissed on 9th November 1925. After the dismissal of that suit, the plaintiffs filed an application, E. P. No. 222 of 1928, wherein they prayed that defendant 2 might be brought on record as the legal representative of his father Venkata Reddi who has since died and also that the properties already attached in E. P. No. 559 of 1923 and ordered to be sold might again be ordered to be sold without the necessity of a fresh attachment, but the application was dismissed for default on 12th November 1928. The plaintiffs then filed a third application (E. P. No. 320 of 1930) wherein they prayed that the immovable properties already mentioned in E. P. No. 559 of 1923 might again be attached and the property directed to be sold. They were accordingly attached and directed to be sold on 7th April 1930. Defendant 1 preferred a claim petition and it was allowed. Hence this suit. It will be seen that the sale deed was executed on 17th August 1927 before the dismissal of

E. P. No. 222 of 1928. It is conceded that on the date of the sale the attachment which was made in pursuance of the order made on E. P. No. 559 of 1923 was subsisting, but it is contended that by reason of the dismissal of the application (E. P. No. 222 of 1928), the attachment ceased and therefore the sale must be deemed to be valid. Both the lower Courts have taken this view and the question is, is it sound? The provision of law bearing on this matter is O. 21, R. 57, which runs thus:

> Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

It is clear from the language of the Section that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected. The expression used is "upon the dismissal of such application." There has been no final orders on E. P. No. 559 of 1923; it has never been dismissed. The question therefore is, can the dismissal of E. P. No. 222 of 1928 operate as a dismissal of the prior execution application? What was prayed in E. P. No. 222 of 1928 was to bring on record the legal representatives of the deceased defendant and to order a fresh sale, but that application was dismissed. The dismissal of this application would not prevent the plaintiffs from making a fresh application and from renewing the same prayer. As long as E. P. No. 559 of 1923 was pending, any order of dismissal on an interlocutory application in the pending execution petition would not terminate the attachment. It is contended that the procuring of a fresh attachment in E. P. No. 320 of 1930 would indicate clearly that the prior attachment was treated by the plaintiffs as not legally subsisting. If owing to a mistake or ignorance of legal rights, the plaintiffs obtained a fresh attachment it would not terminate the attachment which was already subsisting. The fresh attachment is a superfluity. I am therefore of the opinion that the sale must be treated as void and inoperative as against the attachment obtained by the plaintiffs in execution of their decree and which is still subsisting. The question is, what is the relief the plaintiffs will be entitled to? It will be seen that the sale in favour of the plaintiffs was executed in part discharge of a mortgage. The plaintiffs had impeached the said mortgage as fraudulent, but the lower Appellate Court has declared it to be a bona fide transaction and Mr. Venkatarama Iyer has not challenged the finding in respect thereof. The plaintiffs will only be entitled to bring the properties to sale subject to the said mortgage in favour of defendant 1. It is open to defendant 1, if he desires, to have the property sold free from encumbrances and have the amount due on the mortgage paid out to him leaving the plaintiffs to realize their amount from and out of the surplus. The result is that the decree of the lower Appellate Court must be set aside and the plaintiffs be declared entitled to bring the suit properties to sale subject to the mortgage in favour of defendant 1 and the decree of the District Munsif restored with costs throughout. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 173

LAKSHMANA RAO J.

Public Prosecutor — Appellant.

v.

Narayana Ayyar — Respondent.

Criminal Appeal No. 272 of 1939, Decided on 12th September 1939, against acquittal by Stationary Sub-Magistrate, Madura, in C. C. No. 1978 of 1938.

Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (b) and S. 20 (2), R. 28—Ignorance of nature or quality of article is no defence —Service of ghee to customers with meals by hotel-keeper amounts to sale.

The ignorance of the accused of the nature or quality of the article is no defence to a prosecution under S. 5 (1) (b). The price of the ghee served by the hotel-keeper to his customers with their meals being necessarily included in the price of the meals the service of ghee with meals amounts to sale and the acquittal of the accused on the ground that the ghee cannot be said to be sold is untenable. [P 173 C 2; P 174 C 1]

A. S. Sivakaminathan — *for Appellant.*

T. L. Venkatarama Ayyar — *for Respondent (Accused).*

Judgment.—The respondent is an hotel-keeper and the ghee stored by him for service to his customers with their meal was found to be adulterated. The price of the ghee is necessarily included in the price of the meal, and ghee, as defined in S. 2, Madras Prevention of Adulteration Act (Act 3 of 1918), means ghee prepared exclusively from butter made from cows, or buffaloes' milk or cream or both. The aritcle stored was not therefore what it purported to be, and the respondent would be guilty of the offence of storing for sale adulterated ghee under S. 5 (1) (b) and R. 28 framed under S. 20 (2) of the Act. The ignorance of the respondent of the nature or quality of the article is no defence to a prosecution under S. 5 (1) (b) of the Act and his acquittal on the ground "that it cannot be said that the ghee is sold to the customers" is untenable. The order of acquittal is therefore set aside and the respondent is convicted under S. 5 (1) (b), Prevention of Adulteration Act, and R. 28 framed under S. 20, cl. (2) of the Act. He is sentenced to pay off fine of Rs. 5 and in default to simple imprisonment for two weeks.

C.R.K./G.N. *Appeal allowed.*

✻ A. I. R. 1940 Madras 174

GENTLE J.

Kaliana Thevan and others — Appellants.

v.

Muthuswami Goundan and others — Respondents.

Second Appeal No. 1169 of 1934, Decided on 22nd February 1939, against decree of Addl. Sub-Judge, Coimbatore, in A. S. No. 50 of 1934.

✻Promissory note—Promissory note executed by member of joint Hindu family endorsed by promissee— Endorsement not so worded as to transfer original debt — Remedy of indorsee is only against executant and not other members of his family.

The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note against the executant unless the endorsement is so worded as to transfer the debt as well and the law as to stamping is complied with. [P 174 C 2]

A promissory note executed by a member of joint Hindu family was endorsed by the promisee. The endorsement recited "I have assigned this promissory note in your favour":

Held that the endorsement assigned the promissory note and not the original debt. Hence, the endorsee was entitled to succeed only against the executant of the note and not against the other members of the same family of which he was a member : *A I R 1938 Mad 377, Rel. on.* [P 175 C 1]

V. C. Vijiaraghavachari — *for Appellants.*

Watrap S. Subramania Ayyar and T. P. Gopalakrishna Ayyar — *for Respondents.*

Judgment. — In the suit the plaintiff sued on a promissory note dated 5th April 1929 executed by defendant 1 in favour of Kaliappa Kavundan in respect of a sum of Rs. 1355 with interest at one per cent. per mensem. The person in whose favour the promissory note was given transferred it on 7th March 1932 to the plaintiff. The lower Courts decreed in his favour the amount claimed not only against defendant 1, the executant, but also against defendants 2 to 9 as being members of a joint Hindu family with defendant 1. The appellants are defendants 6 to 9, namely, the brothers and nephews respectively of the executant. I have no doubt that the suit was one on the promissory note. On behalf of the appellants, it is contended that the executant alone is responsible in a suit upon a promissory note at the instance of an indorsee and it is contended that the plaintiff is an indorsee. In I L R (1938) Mad 568,[1] it was held that the indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note against the executant unless the endorsement is so worded as to transfer the debt as well and the law as to stamping is complied with. In the course of the judgment, Sir Lionel Leach C. J., at p. 576 said :

> Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of the debt as was pointed out by Madhavan Nair J. in 41 M L W 177.[2] An endorsement may operate to assign the debt as well when it is so worded and the requirements of the law with regard to stamping are complied with.

The respondent contends that the endorsement upon the suit promissory note is an assignment not only of the promissory note but also of the original debt. In this endorsement, which expresses itself to be an assignment after various recitals these words appear : "I have assigned this promissory note in your favour." Assuming that it was an assignment, then what was assigned was nothing more than the promissory note. I have been referred by learned counsel on behalf of the respondent to 28 Mad 544,[3] in which Sir S. Subramania Iyer, Offg. C. J. in the course of the judgment said at p. 546 that in the case of transfer of a negotiable instrument otherwise than by indorsement

> the assignee will acquire in the bill or note, as a chattel, nothing more than the right, title and

---

[1] Maruthamuthu Naicker v. Kadir Badsha Rowther, (1938) 25 A I R Mad 377=174 I C 577= I L R (1938) Mad 568 = (1938) 1 M L J 378 (F B).

[2] Periakaruppan Chetti v. Mottayya Mudali, (1935) 22 A I R Mad 240 = 156 I C 455 = 69 M L J 30=41 M L W 177.

[3] Muthat Sahib Maraikar v. Kader Sahib Marakayar, (1905) 28 Mad 544=15 M L J 384.

interest of his assignor, whereas in the case of an indorsement the assignee will have all the rights and advantages of a holder in due course of a negotiable instrument.

If the endorsement on the suit promissory note is assumed to be an assignment, what was assigned was the promissory note and in respect of the promissory note the right, title and interest of the assignor. I cannot see that there has been any assignment of the original debt. The plaintiff as indorsee or assignee, as the case may be, has not acquired any rights in regard to the original debt and his rights are confined to those arising out of the promissory note. If the endorsement does not amount to an assignment but is no more than an endorsement of the note the position is covered by the decision in I L R (1938) Mad 568.[1] It must follow that the plaintiff is entitled to succeed only against the executant of the note, namely defendant 1, and not against the other members of the same family of which defendant 1 is a member. From the information before me there was no assignment of the original debt to the plaintiff. The endorsement on the suit promissory note is not stamped as an assignment, as such. Two authorities have been cited to me by the learned counsel on behalf of the respondent to the effect that the document having been admitted in evidence the objection as regards inadequate stamping cannot prevail. It is unnecessary to give a decision on this point. The result is that the appeal will be allowed with costs both here and below. Leave to appeal granted.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 175

VENKATARAMANA RAO J.

Yarlagadda Ranganayakulu Naidu Bahadur — Appellant.

v.

Myneni Lakshminarayana and others — Respondents.

Second Appeals Nos. 632 to 654 and 656 to 668 of 1934, Decided on 4th November 1938, against decrees of District Court, Krishna in A. S. No. 19, etc., of 1933 respectively.

Landlord and Tenant—Duty to contribute to expenses for performance of festival in temple is not ordinary incident of relation of landlord and tenant —It cannot be taken into consideration in settling fair rate of rent.

A duty to contribute to the expenses for the performance of a festival in a temple is not an ordinary incident of the relation of landlord and tenant, whether it is a duty which is to be performed by the landlord or the tenant because it has nothing to do with the object for which the land is let. Therefore unless it is shown to be such an incident, it cannot be taken into consideration in settling a fair rate of rent. [P 177 C 2]

V. Govindarajachari — *for Appellant.*

P. Satyanarayana Rao — *for Respondents.*

Judgment.— This is a batch of 36 appeals which arise out of suits brought by the appellant, the zamindar of Katur estate, against his tenants in occupation of the lands in the village of Kummannur in his zamindari for recovery of arrears of rent for faslis 1338 to 1340 under Sec. 77, Estates Land Act. The lands comprise 311 acres 96 cents in extent. The tenants do not dispute the liability to pay rent but only to the rate claimed. The lands were admittedly dry in or about 1860 but most of them have since been converted into wet. The point in controversy is whether the defendants are liable to pay wet rates in respect of those lands or dry rates. The reason why the tenants refused to pay wet rates is that the zamindar has failed to fulfil his obligation of effecting repairs to the main channels which supply water to the lands. One of the questions that fell to be decided therefore was whether there was such an obligation. The lands being originally dry, the tenants were only bound to pay dry rates. The claim to the wet rates would therefore be for an enhancement of rent. The question is whether the zamindar could legally enforce it and whether any consideration moved from him.

It is a well-known fact that between 1865 and 1872 the anicut system for supplying water for the irrigation of lands from the Krishna river was introduced. In many of the villages comprised in the Nuzvid zamindari of which Katur also originally formed part it became a realized possibility, that dry lands could be converted into wet by the supply of Krishna water. Both zamindars and tenants took the advantage of the facilities thus afforded and irrigation channels were dug in most of the estates sometimes at the expense of the zamindar and sometimes at the joint expense of the zamindar and the tenant and rents payable by the tenants to the zamindar were adjusted in each estate having regard to the changed conditions. In most of the estates in the Nuzwid zamindari the system which originally prevailed was the asara system or the sharing system which later gave place in many parts to what is known as the visabadi system or the payment of fixed money rent. In the suit zamindari also irrigation channels were dug and particularly in respect of the suit village it appears that between 1879 and 1889 irrigation channels were dug. It is also in evidence that by the time the channels were dug the visabadi system had come into existence in respect of the suit lands. The digging of the channels and the facility of the Krishna water supply rendered possible the conversion of dry lands into wet. Rents were increased.

The question therefore is what were the terms arranged between the zamindar and the tenants? It is established in evidence that the main irrigation channels were dug by the zamindar and both the Courts have concurrently found that the zamindar was also maintaining the channels by repairing them at his own expense and for a period of over half a century wet rates were being levied and collected in respect of these lands. Both the Courts have concurrently found that the arrangement between the zamindar and the tenants was that the channels should be dug by the zamindar, that the repairs to them should be effected by him and the right to recover wet rates of rent was dependent upon the zamindar fulfilling his obligation to keep the channels in good repair. The Deputy Collector of the Nuzwid Division found that the zamindar failed to fulfil his obligation to keep the main channels in repair in the suit faslies and therefore he could not levy the usual wet rates, but at the same time he observed that the tenants could not insist on having dry rates because the zamindar having dug the channels, it cannot be said that there was no consideration for the enhancement of rent. The Deputy Collector therefore took the view that it was competent to him to fix a fair rate of rent. The zamindari changed hands and the present zamindar came into possession of the zamindari in or about 1922 and after he came into possession, there was a dispute as regards the obligation to effect repairs and that question seems to have been settled by a mutual conference of the zamindar and the tenants on or about 7th December 1923 at which it was agreed that the zamindar should pay Rs. 160 towards repairs of the channels and another sum of Rs. 40 towards the expenses of a festival connected with the temple of Sri Seetharamaswami every year. Both the lower Courts found that this arrangement was not temporary but permanent. In fixing a fair rate of rent the Deputy Collector found that the enhanced wet rate fetched about Rs. 500 a year. He therefore held that as under the agreement the zamindar was bound to pay Rs. 200 a year and the rate enhanced was Re. 1 per acre, the defendants ought to get a reduction of 200-500 of the extra rupee per acre or annas six on each acre of wet land. He gave a decree accordingly. The learned District Judge confirmed this decree. He observed that

> the existence of irrigation channels in a state of good repair is essential for carrying on wet cultivation and the payment of higher wet rates and hence the inference is irresistible, that the execution of repairs or payment for the same is intimately connected with it and is in discharge of a liability to do so as a condition precedent to the recovery of the higher rate of wet rent.

He therefore thought that the contract to pay higher rate for wet cultivation without the liability for effecting repairs to the channels was devoid of consideration and was not legally enforceable and that the enforcement of higher rate was dependent upon the fulfilment of this obligation. He further found that the arrangement made between the zamindar and the tenants in December 1923 was permanent in character, but at the same time he took the same view as the learned Deputy Collector that the tenants were not entitled to revert to dry rates by reason of the non-fulfilment of the obligation to effect repairs. He accordingly agreed with the Deputy Collector that a fixation of fair rent was necessitated in the circumstances and was valid. He therefore confirmed the reduction made by the learned Deputy Collector. In so doing he made the following observation:

> Of the sum of Rs. 200, a portion was, no doubt, earmarked for a temple festival, but the entire sum was in satisfaction of the liability of the appellant to effect repairs which he owed to the respondents and if the latter chose to divert the whole or any part of it for other purposes, that fact cannot alter its inherent character as the amount paid for the cost of the repairs, so far as the appellant was concerned.

I may at once state that this observation was criticized as incorrect by Mr. Govindarajachari and I shall deal with it later. These appeals are by the zamindar and Mr. Govindarajachari on his behalf raised a number of contentions. The first contention was that the obligation of the zamindar was fulfilled by the excavation of the main irrigation channels and the evidence clearly establishes that the contract was only to dig the channels and not to keep them in repair. He referred me to Exs. 14

to 14-b in support thereof. Ex. 14-a is the petition written by an official of the zamindar to the Head Assistant Collector for the sanction of enhancement of rent, the ground stated being that the zamindar constructed the channels and an order was made on that basis. It does not refer to the obligation of the zamindar to keep the channel in repair. Mr. Govindarajachari, therefore contended that where the terms of a contract are clear, the subsequent conduct of the zamindar in having effected repairs should not be taken into consideration on the ground that it is inadmissible to construe a written contract by subsequent conduct. He further contended that the various pattas and muchilikas that were exchanged did not at all refer to the obligation of the zamindar to effect repairs. It seems to me that Ex. 14 series do not evidence the whole contract. It was not necessary for getting the sanction to mention the obligation to keep the channel in repair because the object of getting sanction was that by reason of the digging of the channels water was made available and was being made available for the irrigation of the lands. The letter Ex. 14-a does not mention any arrangement arrived at in pursuance of which the channels were dug and no terms thereof were referred to. There is no written contract in this case and the contract has to be inferred from the conduct and actings of the parties for a series of years. The obligation to effect repairs would arise only as and when necessity for it arose.

It will be seen from the evidence that for some years after the digging of the channels, no repairs were effected but thereafter for a period of 30 to 40 years repairs were made by the zamindar and I cannot say that the inference drawn by both the lower Courts that obligation of the zamindar was not only to dig the channels but also to keep them in repair was not correct. The only question that arises is whether the obligation to keep the channels in repair is a condition precedent to the payment of wet rent by the tenants. Mr. Govindarajachari contended that it could not be and that it is clear from the pattas and muchilikas that the tenants were bound to pay at the rate stipulated and if the zamindar failed to fulfil his obligation to effect repairs, the only course open to the tenants was to plead for a remission of rent if it was open to them to do so by way of set off or file a suit for damages. There is a good deal of force in this contention. But on the other hand, Mr. Satyanarayana Rao contends that the tenants could plead the non-fulfilment of the obligation by way of failure of consideration and unless water was supplied, it would not be possible for the tenants to raise wet crops on which alone the liability to pay wet rates would arise. I think it unnecessary to go into this question because Mr. Govindarajachari frankly stated that if it be held that the zamindar was under an obligation to effect repairs, he would prefer a reduction of rent rather than effect repairs every year as it has led and would lead to considerable trouble between the zamindar and the tenants. But he objects to the rate of reduction. His point in this behalf is that the lower Courts went wrong in taking into consideration the sum of Rs. 40 being the amount which the tenants claimed for the performance of a festival of Seetharamaswami.

Having heard arguments on the point, I am of the opinion that Mr. Govindarajachari's objection must be upheld. A duty to contribute to the expenses for the performance of a festival in a temple is not an ordinary incident of the relation of landlord and tenant, whether it is a duty which is to be performed by the landlord or the tenant because it has nothing to do with the object for which the land is let. Therefore unless it is shown to be such an incident, it cannot be taken into consideration in settling a fair rate of rent. In this case it is clear that the obligation of the zamindar to effect necessary repairs has been commuted into a money payment of Rs. 160 and the learned District Judge was certainly not right in the view he took that the entire sum of Rs. 200 fixed at the settlement of 7th December 1923 was in satisfaction of the liability of the zamindar to effect repairs. Whether the tenants can compel the zamindar to pay the said tenants a sum of Rs. 40 on any other ground is unnecessary for me to consider or express an opinion thereon. All that I am concerned with is whether the said sum of Rs. 40 can be taken into consideration in fixing the fair rate of rent. As the said sum does not represent a portion of the money value of repairs as claimed, and therefore does not relate to the lands let, it should not have been taken into account by the lower Courts. So far as the fixation of rent upto Fasli 1347 is concerned, it is agreed by both the parties that the decree of the lower

Courts in fixing the proportion as 200-500 should not be disturbed and no claim for any refund should be made, assuming it can be, in regard to the annual contribution of Rs. 40 for the festival for the said faslis. But for the future (i. e.) from Fasli 1348 I direct that the reduction should only be in the proportion of 160-500. The decree of the lower Court must therefore be modified accordingly. Subject to this modification, the second appeals fail and are dismissed. I direct the appellant to pay Rs. 150 as and for the costs of the respondents.

C.R.K./D.S. *Decree modified.*

A. I. R. 1940 Madras 178

VENKATARAMANA RAO J.

In re Travancore National and Quilon Bank Ltd. (in liquidation)
Nayar Modern Bank Ltd., Palghat
Applicant
v.
James Voce Pirrie, Cyril Gill and John Stanley Goodwin (Official Liquidators)
Respondents.

Appln. No. 2874 of 1938, Decided on 21st April 1939 in O. P. No. 158 of 1938.

Banker and Customer — Depositor being trustee and money deposited being trust money — Notice to Bank that money deposited is trust money — Effect.

The fact that the depositor is a trustee and that the money deposited is trust money does not affect the relation which the law creates between a Bank and an ordinary customer, namely the relation of a debtor and creditor. The legal effect of a notice to the Bank that the money deposited is trust money is only to cast a duty on the Bank not to participate in a breach of trust by the trustees, because, a Banker who receives into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty. [P 179 C 1]

K. Kuttikrishna Menon and K. Narayana Marar — *for Applicant.*

C. Krishnaswami Iyer — *for Respondents.*

Order. — This is an application by the Nayar Modern Bank for payment of a sum of Rs. 6500 standing to its credit in the Travancore National and Quilon Bank under three fixed deposits for Rs. 1000, Rs. 5000 and Rs. 500 respectively in preference to the ordinary creditors of the Bank. The basis of the claim is thus put in para. 2 of the affidavit of the Managing Director:

> Under the mandatory provisions of Sec. 282-B, Companies Act, the Nayar Modern Bank Ltd. has deposited with the Travancore National and Quilon Bank Ltd. a total amount of Rs. 6500 under three deposits (R. No. 96, dated 30th July 1937 for Rs. 1000, R. No. 6 of 1938 for Rs. 5000, dated 15th January 1938 and R. No. 24-38 for Rs. 500, dated 21st February 1938) and in a separate account earmarked as Employees' Cash Security. The Travancore National and Quilon Bank Ltd. has accepted the deposit as the Nayar Modern Bank Ltd., Employee's Cash Security Deposit and such acceptance is evidenced by the endorsements on the receipts themselves in red ink and the correspondence in relation to the transactions.

One of the Official Liquidators of the Travancore Bank in his counter-affidavit stated that the said amount of Rs. 6500 was deposited with the Bank for the purpose of earning interest thereon and that the Bank was requested to earmark the said deposit as Employees' Cash Security "which clearly meant (and could only mean) that the deposit receipts were to be headed "Employees' Cash Security". to distinguish them from the other several deposits or loans made by the same Bank against which the depositor arranged to obtain overdrafts." In para. 3 of his affidavit he further submitted as follows:

> The depositee Bank appears to have accepted all the said deposits as loans merely as banker for its customer in the ordinary course of its banking business and issued the usual and ordinary customer's deposit receipts showing the sums therein acknowledged were debts due and payable to its customer twelve months after the respective dates of deposit, carrying ordinary deposit interest at the rate of 4 per cent. per annum in the meanwhile. It does not appear that the depositee Bank was asked to accept and it does not appear to have accepted the said sums or any of them as a trustee and none of the three transactions are impressed with any trust.

The letters written by the Nayar Modern Bank at the time of the several deposits merely indicate that it was sending the moneys for a deposit and that they should be earmarked as Employees' Cash Security. It is enough if I refer only to one such letter. On 30th July 1937 the Nayar Modern Bank sent a sum of Rs. 1000 for being placed as a fixed deposit and the letter which accompanied it ran thus:

> We are sending herewith the sum of Rs. 1000 which is to be placed as a fixed deposit for one year in our name and we request you to kindly grant us your usual receipt. The deposit is to be treated as one earmarked as our Employees' Cash Security Deposit as per S. 282-B, Companies Act.

The contention now advanced on behalf of the Nayar Modern Bank is that as the amount representing the Employees' Cash Security was held by the Nayar Modern Bank, as trustees in trust for its employees and the said money having been received by the Travancore National and Quilon

Bank with notice of the said trust the latter Bank must be held to be trustees and held the said property also as trustees for the employees of the Nayar Modern Bank. It seems to me that this contention is untenable. The fact that the depositor is a trustee and that the money deposited is trust money does not affect the relation which the law creates between a bank and an ordinary customer, namely the relation of a debtor and creditor. The legal effect of a notice to the Bank that the money deposited is trust money is only to cast a duty on the bank not to participate in a breach of trust by the trustee. The principle applicable is stated by Hart on "Law of Banking" at page 199 thus :

> A banker who received into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character contracts the duty not to part with them even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty.

He must not be a party to an appropriation of these funds which is inconsistent with the character in which the customer holds them; for example, he must not allow those moneys to be applied in payment of his own overdrawn private accounts. Under Sec. 282-B, Companies Act, the Nayar Modern Bank is entitled to keep or deposit the said moneys deposited with it by its employees in pursuance of their contracts of service in any scheduled Bank as defined in cl. (e) of S. 2, Reserve Bank of India Act, 1934. The Travancore National and Quilon Bank is a scheduled Bank within the meaning of the said Section. The Nayar Modern Bank was within its rights and not acting improperly when it deposited the moneys in the Travancore National and Quilon Bank with a request to earmark them as Employees' Cash Security. The disability which the statute imposes on the Nayar Modern Bank is that no portion of the said moneys shall be utilized by it except for purposes agreed to under the contract of service. When the Travancore National and Quilon Bank accepted the deposits with notice of the fact that the said moneys represented cash security of the employees of the Nayar Modern Bank, the Travancore National and Quilon Bank must also be deemed to have been aware of the limitation or the powers of the Nayar Modern Bank in regard to the said moneys and it should not permit any dealing by the Nayar Modern Bank with those moneys in violation of the duty which the statute imposes. It is not suggested that the Travancore National and Quilon Bank has been a party to the misapplication of the said moneys by the Nayar Modern Bank in violation of the said duty imposed by the statute. The claim for preferential payment cannot therefore be sustained and the application is therefore dismissed with costs of the Official Liquidators, Rs. 35.

C.R.K./D.S. *Application dismissed.*

A. I. R. 1940 Madras 179

BURN AND STODART JJ.

Rowthmall Neopani — Appellant.

v.

Nagarmall Madan Gopal and others —Respondents.

Appeals Nos. 100 and 101 of 1939, Decided on 13th October 1939, from orders of Dist. Court, Guntur, D/- 27th February 1939.

(a) Company—Court giving Official Liquidator sanction to sell company's property in discharge of its debts — Official Liquidator acting on sanction and entering into contract of sale—Court cannot subsequently revoke its sanction so as to nullify contract of sale.

One of the principal functions of the Liquidator is to discharge the debts of the company. For that purpose he may have to sell the company's property, and he can do this with the sanction of the Court. It follows that any sales or contracts of sale effected by the Liquidator in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. Hence, where the District Court has given the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and has expressly sanctioned the contract of sale entered into by the Official Liquidator for a sum considerably in excess of the stipulated price, the Court cannot revoke its own sanction so to nullify the contract of sale : *A I R 1921 Mad 286, Expl. and held obiter.* [P 182 C 1, 2; P 183 C 1]

(b) Companies Act (1913), S. 183 (5)—S. 183 (5) does not apply where act of Official Liquidator is performed in pursuance of Court's sanction.

Section 183 (5) cannot apply to a case in which the act or decision of the Official Liquidator has been performed or made in pursuance of the Court's express sanction. [P 180 C 2; P 181 C 1]

Advocate-General and D. R. Krishna Rao — *for Appellant.*

K. Rajah Ayyar and K. Kameswara Rao —*for Respondents.*

Burn J. — These are appeals preferred from the orders passed by the learned District Judge of Guntur on I. A. No. 73 and I. A. No. 85 of 1939 in O. P. No. 266 of 1936 on the file of the High Court, Madras. The original petition was for the winding up of the Guntur Cotton, Jute and Paper Mills Co.

Ltd., and it was filed in the High Court on 2nd October 1936, and the winding up order was passed on 17th December 1936. The subsequent proceedings in liquidation were transferred to the District Court, Guntur.

It is not necessary, I think, to state again in detail all the facts which have been fully set forth in the order of the learned District Judge. Put quite briefly the position is as follows: On 15th February 1938, the District Judge gave permission to the Official Liquidator to sell the entire property belonging to the Guntur Cotton, Jute and Paper Mills Co. Ltd. The permission was coupled with a condition that the sale should be for not less than Rs. 80,000. On 19th January 1939, the Official Liquidator entered into a contract of sale of the properties to one Rowthmall Neopani for Rs. 95,000 (Ex. 9). On 23rd January 1939 the District Judge approved of this contract of sale and permitted the Official Liquidator to compromise two suits (O. S. No. 15 of 1923 and O. S. No. 21 of 1924 on the file of the Sub-Court, Guntur) in which the company was concerned as plaintff in the first and defendant in the second. In pursuance of the orders of the District Court the Official Liquidator compromised both those suits and decrees were passed by the Subordinate Judge of Guntur in terms of the razinamas. On 27th January 1939 one N. Madan Gopal who had been one of the creditors on whose petition the winding up order was made, put in the application, I. A. No. 73 of 1939 in the District Court in which he prayed that the contract of sale said to have been entered into by the Official Liquidator with Rowthmall Neopani might be set aside, cancelling if necessary the order passed by the learned District Judge on 23rd January. On 31st January 1939 Parripati Venkataratnam filed in the District Court I. A. No. 85 of 1939. He alleged that he was one of the shareholders in the Guntur Cotton Jute and Paper Mills Co. Ltd., and he prayed that the order passed by the learned District Judge on 23rd January 1939 which he described as an ex parte order, might be set aside and fresh orders passed. The learned District Judge disposed of both these applications together and passed identical orders in both. He decreed:

> That the permission granted by this Court on 23rd January 1939 for the compromise of the suits, O. S. No. 21 of 1924 and 15 of 1923, Sub-Court, Guntur, and for the sale of the mill properties be and hereby is revoked;
>
> That respondent 1, (i. e. the Official Liquidator) do hold a fresh sale of the properties by public auction as early as possible after due notice in the public press:
>
> That if at the public auction to be held hereafter the property fetches only Rs. 95,000, respondent 1 (Rowthmall Neopani) must be given preference over the other bidders and that if the property fetches more, it must be knocked down to the highest bidder; that respondent 1 (the Official Liquidator) is hereby directed to obtain the sanction of the Sub-Court, Guntur, for the sale of the property as he is also a receiver appointed by that Court; and
>
> That the respondents do pay the petitioner's costs.

Rowthmall Neopani has preferred both these appeals from the two orders of the lower Court. The contentions of the learned Advocate-General for the appellant can be briefly stated as follows: (1) the learned District Judge had no power to revoke the sanction which he had given on 23rd January 1939 for the sale of the properties, and for the compromise of the suits, and (2) that, even if the learned District Judge had power to revoke his own sanction, he ought not to have done it in the present case. I am very clearly of opinion that the learned Advocate-General's contentions on both these points are well founded. It appears to me a very extraordinary suggestion that the District Court having given the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and having expressly sanctioned the contract of sale entered into by the Official Liquidator for a sum considerably in excess of the stipulated price, and having sanctioned the compromise of two suits in another Court, should be able, by passing an order purporting to revoke its own sanction, to nullify the contract of sale and to render void the decrees passed by the Sub-Court in the two suits. Mr. Rajah Ayyar for the respondents has not been able to refer us to any Section in the Companies Act which would authorize the District Court to pass such orders as those now under appeal. The application of N. Madan Gopal was filed under Ss. 179 and 183 (5), Companies Act. S. 179 describes the powers of the Official Liquidator which he can exercise with the sanction of the Court. S. 183 (5) provides that

> if any person is aggrieved by any act or decision of the Official Liquidator, that person may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such orders as it thinks just in the circumstances.

It is clear that S. 179 has no bearing upon this question, and S. 183 (5) clearly cannot apply to a case in which the act or decision of the Official Liquidator has been performed or made in pursuance of the Court's express sanction. Mr. Rajah Ayyar did not contend that S. 202 would have any application. He contended that the District Court had power to grant a review of its own previous orders either under the provisions of O. 47, Civil P. C., or failing that he contended that the District Court had inherent power to set aside its own orders in the interests of justice. Perripati Venkataratnam, the petitioner in I. A. No. 85 of 1939, based his petition on the same two Sections and added also Sec. 153, Companies Act. Mr. Rajah Ayyar did not suggest that S. 153 could have any application to this case. S. 153 gives power to compromise between a company and its creditors or any class of them or between the company and its members or any class of them. It provides that where any compromise or arrangement is proposed a meeting of the creditors or class of creditors or members of the company or class of members as the case may be must be called, held and conducted in such manner as the Court directs. The compromises in this case were between the company and one creditor who held a mortgage on the company's immovable properties. It was not a compromise between the company and a class of creditors and therefore the provisions with regard to the obligation to call a meeting are inapplicable.

There is, I think, no doubt that the Court in a proper case could grant a review under the provisions of O. 47, Civil P. C., but the applications in this case were not applications for review, and I do not see how they could be brought within the terms of O. 47. Mr. Rajah Ayyar was not able to show any authority for holding that in a case like this the District Court has inherent power to revoke its own sanction after the sanction has been acted upon. He referred to the case in 24 M L W 35.[1] But that case was decided on a totally different point. Krishnan J. expressed the view that in that case the Court had inherent powers to set aside its own previous order but he expressly stated that

> it was not material to decide in this case the somewhat difficult question whether the District Judge himself had jurisdiction to cancel his previous sanction.

The learned Judge's remarks on this point were therefore avowedly obiter. The learned Advocate-General lays stress very properly on the fact that in pursuance of the permission granted by the District Judge to the Official Liquidator the suits (O. S. Nos. 15 of 1923 and 21 of 1924) were compromised in the Sub-Court, Guntur, and he asks how those decrees of the Sub-Court can be rendered void by the order of the District Judge purporting to revoke the permission given by him on 23rd January? I am not aware of any answer to this question. The District Judge could of course have revoked his sanction if he had done so before the Official Liquidator had acted upon it, but if once the Official Liquidator has acted upon it, has compromised the suits and has obtained decrees in terms of the compromises, I am entirely unable to see how the District Judge can have power to revoke it.

Secondly it seems to me quite clear that the District Judge's order was wrong on its merits. He recognizes that the compromises in the suits were beneficial to all parties and it would seem that he only revoked his sanction because he thought that it was technically bad for want of notice to "the persons interested." He states also that there was no prior sanction of the Sub-Court, Guntur, for the proposed sale and he says there was thirdly "the suppression of an important fact a knowledge of which would have prevented the giving of sanction." These matters can, I think, be very briefly dealt with. Mr. Rajah Ayyar has not been able to satisfy us that any notice to anybody was necessary in this case. As I have already pointed out, the Official Liquidator had got from the District Court general authority on 15th February 1938 to sell the property either by public auction or by tender or by private sale, piecemeal or in one lot subject to the approval of the Court. All parties were well aware of this permission. N. Madan Gopal by his vakil expressly stated on 5th February 1938 that he had no objection. The pleader for the mortgage in O. S. No. 21 of 1924 also stated that he had no objection and the learned Judge in his order dated 15th February 1938 (Ex. 4 C) has expressly said that "none appeared to oppose." Technically, therefore, it cannot be said that any notice to anybody was necessary after the Official Liquidator had entered into the contract of sale and before the District Court approved of it. The suggestion that the Sub-Court's sanction was necessary is apparently based upon the fact that Mr. Kota Venkateswaralu, the Official Liquidator of the company, had also been appointed Receiver of the Mill's properties in O. S. No. 21 of 1924, the suit filed against the company on a mortgage for Rs. 1,23,000 odd. Mr. Rajah Ayyar has not attempted to support the order of the learned Judge on this ground. It is clear that when an Official Liquidator is appointed, he has power to dispose of the properties of the company under S. 179, Companies Act, and his power in this case was not limited by the fact that he had had no sanction in his capacity as Receiver in O. S. No. 21 of 1924.

---

[1] Gordhan Das Chuni Lal v. Kanthimathinatha Pillai, (1921) 8 A I R Mad 286=97 I C 295=24 M L W 35.

As for the suggestion that the learned Judge would have refused his sanction if he had known of an important fact which was suppressed, that is based upon the fact that N. Madan Gopal on 20th January 1939 made a written offer to the Official Liquidator of Rs. 96,000. The Official Liquidator refused to take any notice of this offer, because N. Madan Gopal made no deposit of earnest money and the Official Liquidator said that he did not believe it to be a bona fide offer. The Official Liquidator had good grounds for this view. N. Madan Gopal was well aware of the Official Liquidator's power to sell ; he had been in negotiation with the Official Liquidator himself; he had on one occasion offered Rs. 81,001 on 28th March 1938 and even then he made no deposit of earnest money. His complaint that the transaction between the Official Liquidator and Rowthmall Neopani was conducted behind his back was groundless. Rowthmall's offer of Rs. 95,000 was made in November 1938. The vakil for the plaintiff in O. S. No. 21 of 1924 wrote to N. Madan Gopal on 10th January 1939 Ex. 8 (c) and in that letter he referred to the prospect of a compromise between the plaintiff in O. S. No. 21 of 1924 and the defendant company. N. Madan Gopal's reply to that on 15th January, Ex. 8 (d), was that he was afraid to negotiate the purchase of the Jute Mill owing to long-standing disputes and he made no offer. On 16th January the same gentleman telephoned to N. Madan Gopal at Vizianagaram, and warned him that the offer of Rs. 95,000 made by Rowthmall Neopani was going to be accepted unless he made a higher offer. In these circumstances I think that the Official Liquidator was fully justified in paying no attention to the offer of Rupees 96,000 made on 20th January unaccompanied by any deposit and I do not think that the District Court would have been justified in refusing sanction to the Official Liquidator for the sale and the compromises even if the fact of that offer had been brought to the notice of the learned District Judge.

O. S. No. 21 of 1924 was a suit on a mortgage for Rs. 1,23,000, executed on 2nd January 1918 in favour of a member of the Pydah family of Cocanada. By 1926, the claim under this mortgage had risen to somewhere between four and five lakhs. O. S. No. 15 of 1923 was a suit filed on behalf of the company to set aside the mortgage. The Official Liquidator was in great straits for money not only to conduct these suits but even to pay such small items as Municipal tax on the buildings. None of the creditors would provide funds to prosecute O. S. No. 15 of 1923 or to defend O. S. No. 21 of 1924. In these circumstances the compromise by which the mortgagee received Rs. 70,000 in full satisfaction of his mortgage leaving Rs. 20,000 to satisfy the unsecured creditors to the extent of about Rs. 7000 and odd was beneficial to all parties as the learned District Judge himself recognizes. It is in my opinion extremely undesirable that by setting aside the sale these two suits should be reopened and the parties left to bear the risks of them. It is also to be observed that if all these matters are re-opened, there will be considerable delay in the disposal of still another suit O. S. No. 27 of 1934 on the file of the Sub-Court, Cocanada, which is a suit for the administration of the estate belonging to the Pyda family of Cocanada. I am therefore clearly of opinion that the learned Judge's orders were unjustified on the facts as well as being beyond his jurisdiction. These appeals should therefore in my opinion be allowed and the applications I. A. No. 73 of 1939 and 85 of 1939 dismissed with costs. The appellant will recover his costs in Appeal No. 100 of 1939 from respondent 1, N. Madan Gopal, and in Appeal No. 101 of 1939 from respondent 1, Perripati Venkataratnam.

Stodart J. — I agree. One of the principal functions of the liquidator is to discharge the debts of the company. For that purpose he may have to sell the company's property, and he can do this with the sanction of the Court. It follows in my opinion that any sales or contracts of sales effected by the Liquidator in pursance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. I say so for reasons which I think are obvious. If the Liquidator's proceedings are merely provisional and subject to the subsequent confirmation of the Court he will not be able to dispose of the property to the best advantage. Offers for the purchase of the property will be merely tentative. A prospective purchaser will not disclose to the liquidator the final figure to which he is prepared to go if his offer is liable to be outbid by someone else when the sale comes up before the Court for approval. It appears to me therefore that having sanctioned the sale of the company's property and having fixed a reserve price the matter is closed so far as the Court is concerned and the Liquidator is free to dispose of the property provided he observes the conditions previously imposed by the Court. There must be some finality in the proceedings and if bids and offers made to the liquidator are to be subject to the subsequent approval of the Court then the liquidator will be a mere ministerial officer of the Court and the real sale will be effected by the Court itself. But that is not the meaning of the Act.

Section 179.

> The Official Liquidator shall have power with the sanction of the Court to sell the property of the company by public auction or private contract with power to transfer the whole thereof to any person . . . or to sell the same in parcels.

In my opinion this can only mean that the liquidator can finally dispose of the property once he has got the sanction of the Court. It does not mean that he has power merely to invite offers and to submit them to the Court for approval. In the present case the offer of the respondent in A. A. O. No. 100 of 1939, whatever its bona fides, was received after a contract of sale had been finally entered into with the appellant. That offer was too late. If the respondent was willing to go to Rs. 96,000 he would have done so months before. He put forward his offer only when he knew that the property was going to be sold to somebody else. He was not ready to pay cash down which was one of the conditions on which the Pydah mortgagees had consented to accept Rs. 70,000 in complete discharge of their mortgage. The order of the Court, moreover, which is now under appeal, was not in the best interests of the company. Having set aside the contract of sale in favour of Rowthmall Neopani for Rs. 95,000 cash down entered into by the Liquidator because there was a subsequent offer of Rs. 96,000 by the respondent the Court directed that the property be sold by public auction, not, be it noted, starting with respondent's bid of Rs. 96,000 but presumably starting with the reserve fixed in February 1938. And the Court's direction that if the bid reaches Rs. 95,000 then Rowthmall Neopani must be given preference over the other bidders is something which I cannot understand. If Rowthmall was still anxious to purchase the property and if at the public auction he bid up to Rs. 95,000 and if there were no higher bids it follows that the property would be knocked down to him without any question arising of giving him preference over the other bidders.

C.R.K./D.S. *Appeals allowed.*

A. I. R. 1940 Madras 183

LAKSHMANA RAO J.

In re Perianna Pillai — Petitioner.

Criminal Revn. Case No. 316 and Petn. No. 292 of 1939, Decided on 4th October 1939, to revise order of Court of Village Headman, Balakrishnampatti, D/- 8th November 1938.

Government of India Act (1935), S. 224 (2) — Order of Village Headman under S. 10 of Regn. 11 of 1816 cannot be questioned by High Court.

An order of the Village Headman under S. 10 of Regn. 11 of 1816 was not subject to appeal or revision except under S. 107, Government of India Act, 1915, and cl. (2) of S. 224, Government of India Act of 1935 excludes the jurisdiction of the High Court to question the order in such cases. [P 183 C 2]

A. V. Narayanaswami Ayyar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts.—This revision petition is against the order of conviction and sentence till rising of Court made by an acting Village Headman under S. 10 of Regn. 11 of 1816. The petitioner (accused) was charged with having abused the respondent (complainant) in an insulting language and after an enquiry the order of conviction was made. The ground in revision was that the Village Headman was not a permanent incumbent and he had therefore no jurisdiction to take cognizance of the offence.

Order.—The order of the Village Headman under S. 10 of Regn. 11 of 1816 was not subject to appeal or revision except under S. 107, Government of India Act of 1915, and cl. (2) of S. 224, Government of India Act of 1935 excludes the jurisdiction of the High Court in such cases. The revision petition is therefore dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 184

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank Ltd. (in liquidation).

Sir T. Desikachari and another, Trustees, East Tanjore Electric Supply Corporation Ltd. Employees' Provident Fund Institution, Trichinopoly — Applicants.

v.

James Voce Pirrie and Cyril Gill (Official Liquidators) — Respondents.

Appln. No. 29 of 1939, Decided on 2nd May 1939, in O. P. No. 158 of 1938.

(a) Banker and Customer — Notice to bank that money deposited is trust money—Effect.

The fact that the Bank is given notice that the money deposited is trust money does not make the Bank a trustee in respect thereof: *A I R 1940 Mad 178, Rel. on.* [P 184 C 2]

(b) Companies Act (1913), Sec. 282-B — Amount of provident fund lying in deposit in Bank to credit of company not invested in authorized securities provided by S. 282-B—Bank with knowledge of breach of trust must be held to have participated in breach of trust.

Where amount of provident fund lying in deposit in a Bank to the credit of the company has not been invested in the authorized securities as provided by S. 282-B the company is guilty of breach of trust and the bank with knowledge of this must be held to have participated in the breach of trust: *(1869) 8 Eq 526, Rel. on.* [P 185 C 1]

S. Parthasarathy and V. K. Thiruvenkatachari — *for Applicants.*

C. Krishnaswamy Iyer — *for Respondents.*

Order.— This is an application on behalf of East Tanjore Electric Supply Corporation Ltd., Employees' Provident Fund Institution, Trichinopoly, hereinafter called the Corporation, for the payment of a sum of Rs. 500 in preference to the ordinary creditors of the Travancore National and Quilon Bank, hereinafter called the Bank. The ground on which the application is made is that the said amount is the provident fund moneys of the employees of the Corporation standing to the credit of the Savings Bank Account No. 489-8 in the Trichinopoly branch of the Bank and therefore trust money and that the Bank was aware of this fact. The contention is thus put in para. 5 of the affidavit in support of the application :

> I am also advised that under S. 282-B (2), Companies Act, 1913, all moneys contributed to the Provident Fund shall be invested only in securities mentioned in cls. (a) to (e) of S. 20, Trusts Act, 1882. I say therefore that this amount of Rs. 500 is trust property which has come into the hands of the Travancore National and Quilon Bank Ltd., with notice of the trust and inconsistently with the trust. I say therefore that the bank having received the money wrongfully and in breach of trust is itself a trustee for the amount and the amount still continues to be trust money in its hands.

The Official Liquidator of the Bank in his reply states that the Bank did not receive the sum of Rs. 500 wrongfully or knowingly in breach of any trust. He further submits as follows in para. 4 of his affidavit :

> In any event, a reference to the said S. 282-B (2) will show that the trustees were entitled to deposit the said funds in Bank to accumulate the same for the purpose of investing such accumulations annually in the securities referred to in Sec. 20, Trusts Act, 1882.

The rules in regard to the investment of Provident Fund moneys which the Bank may be said to be aware of in so far as they are material to this application are Rules 10 and 11, which run thus :

> 10. All moneys paid to the trustees or otherwise coming into their hands in connexion with the Fund shall be forthwith paid into an account or accounts to be opened in the names of the Trustees with a Bank or Banks approved by the committee.
>
> 11. All moneys of the Fund not immediately required for the purpose thereof shall be invested in the name of the trustees in such securities as are specified in S. 282-B, Indian Companies Act, 1913, as determined by the Committee from time to time.

It will be seen from these rules that there is no prohibition to investing the said moneys in any Bank or Banks approved by the committee of the Provident Fund Institution and that the Provisions of Sec. 282-B, Indian Companies Act should be conformed to. As pointed out by me in my decision in Appln. No. 2874 of 1938[1] the fact that the Bank is given notice that the money deposited is trust money does not make the Bank a trustee in respect thereof. The legal consequence of such a notice is only that the Bank should not participate in a breach of trust by the trustee. Under S. 282-B, Indian Companies Act, the obligation imposed on the corporation is that all provident fund money should be invested in securities mentioned or referred to in clauses (a) to (e), Trusts Act, and all such moneys belonging to the Fund at the commencement of the said Act which are not so invested shall be invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys. This provision came into operation on 1st January 1937. On that date, as the said moneys

---

1. In re Travancore National and Quilon Bank Ltd, *Reported in* (1940) 27 A I R Mad 178.

were not invested in any securities mentioned in S. 20, Trusts Act, the obligation of the corporation was to invest a tenth of the said moneys in that year and in every succeeding year in the authorized securities, and the balance of the moneys could be invested in any authorized Bank or Banks, according to the rules of the institutions. When the said sum was deposited on 18th January 1938, they should have deposited Rs. 100 being the two annual instalments of Rs. 50 each for the years 1937 and 1938. In so far as the corporation had not invested the said sum in any authorized security, they were guilty of a breach of trust and the Bank must be held to have participated in the breach of trust. As observed by Vice-Chancellor Malins in (1869) 8 Eq 526[2] at p. 543 :

> All persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds.

The Corporation is therefore entitled to a sum of Rs. 100 as and by way of preferential payment and in regard to the balance, it can only prove as an ordinary creditor. I award Rs. 5 for Judges summons and Rs. 35 for counsel's fee and Rs. 35 for the Official Liquidators, the costs to come out of the assets of the Bank. I direct that the name of the corporation be included in the list of claims already settled by me.

C.R.K./D.S. *Order accordingly.*

---

[2] Gray v. Lewis, (1869) 8 Eq 526.

A. I. R. 1940 Madras 185

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Manickavasaka Thevar and another — Appellants.

v.

Chidambaram Pillai — Respondent.

Second Appeal No. 23 of 1936, Decided on 3rd October 1939, against decree of Sub-Judge, Tinnevelly, in A. S. No. 61 of 1935.

Madras Estates Land Act (1 of 1908), S. 117 — Collector has no jurisdiction to act under S. 117—Sale in pursuance of orders passed by Collector under S. 117 is illegal — Substantial injury need not be proved for setting aside sale.

Where in almost complete disregard of the provisions of S. 117, the selling officer whose duty it is to fix the date of the sale, settles the terms of the proclamation and cause the sale to be proclaimed does none of these things and the orders which the selling officer should have passed are passed by the Collector, who has no authority, the sale cannot be regarded as a sale lawfully held under the Act and substantial injury need not be proved for setting it aside (as in a case under O. 21, R. 90, Civil P. C.) as there is no such provision in the Estates Land Act: *A I R 1934 Mad 725, Rel. on.* [P 186 C 2]

N. S. Rangaswami Ayyangar — *for Appellants.*

K. Venkateswaran — *for Respondent.*

Leach C. J. — This appeal arises out of a suit filed by the respondent in the Court of the District Munsif of Tenkasi for a decree setting aside a sale held under the Madras Estates Land Act, 1908, and for a declaration of his title. The land in suit formed part a mitta of which the second appellant is the mittadar. The ryot was one Namasivaya Moopanar who became insolvent in 1926. His insolvency, however, did not result in the disturbance of his possession. The Official Receiver took no steps to take over the land, nor even to notify the landlord of the ryot's insolvency. Before the insolvency the ryot had mortgaged the holding to the respondent, who brought a suit to enforce his mortgage and impleaded the Official Receiver as a defendant. A mortgage decree was obtained and on 18th October 1929 the property was sold in execution, the respondent being the auction-purchaser. He took possession of the property from the ryot on 19th December 1929. In 1932, appellant 2 instituted proceedings for the recovery of the rent then due. The property was still registered in the name of Namasivaya Moopanar, who was made the respondent in the proceedings. The property was brought to sale on 15th October 1932 and was purchased by appellant 1.

It will be convenient to interrupt the narrative here in order to refer to the relevant provisions of the Madras Estates Land Act, 1908. S. 112 provides that when the landholder to whom an arrear is due intends to avail himself of the powers given by S. 111 to sell the property, he shall serve on the defaulter through the Collector a written notice, stating the amount due for arrears, interest and costs, if any, the period for which and the holding in respect of which it is due, and informing him that if he does not pay the amount or file a suit before the Collector contesting the right of sale within 30 days from the date of service of the notice, the holding or any part thereof specified in the notice will be sold. S. 113 requires that intimation of the date of service shall forthwith be given to the landholder by post. S. 114 says that if the amount of the arrear is not paid and if no suit contesting the right of sale is instituted before the

Collector within 30 days from the date of service of the notice or if such suit has been decided against the defaulter, the landholder may apply to the Collector for sale. S. 115 provides that if no suit has been instituted the application for sale shall be made within 45 days of the posting by the Collector of intimation of service under S. 113. No suit was filed by the defaulter and it is common ground that the provisions of Ss. 112, 113, 114 and 115 so far as they were applicable were followed. S. 116 says that immediately on receipt of the application for sale the Collector shall appoint an officer to conduct the sale. S. 117 requires the selling officer by order (i) to fix a date for the sale, (ii) to cause the sale to be proclaimed by beat of drum in the village in which the holding is situated, and (iii) to post a copy of his order in some conspicuous place in the village. This Section clearly contemplates the selling officer settling the terms of the proclamation.

In this case the Collector fixed the date for the sale, settled the terms of the sale proclamation and himself caused it to be proclaimed. He signed the sale proclamation as the selling officer, which he had no power to do as he was not the selling officer. The sale proclamation was settled on 8th September 1932, and was proclaimed by a process-server acting under his orders on 14th September 1932. By an order dated 11th September 1932 the Collector appointed a selling officer, but all that the selling officer did was to preside at the auction. The respondent's case is that by reason of the non-compliance with the provisions of Sec. 117 the sale was unlawful. The District Munsif accepted this contention and decreed the suit. The decision was upheld on appeal by the Subordinate Judge. While admitting that there were the irregularities complained of by the respondent the appellants contend that the provisions of S. 117 of the Act are merely directory and that inasmuch as the disregard of them has resulted in no loss being suffered, the Court is not entitled to set aside the sale.

It does not necessarily follow because imperative language is used in a Section that a disregard of its provisions will render action taken void. In (1861) 30 L J Ch 379[1] Lord Campbell L. C. said :

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed.

The authorities were examined by Lord Penzance in (1876) L R 2 P 203[2] and he arrived at the same conclusion as Lord Campbell. Lord Penzance summed up the position in these words :

> I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

The Sections in the Madras Estates Land Act, 1908, to which I have referred, state what should be done before a ryot's holding is sold for arrears of rent. In this case there was almost a complete disregard of the statute. The selling officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed did none of these things. He did not pass a single order. The orders which the selling officer should have passed were passed by the Collector, who had no authority. With such great disregard of what the Legislature says shall be done by the selling officer we are unable to regard the disobedience as amounting to mere irregularity. We consider that in view of the degree of disobedience the sale cannot be regarded as a sale lawfully held under the Act. In 40 M L W 535[3] Krishnan Pandalai J. also held that material irregularity deprived a sale of all validity.

Our attention has been drawn to the proviso to O. 21 R. 90, Civil P. C., which says that a sale shall not be set aside as the result of irregularity or fraud unless the applicant has sustained substantial injury as the result. There is no such provision under the Act which governs this case. Moreover, substantial injury would be done to the respondent if the sale were allowed to stand. He would lose all benefit from his mortgage decree. The appeal will be dismissed with costs.

Krishnaswami Ayyangar J. — I entirely agree. The decision of the question whether the terms of a statute are to be regarded as imperative or directory only turns upon a correct appreciation of the scope of the Act itself and is not to be controlled by the consideration whether substantial injury has or has not resulted. This is the true principle to be gathered from the judgments of Lord Campbell and Lord Penzance in the cases referred to by my Lord. The absence of any reference to the question of substantial injury is in my view significant and the inference is plain that neither of the Lord Chancellors considered it to be an element which could affect the decision one way or the other.

---

[1] Liverpool Borough Bank v. Turner, (1861) 30 L J Ch 379=7 Jur (NS) 150=13 L T 494 = 9 W R 292.

[2] Howard v. Bodington, (1876) L R 2 P 203.

[3] Kadirvelu Ambalam v. Alagappan Ambalam, (1934) 21 AIR Mad 725=152 I C 350 = 40 M L W 535.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 187

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND PATANJALI SASTRI JJ.

Sivaprasad Sowcar — Appellant.

v.

Sekharamantri Narasimhamurthi and others — Respondents.

Second Appeal No. 863 of 1935, Decided on 24th November 1939, against decree of Sub-Judge, Vizagapatam, in A. S. No. 203 of 1934.

(a) Res Judicata — Applicability to survey officer's decision under Madras Survey and Boundaries Act (Per *Krishnaswami Ayyangar and Somayya JJ., in Order of Reference)*

The rule of res judicata cannot be applied to the decision of a survey authority under the Madras Survey and Boundaries Act : *A I R 1922 P C 257, Rel. on.* [P 189 C 2]

(b) Madras Survey and Boundaries Act (4 of 1897), S. 12 — No boundary dispute — Survey officer entering in register one claimant as owner of holding—Other claimant can institute suit to establish his title as true owner.

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. There is no provision in the Act which can be read as operating in such circumstances to prevent A, when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner. [P 193 C 2]

(c) Madras Survey and Boundaries Act (4 of 1897), Ss. 11, 12— Order of survey officer under S. 11 or of appellate authority under S. 12 does not break continuity of adverse possession held by unsuccessful party: *56 Mad 366= AIR 1933 Mad 279 = 141 I C 307 and 40 M L W. 536=AIR 1934 Mad 685=152 I C 462, Overruled.*

An order of the survey officer under S. 11 or of the appellate authority under S. 12 of the Act, in itself has not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to complete his title. If the unsuccessful party remains in adverse possession of the disputed area for over twelve years his title is good irrespective of any order passed under the Act : *A I R 1932 Mad 310, Approved ; 56 Mad 366=A I R 1933 Mad 279=141 I C 307 and 40 M L W 536=A I R 1934 Mad 685=152 I C 462,* **Overruled** ; *Observation of Wadsworth J., in A I R 1939 Mad 61, held should be disregarded ; Case law discussed.* [P 195 C 2]

B. V. Ramanarasu — *for Appellant.*

Y. Suryanarayana — *for Respondents.*

ORDER OF REFERENCE

Krishnaswami Ayyangar and Somayya JJ. — The plaintiff is the appellant. The property in dispute is a house in Allipuram, a suburb of Vizagapatam. The original owner was one Sekharamantri Appalaswami, the father of defendant 1 in the suit and respondent 1 in the second appeal. Sekharamantri Appalaswami was indebted to the father of respondents 2 to 5, one Kanti Mahanti Appalanarasayya. For the recovery of the debt, K. Appalanarasayya instituted a suit against Appalaswami and in execution of the decree obtained therein purchased the suit house on 7th January 1916, and obtained a sale certificate on 2nd July 1920. Though he thus obtained a perfect title to the house, he never reduced it to possession either by process in execution or otherwise. S. Appalaswami and after him his son respondent 1 have continued in undisturbed possession of the house. By the date of the suit, they had been in possession for over 15 years, a period sufficiently long to give them a prescriptive title under Art. 144, Limitation Act, against K. Appalanarasayya or anyone claiming under him, or indeed against all the world. The plaintiff derives his title to the suit house from K. Appalanarasayya. He had advanced money on a mortgage of the house to the latter. On that mortgage the plaintiff instituted a suit and obtained a decree. In execution the plaintiff himself purchased the house on 6th September 1929 and a sale certificate was issued to him on 10th October 1929. Resisted in obtaining possession by defendant 1, he filed an application to remove the obstruction, but the application was dismissed. Within one year of this adverse order, the plaintiff instituted the present suit to set aside the order, and to recover possession of the house. The claim is resisted by defendant 1, on the ground that the appellant's title assuming he had a good title has been lost by adverse possession. Seeing that on the findings of the Courts below respondent 1 and his father have been in continuous and exclusive adverse possession of the property, the appellant would prima facie be barred. Acting on this view the Courts below have dismissed the suit, overruling a contention of the appellant advanced with the object of getting over the bar of limitation.

To appreciate that contention a few facts are necessary. In 1922 there was a Town Survey of Vizagapatam and its suburbs, in one of which, namely Allipuram, we have said that the suit house is situate. The site of the house was demarcated as No. 967 belonging to K. Appalanarasayya, who as we have already mentioned, had purchased the property in court-auction in 1916, and had accordingly a perfectly good title at the time. This survey number as well as certain others formed the subject-matter of a survey dispute, as shown by the order dated 29th November 1922 of the appellate survey authority in land complaint Appeal No. 126-F. B. It may at this stage be mentioned that the survey was conducted under the provisions of the Survey and Boundaries Act (4 of 1897). It is found from the appellate order aforesaid that the appellant was one Mantri Lakshminarasimham. There were four respondents and two of them were K. Appalanarasayya and S. Appalaswami. It looks as if Survey No. 967 was claimed by the appellant as against K. Appalanarasayya and it does not appear that there was any dispute between K. Appalanarasayya and S. Appalaswami inter se as regards the suit house. The former produced his sale certificate of 1920, and on its strength he was recognized as the owner, and registered as such. The latter whose adverse possession was at the time only six years old could not with any chance of success object to the title of the former and for that reason apparently, acquiesced in the decision without raising any objection then or thereafter either within the time limited by S. 13 of the Act or even afterwards. The survey order accordingly became final under S. 12 (3) and conclusive under S. 13.

It is contended for the appellant that the survey decision by reason of its statutory attributes has the effect of dissipating and putting an end to the prior title if any, in the unsuccessful party, inclusive of such growing but immature right arising out of a possession for less than the statutory period. There can be no doubt, that such a possession is not to be treated as carrying no legal consequence, as the law invests the possessor with certain limited rights not only as against a stranger but even against the true owner. On the argument of the appellant the period of adverse possession prior to the order must be ignored altogether, and is not to be tacked on to the later period. The order of the survey authority, it is urged, has the effect in law of interrupting the continuity of the possession, and creating or recognizing on its date a complete title, which can only be displaced by a fresh period of adverse possession for the statutory period to be counted from the date of the order. This is a question on which there has been a divergence of judicial opinion due to a decision of a Division Bench in 62 M L J 399,[1] which strikes a note, it seems to us, different to that involved or expressed in the other cases of this Court including the Full Bench decision in 42 Mad 425.[2] We shall revert to this question a little later.

It is to be observed that the finality attached by S. 12 (3) of the Act to a survey officer's decision, is a finality only for the purposes of the survey operations, and the survey records compiled as a result of those operations. It has no further efficacy and does not affect title in particular: *vide* 44 Mad 340.[3] But the provisions of S. 13 have a more far-reaching effect and it is settled that if a case fell within the Section, and the suit contemplated by it is not instituted within the time limited, the survey order becomes decisive of even a question of title. But to have this consequence it must be clearly shown that the conditions of the Section have been fully satisfied. In the present case we are of opinion that they are satisfied. S. 13 is as follows:

> Any party to a boundary dispute before the survey officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal is given, and any person claiming under any such party, deeming himself aggrieved by the order of the survey officer or by the decision of the appellate authority, as the case may be, may, subject to the provisions of Parts II and III, Limitation Act,

---

[1] Azhagaperumal Pillai v. Rasa Pillai, (1932) 19 AIR Mad 310=138 I C 362=62 M L J 399.

[2] Muthirulandi Poosari v. Sethurama Iyer, (1919) 6 AIR Mad 779 = 50 I C 43 = 42 Mad 425=36 M L J 356 (F B).

[3] Chinna Venkatrayudu v. Ramamurthi, (1921) 8 AIR Mad 63=61 I C 986= 44 Mad 340=40 M L J 149.

1877, institute, within the period of one year from the date of such order or decision, a suit to establish the right which he claims in respect of the boundary of the property surveyed: Provided that, subject to the result of such suit, if any, such order or decision shall be conclusive as between the parties to the dispute or to the appeal, including those to whom notice of such appeal has been given and those claiming under such parties or any of them.

The Section makes it obligatory on the following descriptions of persons who deem themselves aggrieved by the order, to institute a suit within the period of one year to establish their claim on pain of being for ever precluded from agitating it by suit or otherwise. They are : (i) a party to a boundary dispute, (ii) a party to an appeal preferred under S. 12, and (iii) a person though not impleaded as a party to the appeal has yet had notice of the appeal served on him.

The effect of the Section is to treat class (iii) as on the same footing as class (ii), as service of the notice of appeal makes them in fact, though not in form, parties to the appeal. If we refer to S. 12, it is clear that a right of appeal is conferred on a registered holder the boundaries of whose holding are affected by the order of the survey officer. If the boundary is disputed before the officer, the order settling the dispute is made conclusive as between the disputants by force of S. 13 unless challenged by suit. Even where no dispute had been brought up before the officer, and the officer had merely directed the boundary to be laid down as pointed out by the registered holder or his agent, a right of appeal is given to a neighbouring holder on the issue of the notification contemplated by S. 11 (4). In this case, notice is directed by S. 12 (1) (c) to issue "to all registered holders, the boundaries of whose holdings may be affected by the proceedings in appeal." Both classes of persons, namely those originally impleaded by the appellant, and those others to whom notice is issued by reason of the fact that the boundaries of their holdings may be affected by the result of the appeal are bound by the order passed by the appellate authority. This is the language of S. 13.

In the present case, both K. Appalanarasayya and S. Appalaswami were made parties to the appeal at the outset and we must presume that notice went to the latter in the appeal, and he was aware of the proceedings when they went on, and of the result after they ended. It is clear that the interests of these two individuals conflicted, as Appalaswami was holding possession adversely to K. Appalanarasayya though it is equally clear that no actual conflict or dispute between them was brought up for determination by the appellate authority. On the contrary it is the claim of the appellant alone who apparently set up a right as against K. Appalanarasayya or perhaps even against all the respondents as a body, that was determined by the order. If the rule of res judicata as between co-defendants, is to be applied, we should be inclined to hold that the order in question cannot be taken to have conclusively determined the question of title as between the two respondents namely, K. Appalanarasayya and S. Appalaswami as the adjudication on the point was not necessary for giving relief to the appellant. None of the respondents had a case which can be said to have been common to him and the appellant, so that the decision could be said to have settled a dispute latent at least in character as between the respondents though it did not come up in a practical form before the survey authority. Even apart from this consideration it seems to us that we shall not be warranted in applying the rule of res judicata to the decision of a survey authority under the Act especially after the pronouncement on the point by the Privy Council in 45 Mad 475[4] where their Lordships cited with approval the following passage in the judgment of the High Court, namely :

> The answer is that the general doctrine of res judicata is not in question, but the application of the special rule stated in S. 52 (3), Estates Land Act . . . .

The language of the Section has therefore to be construed without reference to the body of rules evolved in relation to the doctrine of res judicata as applied to the decision of a Civil Court. From this standpoint it is only necessary to enquire whether K. Appalanarasayya and S. Appalaswami were parties to the appeal within S. 13, and not whether there was any active contest between them. Once it is shown, as it has been shown in this case, that S. Appalaswami was a party, the order is conclusive against him even though he had not actively resisted K. Appalanarasayya's claim. There is no hardship or injustice involved in this view being accepted. For it is difficult to imagine that a person being a party to the appeal and not realizing the nature or the consequence of a decision, if it went against him. If in spite of this knowledge, he chooses to keep quiet without questioning it by suit, he must take a consequence for which he alone is responsible.

---

[4] Radhakrishna Iyer v. Sundaraswamier, (1922) 9 A I R P C 257 = 74 I C 584 = 45 Mad 475 =49 I A 211 (PC).

It therefore becomes necessary to decide for the disposal of this second appeal the question to which we have adverted above. It will be enough to refer to three decisions of this Court to indicate the reason which has prompted us to refer the consideration of the question to a Full Bench. We may at once say that our inclination is to interpret the Full Bench decision in 42 Mad 425[2] in favour of the appellant, that is to say in support of the view that the adverse possession of the unsuccessful claimant during the period anterior to the decision of the survey authority is to be ignored as of no legal consequence. In the case before the Full Bench, the plaintiffs whose title to the property in dispute had been established by a decree of the Civil Court in 1900 continued in undisturbed possession till 1913 when on account of the defendants attempting to interfere with their possession they instituted the suit for an injunction against them. It appeared that some time between 1904 and 1906 in the course of a survey conducted under the Act, the survey officer had passed an order demarcating the land as belonging to the defendant's father in spite of the plaintiff's opposition. The possession of the property however continued with the plaintiffs undisturbed by the defendants notwithstanding the survey order. The District Judge reversed the judgment of the District Munsif who had decided in favour of the defendants and held, following 2 Mad 306[5] that the plaintiffs were entitled to succeed as the demarcation of boundaries by the survey officer did not interfere with plaintiffs' continued enjoyment from even before the date of the order. A second appeal was preferred and came before Phillips and Seshagiri Ayyar JJ., who considered it necessary to refer the following question to the Full Bench, viz :

> When a plaintiff's claim has been disallowed under the Survey and Boundaries Act 4 of 1897, but he has been in possession of the property, does the decision of the survey officer operate as res judicata in a subsequent suit for possession.

This reference was rendered necessary as in the view of the referring Judges the decision in 2 Mad 306[5] was felt to be of doubtful authority. In his order of reference, Phillips J., expressed his inability to accept the contention based on this decision that the plaintiffs' title could be supported on the strength of their adverse possession. If their possession both prior and subsequent to the survey order were taken into account, it was for more than the required duration, and the argument would have prevailed. But the learned Judge was of opinion that such addition was not permissible, as the survey officer's order had the effect of interrupting the continuity of the possession which the plaintiffs had held. The other referring Judge, Seshagiri Ayyar J., appears to have shared the same opinion as in any other view it is not possible to understand his observation that the defendants acquired a title to the property *on the date of the survey officer's demarcation*. The italics are ours and the words italicized involve the proposition that the survey order had the effect of creating a new title requiring to be displaced by a sufficient period of adverse possession to commence after its date.

The question propounded for answer by the Full Bench did not in terms expressly refer to the point adverted to above. Nonetheless it is clear that the prior possession of the unsuccessful party which had continued undisturbed even after the order was obviously the ground of the doubt which called for solution. The answer was given by Wallis C. J., on behalf of the Full Bench in a somewhat terse statement that the order

> if not reviewed by the appellate authority or questioned by suit as provided in the Section was conclusive as to the rights of the parties, and nonetheless so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession.

There is no specific mention here of the effect of the survey order on the running of adverse possession, but it is equally certain that there is nothing to suggest a dissent from the opinion of the referring Judges. The continuance of the possession in the unsuccessful party was held not to affect the conclusiveness of the order against him. When the second appeal came again before the Division Bench after the return of the answer by the Full Bench, the Court reversed the judgment of the District Judge, and negatived the claim of the plaintiffs. This result could have been arrived at only on the footing that the Full Bench had sanctioned the view of the referring Judges, viz. that the survey officer's order brought about a break in the continuity of the adverse possession which should therefore be dated as from the date of the order and not earlier. It was in this sense Devadoss J. understood the principle underlying the Section, as interpreted by the Full Bench, and we think there is a great deal of force in it as the opposite view would tend to detract from the conclusiveness of the order, enacted by the Section. His judgment was, however, upset on appeal under the Letters Patent, by a Bench of two Judges, Reilly and Ananthakrishna Ayyar JJ., who took a different view of the ruling, supporting themselves by a pronouncement of Ramesam J. in 16 M L W 99[6] and also by an unreported decision of Benson and Krishnaswami Ayyar JJ. in S. A. No. 1102 of 1900. They observed :

---

[5] Krishnamma v. Achayya, (1879) 2 Mad 306.

> Neither the decision of the survey officer, nor the planting of stones in accordance with it in proceedings under the Act ipso facto dispossesses any party, nor could it make a legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date.

To our mind it appears, if we may say so with respect, that this expression of opinion is contrary to the view of the Full Bench, whatever merit there may be in the reason adduced by the Court, namely that it would be very extraordinary if the survey officer's decision could have an effect denied to the decision of a Civil Court as in 46 Mad 751[7] and 46 Mad 525.[8] In a later decision reported in 56 Mad 366,[9] the view which prevailed in 62 M L J 399,[1] was not accepted. The matter first came before Spencer J. sitting as a single Judge in Second Appeal, from whose decision a Letters Patent Appeal was preferred which came up before a Division Bench composed of Waller and Pandalai JJ. who differed. The main question on which the difference of opinion arose was as to what should be considered as a boundary dispute within the meaning of the Act. With reference to the point now under consideration after referring to the Full Bench decision, Waller J. expressed himself emphatically as follows:

> The referring Judges in that case were definitely of opinion that the decision of the survey officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it, so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion.

Pandalai J. favoured the other view, accepted in 62 M L J 399,[1] holding that a survey officer's decision as to boundary does not have the legal effect of terminating the possession of the man who was in possession or of breaking the running of his possession for purposes of limitation. On a reference to a third Judge, Wallace J., endorsed the opinion of Waller J. in preference to that of Pandalai J. and animadverted on the contrary decision of the Division Bench, as not in accordance with the effect of the Full Bench ruling which, according to him,

> held that the decision of a survey officer is a decision that the successful party is in possession even though the unsuccessful party was really in possession, and that the decision estops the unsuccessful party from urging later on that he was in possession.

An attempt at reconcilation of the conflicting views has been made by Wadsworth J. in (1938) 2 M L J 894,[10] in which he has also endeavoured to support the decision in 62 M L J 399,[1] by suggesting that the survey officer in that case had not determined any question of possession. According to the learned Judge, the survey officer's decision can be regarded as final only to the extent to which it purports to decide the rights of the parties, the governing factor being the actual decision. On this view it will be necessary in every case to enquire whether the decision of the survey officer was based on possession or on title. If it is based on an adverse finding against the title of the unsuccessful party on a mere consideration of the documentary evidence of ownership, that finding should not according to the learned Judge, stand in the way of his adding up his possession anterior as well as posterior, so as to make up the period required by the Limitation Act for a prescriptive title. With very great respect, we feel that the survey officer is not called upon to give an express decision on either title or possession. The Court is merely called upon to interpret the conclusiveness attributed to a demarcation of boundary by an officer charged with the duty of deciding a question of boundary only. An analysis of the basis of his decision, leading to a difference in the effect of the decision on the rights of the parties does not appear to be warranted by anything in the language of the Section. We regret to say that we are not convinced of the correctness of the reasoning either on which the learned Judge has supported the decision in 62 M L J 399[1] as not being really inconsistent with the Full Bench ruling. However that may be, we think that the time has arrived for the conflict of opinion noticed above being resolved by a reference to the Full Bench of the following question :

---

[6] Kuppuswami v. Venkataswami, (1923) 10 A I R Mad 29=70 I C 672=16 M L W 99.

[7] Subbayya Pandaram v. Mohammad Mustapha Maracayar, (1923) 10 A I R P C 175 = 74 I C 492=46 Mad 751=50 I A 295 (P C).

[8] Singaravelu Mudaliar v. Chockalinga Mudaliar, (1923) 10 A I R Mad 88=70 I C 994=46 Mad 525=43 M L J 737.

[9] Ramamurthi v. Narayana Gajapati Raju, (1933) 20 A I R Mad 279 = 141 I C 307 = 56 Mad 366=64 M L J 361.

[10] Achutharamayya v. Soorappayya, (1939) 26 A I R Mad 61=180 I C 543=(1938) 2 M L J 894.

"Whether the order of a survey officer under S. 11, or of the appellate authority under S. 12, Madras Act 4 of 1897 has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession."

OPINION

Leach C. J. — A person named Kantimahanti Appalanarasayya obtained a decree against one Sekharamantri Appalaswami and in execution of that decree attached immovable property belonging to the latter in Allipuram, a suburb of Vizagapatam. The property was sold at a court-auction on 7th January 1916 and the decree-holder became the purchaser, the sale certificate being issued to him on 2nd July 1920. Appalanarasayya took no steps to gain possession of the property which remained with the judgment-debtor. In the year 1922 a re-survey of all the properties lying within the boundaries of Vizagapatam took place. The property which was the subject of the court-auction was registered as Survey No. 967. Notwithstanding that Appalanarasayya had made no attempt to obtain possession of this property he claimed it as his, and although the survey officer's order has not been produced it would appear that he was registered as the owner and that Appalaswami as the owner of an adjoining area marked as Survey No. 999. The Court has been given to understand that before the sale Appalaswami was the owner of both the areas. The survey officer's order was passed under the provisions of S. 11, Madras Survey and Boundaries Act, 1897. An appeal from the order was preferred under the provisions of S. 12 of the Act and the appellate authority passed an order in these terms :

> The complaint in respect of S. Nos. 967 and 999 relate to wrong registration and as such does not fall within the scope of the Boundary Disputes Act 4 of 1897. The present registry in the names of Kantimahanti Appalanarasayya and Sekhara Mahanti Appalaswami respectively is confirmed.

It is common ground that there was no dispute as to the boundaries of the respective properties. The only dispute was whether Appalanarasayya or Appalaswami's name should be registered as the owner of S. No. 967. In 1926 Appalanarasayya mortgaged S. No. 967 to the appellant in the appeal out of which this reference arises. The appellant filed O. S. No. 299 of 1927 of the Court of the District Munsif of Vizagapatam to enforce his mortgage. He obtained a decree and the property was sold by the Court on 6th July 1929, the purchaser being the appellant to whom a sale certificate was granted on 10th October 1929. Appalaswami, who was in possession and had remained in possession throughout, refused to deliver the property to the appellant and Appalaswami's possession having been established the appellant's application was dismissed. Within one year of the order of dismissal the appellant instituted the present suit in the Court of the District Munsif of Vizagapatam for a decree for possession. At the date of the suit Appalaswami had been in adverse possession of the property continuously for fifteen years, unless the orders passed under the Madras Survey and Boundaries Act, 1897 operated to create in law a break. The District Munsif dismissed the suit holding that the orders passed in the survey proceedings did not disturb the continuity of Appalaswami's possession. On appeal the Subordinate Judge concurred in this decision. A second appeal was then filed to this Court and came before Krishnaswami Ayyangar and Somayya JJ. In view of the conflict which exists in the authorities the learned Judges have referred the following question to a Full Bench :

> Whether the order of a survey officer under S. 11, or of the appellate authority under S. 12, Madras Act 4 of 1897 has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of 12 years required by the Limitation Act to perfect a title by adverse possession?

This Bench has been constituted to answer the question. Before turning to the authorities it is necessary to examine in some detail the provisions of the Madras Survey and Boundaries Act, 1897. That Act has been replaced by the Madras Survey and Boundaries Act, 1923, but as the survey proceedings took place under the old Act regard can only be had to the provisions of the former Act. I may in passing mention that so far as this case is concerned, there is no material difference between the two Acts. The Act of 1897 was an Act relating to survey of lands and settlement of boundary disputes and its provisions can only have application to such matters. S. 11 (1) provided that if, at the time of survey, a boundary was undisputed the survey officer might order that the boundary should be laid down as pointed out by the registered holder or his agent. Sub-s. (2) said that if the registered holder was not present, or if the boundary was disputed, the survey officer should order it to be laid down, as nearly as might be, in accordance with the village records, or as ascertained from the village officers and from such other evidence as the survey officer might be able to procure. Sub-s. (3) said that the order passed by the survey officer in the case of any dispute under sub-s. (2) should be recorded in writing and the purport thereof communicated forthwith to the parties to the dispute a copy of the order being furnished to them on their application and at their cost. Sub-s. (4) said that when the survey of a village or other defined local area forming part of the land under survey had been completed in accordance with the orders passed under sub-ss. (1), (2) and (3), the survey officer should notify the fact as soon as practicable thereafter. S. 12 provided for appeals against orders under S. 11. Sub-s. (3) of that Section said that the order of the survey officer, or, in the event of an appeal being filed, the decision of the appellate authority, should be final, and there should be no further appeal from such decision. But S. 13 allowed the matter to be carried further by a suit. It said that any party to a boundary dispute before the survey officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal was given, and any person claiming under any such party, who deemed himself aggrieved by the order of the survey officer or by the decision of the appellate authority, as the case might be, might, subject to the provisions of the Limitation Act, institute within a period of one year from the date of such order or decision, a suit to establish the right which he claimed "in respect of the boundary of the property surveyed," provided that, subject to the result of the suit, if any, the order or decision should be conclusive. To this Section was added an explanation in these words :

> Where parties litigate bona fide in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this Section, be deemed to claim under the parties so litigating.

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. If there was a boundary dispute the Act provided the machinery for its settlement and the survey officer's order demarcating the boundaries was final subject to an appeal under S. 12 or to the decision in a suit under S. 13. When it was a matter of a boundary dispute the survey officer had to decide where the boundary should lie and if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. I can find no provision in the Act which can be read as operating in such circumstances to prevent *A*, when *B* had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner.

In 16 M L W 99[6] Coutts-Trotter and Ramesam JJ. held that where the survey officer had found that the plaintiffs were in possession and no suit had been filed under S. 13 of the Act of 1897 the plaintiffs were entitled to a decree for possession, even though the defendants had as a matter of fact been in possession for over the statutory period of 12 years, part of which was before and the remainder was subsequent to the decision of the survey officer. Coutts-Trotter J. had no doubt that the survey officer's order was wrong, but he considered that the case was governed by the decision of the Full Bench of this Court in 39 Mad 1202.[11] I am unable to share the opinion that the Full Bench decision had application. In the Full Bench case Wallis C. J. and Ayling and Seshagiri Ayyar JJ. applied the doctrine of res judicata in these circumstances. A boundary settlement officer had decided under the Boundaries Act of 1860 that certain land did not fall within the boundaries of a mitta and had never formed part of the mitta. No suit was brought by the mittadar to contest this finding under S. 25 of the Act. The Full Bench considered that the ground of the decision as well as the actual decision was res judicata in a subsequent suit instituted by the mittadar to recover the lands as having formed part of the mitta or in the alternative for a deduction of the peshkush of the mitta. This dispute can only be regarded as a boundary dispute and the decision of the Full Bench is not in point in the present case, nor was it in point in 16 M L W 99.[6] The Privy Council in 45 Mad 475[4] held in a case arising out of the Madras Estates Land Act of 1908 that the doctrine of res judicata did not apply to a suit under that Act, although the Board recognized that a statute might embody a special rule which operated as a bar to the same question being re-agitated in subsequent proceedings, and some day 39 Mad 1202[11] may have to be reconsidered in the light of the ruling of the Privy Council in the case under the Madras Estates Land Act, but it is not necessary to dwell on the question here. Before leaving 16 M L W 99,[6] I may mention that in his judgment in that case Ramesam J. indicated that in his opinion the decision in 42 Mad 425[2] to which I shall next refer did not prevent a plea of adverse possession being raised subsequent to the decision of the survey officer.

---

[11] Muthammal v. Secy. of State, (1915) 2 A I R Mad 106 = 26 I C 817 = 39 Mad 1202 = 27 M L J 529 (F B).

In 42 Mad 425,[2] Wallis C. J., and Ayling and Kumaraswami Sastri JJ. held that an order passed by a survey officer under S. 11 of the Act of 1897 on a dispute arising between two parties with regard to the boundary of a certain property was conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within one year, and it was none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. The dispute merely related to the boundary of the two holdings and therefore fell within the four corners of the Act. The statement that the decision was none the less conclusive as to the rights of the parties, because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession carried the decision no further. The Court was not considering whether one of the parties had obtained a title to an area by adverse possession.

In my opinion the correct view of the scope of the Act was taken by Reilly and Ananthakrishna Ayyar JJ., in 62 M L J 399.[1] There it was said that the decision of a survey officer for the planting of stones for the demarcation of the boundary does not ipso facto dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at the date of the decision. In that case it was argued that the judgment in 42 Mad 425[2] ran contrary, but this argument was rejected by the learned Judges and the opinion of Ramesam J. in 16 M L W 99,[6] was accepted as supporting their decision.

There are two cases which conflict with the decision in 62 M L J 399.[1] The first is 56 Mad 366[9] and the second is 40 M L W 536.[12] In the first case in the course of a survey, a dispute arose whether a certain field lying wholly within the boundaries of a zamindari should be demarcated as an inam or as part of the ryoti land of the zamindari. The zamindar claimed the land as ryoti land and the inamdar as his mirasi inam. The survey officer demarcated the land as mirasi inam, and his decision was upheld on appeal. The zamindar did not file a suit under Sec. 13 of the Act but in a suit brought subsequently by the inamdar against the zamindar the question of title was raised. The appeal was heard by Waller and Krishnan Pandalai JJ. Waller J. was of the opinion that the dispute was a boundary dispute within the meaning of the Act, that the survey officer had jurisdiction to decide the dispute and that as the zamindar did not file a suit within a year under Sec. 13 to get the decision set aside it had conclusively decided that the land was Government service inam and not part of the zamindari. Pandalai J. held that the Act did not preclude the institution of the suit. He observed :

> In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted.

---

[12] Seetharamaraju v. Narayanaraju, (1934) 21 A I R Mad 685=152 I C 462=40 M L W 536.

If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded as a necessary logical consequence but not by virtue of the Act. But if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey, and his order, Exs. G and 23, being one on a matter beyond his jurisdiction could not become conclusive under the Madras Survey and Boundaries Act.

As the result of the disagreement the appeal was referred to a third Judge, Wallace J., who agreed with Waller J. Wallace J. refused to accept the argument that there could not be a boundary dispute unless there was a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is a dispute as to "when, where and how" the boundary between both should run, but that if the dispute involved on one side or the other the whole of the contestant's property there could not be any boundary dispute, because the boundary of the disputed portion was not itself in dispute. The learned Judge said that he could see no principle in such a contention. I cannot agree. In my opinion the judgments of Wallace and Waller JJ. are contrary to the scheme and the provisions of the Act. The Act was never intended to vest in the survey officer or in the appellate authority power to decide a pure question of title when the boundaries were accepted by both sides, which was the case in 56 Mad 366.[9] The decision in 40 MLW 536[12] was given by Butler J. who followed 56 Mad 366.[9] These two cases therefore stand or fall together.

The only other case which calls for mention is (1938) 2 M L J 894.[10] There, Wadsworth J. endeavoured to reconcile the two conflicting views but I consider that they are too divergent for reconciliation. The learned Judge read the judgment of the Full Bench in 42 Mad 425[2] as laying down the rule that the survey officer's decision under S. 11 of the Act of 1897 is conclusive as to the rights of the parties, but he said that it was apparent that the survey officer's decision could only be final to the extent to which it purported to decide those rights. If the survey officer decided that the unsuccessful claimant was not in possession, the learned Judge considered that it would not be open to the unsuccessful claimant to contend that he had acquired a title by adverse possession. On the other hand, if the survey officer merely on a consideration of the documentary evidence of ownership gave an adverse finding regarding title Wadsworth J. saw no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner, taking into consideration possession before and after the survey officer's order. The governing factor was what the survey officer actually decided; the unsuccessful claimant could not go behind that. I have already indicated what my reading of the Act is and I cannot regard these statements of Wadsworth J. as embodying a correct interpretation of the law.

The answer which I give to the reference is that an order of the survey officer under S. 11, or of the appellate authority under S. 12 of the Act, in itself had not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of 12 years required by the Limitation Act to complete his title. If the unsuccessful party remained in adverse possession of the disputed area for over 12 years his title was good irrespective of any order passed under the Act. As my learned brothers are in agreement with me the majority decision in 56 Mad 366[9] and the decision of Butler J. in 40 M L W 536[12] must be overruled. It follows that the observations of Wadsworth J. in (1938) 2 M L J 894,[10] which are in conflict with the answer given to the reference should also be disregarded. The costs of the reference will be made costs in the appeal.

Krishnaswami Ayyangar J. — After the fuller and more elaborate discussion of the question before the Bench as now constituted I feel that the opinion expressed by my Lord is the better and sounder one. In the order of reference I had expressed an inclination in favour of the other view which on further consideration, I agree, is not maintainable on general principles no less than on the language of the statute. It is difficult to support a view of the law which attributes to the decision of a survey authority, a higher efficacy than that which is annexed to the decision of a Civil Court of competent jurisdiction as per 46 Mad 751.[7] To have this consequence, language must be much more clear than what we have. I may add that my former inclination towards the opposite construction was in a large measure the outcome of the limitation imposed on me as a member of a Division Bench, bound by the opinions expressed by other Benches and the legal consequences which might be regarded as flowing out of them. I now feel no doubt that the correct decision is the one now given expression to by my Lord, and I have no hesitation in preferring it to the other.

Patanjali Sastri J.—I agree with the judgment of my Lord and have nothing material to add.

Final Judgment.

Krishnaswami Ayyangar J.—In view of the answer given by the Full Bench, this second appeal is dismissed with costs of respondent 1.

C.R.K./D.S. *Appeal dismissed.*

---

* * A. I. R. 1940 Madras 196

FULL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

In re Guruswami Tevar and others — Accused.

Referred Trial No. 119 and Criminal Appeal No. 508 of 1939, Decided on 4th December 1939, referred by Sessions Court, Tinnevelly Division, in case No. 60 of 1939.

*** * Evidence Act (1872), S. 32—Conviction can be based on uncorroborated dying declaration if found true.**

There may not be corroboration of the nature contemplated by S. 157 or matters provable under S. 158, and the only direct evidence may be a statement by the deceased made admissible under S. 32. It does not however necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. If the evidence of an accomplice is tainted the Court may under S. 114, presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no restriction on its acceptance. [P 200 C 1]

It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must of course be fully convinced of the truth of the statement and naturally it cannot be fully convinced if there is anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility: *R. T. No. 112 of 1937, Approved; Criminal Appeal No. 653 of 1935, Not followed; A I R 1933 Bom 479, Explained and partly approved; 2 Weir 753, Criticised and not approved; 1935 M W N (Cr) 193, Disting.* [P 200 C 2]

E. R. Balakrishnan — *for Accused.*

Public Prosecutor — *for the Crown.*

ORDER OF REFERENCE

Burn and Mockett JJ.—The appellants have been convicted of murder by the learned Sessions Judge of Tinnevelly and appellants 1, 2 and 4 have been sentenced to death. Appellants 3 and 5 have been sentenced to transportation for life. The case is one of a simple nature but there is an important question of law involved. There is no doubt about the fact that, on the early morning of 31st March 1939, Nammalwar Naicker, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannagopalanaickenpatti. He was stabbed in 38 places and he died soon after midnight. The Sub-Assistant Surgeon (P. W. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 P. M. and found 32 injuries on him, of which seven were penetrating wounds into the abdomen and one was a penetrating wound in the chest. This Sub-Assistant Surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the Headquarters Hospital at Palamcottah. Another Sub-Assistant Surgeon (P. W. 2) made a postmortem examination on 1st April and then he found that there were in all 38 injuries. P. W. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naicker would only prove fatal in the absence of medical or surgical treatment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and, in our opinion, it is worthless. The post mortem certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that faeces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naicker was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

There are no eye-witnesses in the case, the assassins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naicker himself before he died. Three witnesses, P. Ws. 6, 7 and 8, say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naicker but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned Sessions Judge had said, there are four statements of Nammalwar Naicker to be considered. In the first place, P. Ws. 6, 7 and 8 say that as soon as they reached him, he told them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P. W. 6 ran to the village and informed P. W. 12, the brother-in-law of the deceased. P. Ws. 12, 13 and others went to the place where Nammalwar Naicker was lying stabbed. Nammalwar Naicker is said to have told those witnesses also the names and fathers' names of these five appellants. P. W. 12 went and fetched the Village Munsif, P. W. 21. He reached the scene of the murder at about 8 o'clock in the morning and he took down a statement from Nammalwar Naicker which is Ex. K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 P. M. on the same day in the hospital at Ettiyapuram a dying declaration (Ex. A) was recorded by a special Magistrate (P. W. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

Learned counsel for the appellants has attempted to show that the statement (Ex. K) recorded by the Village Munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naicker and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P. Ws. 6, 7 and 8 belong to a different village, Mannagopalanaickenpatti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naicker named these five persons as his assailants. We can see no reason to believe that Ex. K was concocted.

The next contention of learned counsel for the appellants is that Ex. K and Ex. A are widely discrepant. This contention is based upon the fact that in Ex. K, Nammalwar Naicker is recorded as having said that, when the five appellants approached him, appellant 1 came and gave him a stab with a soori (dagger) in the abdomen and afterwards the four persons joined together and stabbed him in the body. In Ex. A however he has given a much more detailed account in which he says that Guruswami Tevar (accused 1) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that accused 3 and 5 held his legs while the other three accused 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Ex. K the wounded man has stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Ex. K and Ex. A is with regard to a knife. In Ex. K, Nammalwar Naicker, said: "When I warded off the soori which Kandiah Thevan had, it fell down." In Ex. A he said: "When they stabbed me, I wrested the soori from Krishna Thevan." Now, Krishna Thevan is the name of accused 2 and Kandiah Thevan is the name of accused 4. In Ex. K, Nammalwar Naicker does not mention that he wrested a knife from accused 2 and in Ex. A he does not mention that, while he was warding off a blow aimed at him by accused 4, accused 4's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naicker charged these five persons with the attack upon him. We cannot find also, as already stated, any reason to disbelieve P. Ws. 6, 7 and 8 and P. Ws. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naicker has been alleging that these five appellants are responsible for his death.

We agree with the learned Sessions Judge therefore that the statements of Nammalwar Naicker have been truthfully described by the witnesses and in the documents, Exs. K and A. The next question, as the learned Sessions Judge has pointed out, is whether Nammalwar Naicker's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P. W. 12 and the village Munsif, on account of the enmity due to faction between the Thevars (Maravars) and the Naickers. Accused 3 alleged that he had been sick for the last eight months and therefore confined to his house. He repeats this statement in his appeal petition from jail. None of the accused offered any explanation beyoud this bare denial and allegation that the case was concocted on account of faction and none of them cited any witnesses. As already observed, there was enmity between the deceased and the Maravars of Kalugalachalapuram, but there was no special enmity between the deceased and these five appellants, and, as the learned Sessions Judge has observed, there was not the slightest reason shown why Nammalwar Naicker, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naicker took place. He was stabbed in 38 places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naicker. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated, (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of Sanjappa (R. T. No. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Cr. Apps. Nos. 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by Sir Owen Beasley C. J. and Gentle J. and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned Judge says:

> Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration.

In the case in question the learned Judge showed that the dying declaration upon which the prosecution relied was unreliable; but the observations are of a general nature. And in another place the learned Judge has said :

> Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone. . . . .

Referring to these passages, my learned brothers Mockett and Horwill JJ. have stated in R. T. No. 5 of 1937 :

> Even a dying declaration, as has been held by this High Court, is very dangerous material by itself on which to found a conviction.

These dicta are clearly at variance with the principle on which R. T. No. 112 of 1937 was decided. The learned Public Prosecutor has stated that, so far as he is aware, there has not been any case in which it has been held that a dying declaration, proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as 1935 M W N Cr 193,[1] is no exception to this rule, for, there the dying declaration was found to be unsatisfactory in itself. On the other hand, there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in 58 Bom 31,[2] I L R (1937) 1 Cal 475[3] and the A I R 1938 Rang 282.[4] It is clear that by the provisions of S. 32 (1), Evidence Act, the statements made by Nammalwar Naicker in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case. As however there is a conflict between the decision in R. T. No. 112 of 1937 and the observations in Cr. Apps. Nos. 653 of 1935 and 148 of 1936 with regard to the question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction, we order, under R. 2 of the Appellate Side Rules, that this matter be referred to a Full Bench. The records will be laid before His Lordship the Chief Justice.

---

[1] Gula Ella Reddi v. Emperor, (1935) M W N Cr 193.

[2] Emperor v. Akbaralli Karimbhai, (1933) 20 A I R Bom 479=1933 Cr C 1583=146 I C 548=58 Bom 31=35 Cr L J 109=35 Bom L R 1021.

[3] Naimuddi Biswas v. Emperor, (1936) 23 A I R Cal 798=1936 Cr C 1129=166 I C 625=38 Cr L J 243=I L R (1937) 1 Cal 475=40 C W N 1377.

[4] King v. Maung Po Thi, (1938) 25 A I R Rang 282=176 I C 683=39 Cr L J 771.

OPINION

Leach C. J.—In order to appreciate the question which has been referred it is necessary to state certain of the facts. The appellants have been convicted of murder. Appellants 1, 2 and 4 have been sentenced to death and appellants 3 and 5 to transportation for life. Between 5 and 6 o'clock on the morning of 31st March 1939 one Nammalwar Naicker was attacked by a band of men and received 38 injuries from which he died shortly after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased, he told them that he had been attacked by five men and gave their names and the names of their fathers. The names given were the names of the five appellants. One of these witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The Village Munsif was called to the scene of the crime at about 8 A. M. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the hospital at Ettiyapuram and at about 2-30 P. M. his dying declaration was recorded by a Magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants, who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two Division Benches of this Court are in conflict. Neither of these judgments has been reported. The first of the two cases which have given rise to this reference is Cr. App. No. 653 of 1935 which was decided by Beasley C. J. and Gentle J. The judgment was delivered by Gentle J. who after quoting from Taylor on Evidence and referring to 58 Bom 31,[2] 2 Weir 753[5] and 1935 M W N Cr 193,[1] observed:

> Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration.

The judgment which is in conflict is the judgment in R. T. No. 112 of 1937, which was delivered by Burn J. and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of Gentle J. as correctly stating the position. With great respect I regard the statement as being far too wide. S. 32, Evidence Act, says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The Section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore, a statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. There are two other Sections of the Evidence Act which may have important bearing in a case of this nature, namely Ss. 157 and 158. Section 157 says:

> In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

---

[5] In re Dabbukota, (1905) 2 Weir 753.

Section 158 is in these words:

> Whenever any statement, relevant under S. 32 or Sec. 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

There may not be corroboration of the nature contemplated by S. 157, or matters provable under S. 158, and the only direct evidence may be a statement by the deceased made admissible by Sec. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and S. 114, Evidence Act, (illustration *b*) says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance. The reference which Gentle, J. made to Taylor on Evidence consisted of a quotation from Sec. 722 of 11th Edn. This Section deals with dying declarations and the quotation was as follows:

> It should always be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be; and that where a witness has not a deep sense of accountability to his maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction.

This, of course, may be the case, but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less, but here again it seems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they are otherwise unimpeachable. In 58 Bom 31,[2] Beaumont, C. J. observed:

> Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration.

The learned Chief Justice however agreed that there is no rule which requires that a dying declaration should not be acted upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under Sec. 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree, but I am not prepared to go so far as to say that a declaration relevant under S. 32, though not made in immediate expectation of death, and not made in the presence of the accused, necessarily requires corroboration.

In 2 Weir 753[5] it was said:

> It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination and if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing.

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India. With regard to the case in 1935 M W N Cr 193,[6] all that need be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility. I would answer the reference in this sense.

Lakshmana Rao J.—I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Reference answered.*

A. I. R. 1940 Madras 201

PATANJALI SASTRI J.

Chebrolu Latchayya — Appellant.

v.

Kucherlapati Venkatapatiraju and others — Respondents.

Second Appeal No. 469 of 1936, Decided on 15th September 1939, against decree of Sub-Judge, Narasapur, in A. S. No. 111 of 1935.

Res Judicata — Suit by *A* for redemption dismissed — Subsequent suit by *A* for redemption against parties to previous suit by impleading additional parties held res judicata so far as parties to previous suit were concerned.

One *A* purchased a mortgaged property from *B* and *C* who were alleged to have inherited it from the mortgagor as his reversioners. *A* brought a suit for redemption against the mortgagees *D* and *E* and impleaded in that suit his vendors *B* and *C*. In that suit the mortgagees *D* and *E* pleaded that *A* was not entitled to redeem by virtue of his purchase from *B* and *C* as one *P* was the nearest reversioner of the mortgagor entitled to succeed him. This plea was accepted by the Court and *A*'s suit was dismissed. After the suit *D* and *E* acquired the interest of *P* from his sons. Subsequently, *A* brought a suit for redemption against *D* and *E* and impleaded sons of *P* to the suit :

Held that by addition of the sons of *P* as parties to the later suit, the same did not cease to be one between the same parties so far as *D* and *E* were concerned. The suit was between the same parties as the prior suit so far as the substantial reliefs prayed for against *D* and *E* were concerned. Hence, the question of *A*'s title to redeem was barred by res judicata by prior suit: *A I R 1927 Lah 900 and A I R 1927 Mad 844*, *Disting.*; *AIR 1917 Cal 667*, *Expl.* [P 203 C 1]

K. Kameswara Rao — *for Appellant.*

K. Bhimasankaram — *for Respondents.*

Judgment.—This second appeal arises out of a suit brought by the appellant for redemption of a mortgage and recovery of possession of the mortgaged properties from respondents 1 to 13 who were alleged to be in possession thereof as mortgagees and for other incidental reliefs. The suit was dismissed by both the Courts below on the preliminary ground that the question of the appellant's title to redeem is foreclosed as res judicata by reason of the decision in A. S. No. 62 of 1928 of the Subordinate Judge's Court of Narasapur. Hence the appeal. The facts giving rise to this plea of res judicata may be briefly stated. The properties in question originally belonged to one Seshayya who died without issue in 1877. He executed the mortgage now sought to be redeemed in favour of one Subbaraju whose descendants are respondents 1 to 13. Seshayya's widow who succeeded to his properties died in April 1921. In March 1925 the appellant purchased the properties in suit from respondents 14 to 16 herein who were alleged to have inherited them on the widow's death as the sisters' sons and nearest reversioners of Seshayya. Soon after this purchase, the appellant brought O. S. No. 320 of 1925 in the District Munsif's Court of Tanuku against respondents 1 to 13 and the deceased defendant 1 as mortgagees in possession for the same reliefs that are now claimed against them, impleading also his vendors, respondents 14 to 16, as defendants pro forma. Respondents 1 to 13 then pleaded inter alia as they do now, that the appellant was not entitled to redeem by virtue of his purchase from the sisters' sons of Seshayya, as one Perraju who was an agnatic relation of Seshayya was the nearest reversioner entitled to succeed on the widow's death. This plea was upheld by the first Court and was confirmed by the Appellate Court in A. S. No. 62 of 1928 referred to above. Perraju was not impleaded in that suit, and his sons applied in I. A. No. 1083 of 1931 in A. S. No. 62 of 1928 to implead themselves as respondents in that appeal but the application was dismissed. Thus, neither Perraju nor his sons were parties to the previous litigation. In the present suit however they have been impleaded as defendants 18 to 21 and the appellant has asked for a declaration that they are not entitled to the properties of Seshayya as their father Perraju was not his heir. It has to be mentioned that respondents 1 to 13 have since obtained a transfer of all such rights as these defendants who are respondents 17 to 20 herein might have to the suit properties.

The appellant's learned counsel has raised two contentions before me. First, the present suit is not barred by the principle of res judicata as the appellant has impleaded the sons of Perraju and prayed for the declaration referred to above against them and further respondents 1 to 13 having also relied upon their purchase of the right, title and interest of respondents 17 to 20 must now be regarded as litigating under a different title. In other words, there can be no res judicata as the parties are not the same and they are also not litigating under the same title. Secondly, the learned counsel urged that, in any case, the question of the alleged adoption of respondent 14, one of the appellant's vendors, by one of the two sisters of Seshayya having been expressly left open by the Appellate Court in the previous litigation, the appellant's title, in so far as it was claimed to have been derived from that respondent, cannot be said to be res judicata.

The latter contention can be dismissed in a few words. It is no doubt true that there was no adjudication as to respondent 14's alleged adoption in A. S. No. 62 of 1928, but that was because it was unnecessary to decide that question in view of the finding that Perraju was an agnatic sapinda of Seshayya and as such would exclude respondent 14 who would only be a bandhu even if his adoption was true. It cannot therefore be said that the appellant's title to a half share in the suit properties though based on that adoption was left open. The appellant's title to the whole of the suit properties was negatived as it was found that none of his vendors was entitled to succeed to any of the properties of Seshayya.

Turning now to the main contention, I find it difficult to appreciate how, by reason only of the addition of respondents 17 to 20 as parties to the present suit, the latter can cease to be a suit between the same parties so far as respondents 1 to 13 are concerned. It is of course a suit between different parties as regards respondents 17 to 20 and it would be open to the appellant to proceed with it against these persons and obtain, if possible, the declaration he has prayed for against them, but it would be obviously futile for him to do so, as respondents 1 to 13 are in actual possession of the properties, and I did not understand the appellant's counsel to say that his client desired to prosecute the suit against respondents 17 to 20 even if it were to fail against the other respondents. I am therefore clearly of opinion that the present suit must be regarded as one between the same parties as the prior suit, so far as the really substantial reliefs which are prayed for only against respondents 1 to 13 are concerned. The learned counsel for the appellant relied on a decision of the Lahore High Court, A I R 1927 Lah 900.[1] The facts of the case do not fully appear in the report, but as far as they can be gathered, it is clear that the additional parties impleaded in the second suit were persons against whom the substantial, if not the entire, reliefs claimed in the suit were directed, the plaintiff in the previous suit having been impleaded apparently as a mere pro forma defendant. It was in those circumstances that the Court held that there was no res judicata as it could not be said that the later suit was between the same parties as the earlier one. That decision does not, in my opinion, assist the appellant here.

The appellant next urged that the principle of res judicata has no application here as respondents 1 to 13 must now be deemed to be litigating under a different title as they claimed to have since acquired the rights of respondents 17 to 20. This argument appears, to my mind, to proceed upon a misconception of the true position. Respondents 1 to 13, as persons in possession of the properties, have the advantage of being able to resist the appellant's suit for possession, not necessarily by establishing their own title to the property but by merely putting the appellant to proof of his title and the latter can succeed in the suit only on the strength of his own title. It is thus unnecessary for respondents 1 to 13 to rely upon the transfer which they have obtained from respondents 17 to 20 and their learned counsel stated before me that they do not rely, in any manner or to any extent, upon such transfer and that it might be entirely ignored for the purposes of this suit. The position therefore is that the appellant has to establish his title to redeem the suit properties from the mortgage of respondents 1 to 13, and it was precisely this that they failed to do in the previous suit. In other words, it was adjudged in the previous suit that as between the appellant and respondents 1 to 13, the appellant was not entitled to redeem these properties and I am unable to see why the principle of res judicata should not operate to make that adjudication conclusive of the same question when it is sought to be raised again by the appellant against the same persons in the present suit.

The appellant's counsel placed reliance on a decision of this Court in 50 Mad 877.[2] I confess that at first sight it might appear to lend some support to his contention for it is, in essential respects, the converse of the present case; that is to say, if the appellant herein had succeeded in the former suit and respondents 1 to 13, having subsequently obtained a transfer from the representatives of Perraju had, on the strength of such transfer, sued the appellant for recovery of the same properties, the decision would be exactly in point and on its authority it would have to be held that the later suit in the case supposed would not be barred by res judicata. But the reversal of the position of the parties as in the present case seems to my mind, to make an essential difference in the application of the principle. For, in the case supposed, it would be necessary for respondents 1 to 13, as plaintiffs in the suit, to put forward and establish, in order to succeed, their title derived from Perraju's representatives and, in so doing, they would be litigating under a different title. In the present case however for the reasons I have already indicated, it is not necessary for them to rely upon such title as they occupy the position of defendants in the suit and it is clear, so far as the appellant is concerned, that he is litigating under the same title as before. It seems to me therefore that the decision in 50 Mad 877[2] has no application to the facts of the present case.

---

[1] Ganga Ram v. Mohamed Hussain, (1927) 14 A I R Lah 900=103 I C 858=28 P L R 683.

[2] Jagannadham v. Venkatasubba Rao, (1927) 14 A I R Mad 844=104 I C 468=50 Mad 877=53 M L J 864.

The appellant's learned counsel next relied upon a decision of the Calcutta High Court in 37 I C 881.[3] That was a case where *A* sued and recovered certain properties from *B* as the son and heir of *C* who had gone abroad and not been heard of for many years. *C* turned up subsequently and sued *A* for recovery of the same properties but, pending this litigation, died, whereupon *B* was impleaded as his heir and representative which he now really was. It was held, if I may say so, rightly, that *B* was litigating under a different title in the later suit brought by his father and there was therefore no bar of res judicata. I do not see how this decision supports the contention of the appellant here. For these reasons, I agree with the Courts below in holding that the question of the appellant's title is res judicata by reason of the finding in the previous litigation and dismiss the second appeal with costs of respondents 1 to 13. Leave granted.

C.R.K./D.S. *Appeal dismissed.*

---

[3] Ramani Mohan Roy v. Jagubandhu Karmakar, (1917) 4 A I R Cal 667=37 I C 881.

A. I. R. 1940 Madras 203

KUNHI RAMAN J.

Noothalapati China Venkayya — Petitioner.

v.

Perla Suryanarayana and others — Respondents.

Civil Revn. Petn. No. 1673 of 1937, Decided on 19th September 1939.

(a) Civil P. C. (1908), O. 47, R. 1—Specific question involved in issue raised by plaintiff abandoned as result of erroneous view of his pleader—This is no ground for granting review.

Where a specific question involved in an issue that was raised at the instance of the plaintiff has been abandoned as a result of an erroneous view taken by the plaintiff's pleader, Court cannot interfere under O. 47, R. 1. Otherwise, there will be no finality to the decision of a Court if after judgment is pronounced the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts: *2 Mad 58, Rel. on ; A I R 1925 Rang 314; A I R 1925 Mad 1031 and A I R 1932 Mad 63, Disting.* [P 205 C 2]

(b) Civil P. C. (1908), O. 47, R. 1 and S. 115 —Lower Court granting review even though there was no sufficient ground for doing so— High Court can interfere under S. 115.

Where the Court below has interfered when there was no sufficient reason for granting a review under O. 47, R. 1 it is certainly a case in which a question of jurisdiction is incidentally involved and if that question of jurisdiction is not covered by the provisions of O. 47, R. 7, then there is nothing wrong in the aggrieved party coming to High Court in revision under S. 115. [P 205 C 1, 2]

M. S. Ramachandra Rao — *for Petitioner.*

V. Rangachari — *for Respondents.*

Order. — This is a petition presented against an order made by the learned District Munsif of Guntur in I. A. No. 2920 of 1936 in O. S. No. 552 of 1935 on the file of his Court. The application before the lower Court was for review of the judgment and decree passed by it in the suit mentioned above on 31st July 1936. The application has been granted by the Court below and this petition is presented on behalf of defendant 3 in the suit. The facts are briefly as follows: In the suit that was disposed of by the lower Court there was an issue framed in the following terms:

> Whether the plea of defendant 3 regarding his sale is barred by res judicata by the decision in O. S. No. 370 of 1931 on the file of the District Munsif's Court, Guntur and A. S. No. 46 of 1934 on the file of the Sub-Court, Guntur.

In the judgment pronouncd by the lower Court it was mentioned that this issue was not pressed at the time arguments were advanced by the learned advocates. The petition for review of the judgment and the decree alleged that this was an incorrect statement contained in the judgment because the issue was not really given up by the learned pleader who appeared in the suit on behalf of the plaintiff. The records show that arguments were addressed to the learned District Munsif on 30th July 1936 and on the very next day, namely, on 31st July 1936 the judgment was pronounced which contained this disputed statement. It is thus clear that the facts must have been fresh in the mind of the learned District Munsif when he pronounced judgment.

In the order granting the petition for review the learned District Munsif states that the judgment does not contain any incorrect statement. He is quite positive that no arguments were advanced by the plaintiff's pleader on the issue in question. He also mentions the fact that this issue was raised as an additional issue at the time of the trial and he says that normally the plaintiff or his pleader would not have given up in this manner such an issue that was raised at the instance of the plaintiff. But what he states is that the plaintiff's pleader must have taken an erroneous view of the facts and that it was because of this erroneous view that the issue was not pressed at the trial. The error referred to is with regard to a mortgage of the northern portion of the suit property to an outsider. This was the portion allotted to the share of the plaintiff and what was contended before the lower Court was that if the plaintiff and his pleader were aware of the fact that the mortgage was only of the northern portion of the property and not of the entire property, they would certainly not have relinquished the point raised in the additional issue which was framed at their instance because the result of doing so would be highly prejudicial to the interest of the plaintiff.

On behalf of the petitioner before this Court, who was the respondent in the Court below, it is pointed out that there was express reference made in the written statements filed by defendants 1 and 2 in the lower Court to the fact that the suit property was subject to a mortgage in favour of a third party and that therefore there was no excuse for the plaintiff or his pleader saying that they were not aware of the existence of this mortgage. The learned advocate for respondent 1 here contends that the Court below has not stated in its order that the plaintiff's pleader had expressly given up the point involved in issue 2 but that on a perusal of the order made by the lower Court all that can be said is that no arguments were specifically addressed on this issue and that consequently the lower Court presumed that that issue was not pressed. I am not able to accept this contention as well founded. It is nowhere stated in the order that it was a mistake committed by the lower Court as the result of the plaintiff's pleader not addressing arguments on the issue in question. On the other hand, the following sentence that appears towards the end of the order seems to me to indicate clearly that the issue was not pressed by the learned advocate as the result of a mistake. The sentence is worded as follows:

> The issue was specifically prayed for by the plaintiff and was got framed on the date of trial, and the judgment and decree copies necessary for the decision on that issue were all got exhibited, and it is not conceivable that the plaintiff would have given it up immediately but for the erroneous view of the vakil.

There is no doubt at all from this sentence that the issue was given up and that it was done as the result of an error on the part of the advocate. In an old case reported in 2 Mad 58[1] which arose under the corresponding provision relating to review contained in S. 376, Civil P. C., Act 8 of 1859, the wording of which is much wider than the wording of O. 47, R. 1 of the present Code, the learned Judges expressed themselves strongly against the granting of review in circumstances similar to those in the present case. In the course of the judgment they say:

> The question was apparently abandoned, and if upon no other ground, we would think that, upon that ground alone, the review asked for should not be granted . . . . . . A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question on review.

In the present case also there was an abandonment of a specific question involved in an issue that was raised at the instance of the plaintiff and according to the order of the Court below such abandonment took place as a result of an erroneous view taken by the plaintiff's pleader. There is no extraordinary or special feature alleged in the present case which would warrant interference under O. 47, R. 1, although the point was given up as the result of a mistake committed by the advocate. Respondent 1's learned advocate then points out that the fact that it was the northern portion of the suit property that was mortgaged to a third party was not known either to the plaintiff or his pleader at the time that the concession was made in the lower Court and that therefore since the plaintiff found out this fact subsequently it must be regarded as a new fact that was discovered subsequent to the judgment of the lower Court. This aspect of the case was evidently

---

1. Sabapathi v. Subraya, (1878) 2 Mad 58.

not put before the lower Court. It is not open in such circumstances for the learned advocate to raise it for the first time here. As pointed out by the learned advocate for the petitioner, had this question been raised in those terms in the Court below the short answer of the petitioner here would have been that had the plaintiff or his pleader exercised reasonable diligence, they would certainly have found out that it was the northern portion of the property that was subject to a mortgage in favour of a stranger.

This argument is well founded, because the existence of the mortgage was disclosed in the written statement filed by defendants 1 and 2 in the Court below. It is not therefore open to the plaintiff to plead ignorance of the mortgage. When he was aware of the mortgage it was his business to have ascertained whether the mortgage was of the entire property or of only the northern portion of it. If he had not done so, then it would be a case of failure to exercise reasonable diligence which would preclude him from taking advantage of the provisions of O. 47, R. 1. Then it is contended on behalf of respondent 1 that there is no question of jurisdiction involved in this revision petition and that therefore the petition should be dismissed. The learned advocate states that the lower Court had jurisdiction to decide whether there was sufficient reason to review the judgment under O. 47, R. 1 and that even if an erroneous decision was arrived at on this question by the lower Court, it cannot be said that it had no jurisdiction to make the order. The petitioner's learned advocate answers by citing the decision of the Privy Council reported in 3 Lah 127.[2] Their Lordships point out in this decision that

> any other sufficient reason used in O. 47, R. 1 must be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously.

They go on to say that "such an interpretation excludes from the power of review conferred the course taken by the Second and Third Division Benches" of the Lahore High Court in that case. From this it is clear that the matter involves a question of jurisdiction. Where the Court below has interfered when there was no sufficient reason for granting a review under O. 47, R. 1 it is certainly a case in which a question of jurisdiction is incidentally involved and in such a case according to the decisions of this Court it is permissible to interfere in revision under Sec. 115, Civil P. C. In view of this aspect of the matter it is not necessary to refer to another argument advanced on behalf of respondent 1 that since provision is made in O. 43, R. 1 (w) for appealing against an order made under O. 47, R. 1 a revision petition ought not to be entertained. It is conceded that the appeal referred to can lie only in the case specified in O. 47, R. 7. If a question of jurisdiction is involved which will not be covered by the provisions of that rule, then there is nothing wrong in the aggrieved party coming to this Court in revision under S. 115, Civil P. C. The case reported in 3 Rang 261[3] cited by the learned advocate for respondent 1 in support of his contention that the order of the lower Court is correct, does not really help him. That was a case where the Court was acting under a misapprehension as to a representation made by an advocate. The case in 49 M L J 671[4] and 34 M L W 735,[5] also cannot be regarded as authorities which would support the view taken by the lower Court that it is a fit case for granting a review of judgment under O. 47, R. 1.

It is obvious that there will be no finality to the decision of a Court if after judgment is pronounced the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. If applications for review are allowed on such grounds, there will be no end to legal proceedings. The aggrieved party may have other remedies open to him but so long as the case does not fall within the purview of O. 47, R. 1 it will not be correct to allow an application for review. In these circumstances, I hold that the order made by the lower Court is clearly wrong. It is accordingly set aside and the petition for review is dismissed. Respondent 1 shall pay the costs of the petitioner in this civil revision petition.

C.R.K./D.S. *Order set aside.*

---

[2] Chajju Ram v. Neki, (1922) 9 A I R P C 112= 72 I C 566=3 Lah 127 = 49 I A 144 (P C).

[3] Kyone Hoe v. Kyon Soon Sun, (1925) 12 A I R Rang 314 = 91 I C 509 = 3 Rang 261.

[4] Nagabushanam v. Jagannaikulu, (1925) 12 A I R Mad 1031=90 I C 775 = 49 M L J 671.

[5] Ayyaswami Chetty v. Official Receiver, Coimbatore, (1932) 19 A I R Mad 63 = 135 I C 750= 61 M L J 719 = 34 M L W 735.

A. I. R. 1940 Madras 206

BURN AND STODART JJ.

Natesa Pillai and others — Appellants.

v.

Venkatarama Ayyar and another — Respondents.

Appeal No. 104 of 1938, Decided on 11th October 1939, against order of Sub-Judge, Mayavaram, D/- 26th July 1937.

(a) Civil P. C. (1908), O. 21, R. 90—Application to set aside sale on ground of illegality—That judgment-debtor is materially prejudiced need not be proved.

In order to set aside a sale on the ground of illegality it is not necessary for the Court to hold that the judgment-debtor has been materially prejudiced by the sale, for the sale itself is a nullity. [P 206 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 69, 90—Sale held on day on which it has been proclaimed that it shall not take place is invalid.

A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. Such sale is vitiated by illegality and is a nullity. [P 207 C 1, 2]

S. Muthiah Mudaliar — *for Appellants.*

C. A. Seshagiri Sastri—*for Respondents.*

Stodart J. — The appellants are the judgment-debtors. They applied to the Court below under O. 21, R. 90 to set aside a court sale of their property held on 12th August 1935, on the ground that there was irregularity in publishing and conducting it, which resulted in the property being sold for a price much below its real value. The objections of the appellants were not stated with any degree of clarity in their application to the lower Court but in the course of the hearing it was urged that the sale was also vitiated by illegality. For the Court at the beginning of its judgment states that

> it is urged inter alia that there has been material irregularity and illegality and fraud in the publication and conduct of the sale.

The Court held that the price fetched at the sale was not unduly low, that there was no material irregularity or illegality in publishing or conducting it and that the price fetched at the sale even if considered to be low was not the result of the alleged irregularities or illegalities. Hence this appeal. The contesting respondents here are the decree-holder and the purchaser at court auction who opposed the petition in the lower Court. The latter is the decree-holder's father. The questions we have to decide are: (1) Was the price fetched at the sale unduly low so that it can be said to have resulted in substantial loss to the judgment-debtors? (2) If so was that loss due to material irregularity or fraud in publishing or conducting the sale? (3) Was the sale vitiated by illegality? Learned counsel on both sides have taken us very carefully through all the evidence relating to the value of the property. (Their Lordships then discussed the evidence as regards the value of the lands and continued.) In the light of all these circumstances, we agree with the learned Sub-Judge that judgment-debtors have not shown that they suffered any substantial injury by reason of the price fetched at the sale. And in this view of the case it is not necessary for us to decide the second question which arises in this appeal, namely whether the learned Sub-Judge was wrong in holding that there was no irregularity or fraud in publishing or conducting the sale.

We proceed therefore to the third point. Was the learned Sub-Judge wrong in holding that the sale was not vitiated by illegality? On this point we think the appellants are entitled to succeed. For reasons which we shall presently state we think the sale was vitiated by illegality. And in such a case the sale must be deemed to be altogether void. In order to set aside a sale on the ground of illegality it is not necessary for the Court to hold that the judgment-debtor has been materially prejudiced by the sale. For the sale itself is a nullity. In this particular case we are compelled to hold that the sale was held on a day which was not a day on which it had been advertised to take place or a day to which it had been adjourned. The sale was originally posted to 8th July 1935. It was adjourned to the 9th; then to the 10th and then to the 11th, the order of the Court being taken for every adjournment. Then on the 11th it was ordered to be continued from day to day till the 26th and it was further directed that the sale would be on the 26th. This was in our opinion an irregularity. It would not have been irregular if the Court had directed that the sale should be adjourned from day to day till satisfactory bids were forthcoming and that these *de die in diem* adjournments should not continue after the 26th. But for the Court to order on the 11th that the sale should not be concluded till the 26th amounted to an adjournment of the sale for 15 days. And O. 21, R. 69 (2) as it then existed laid down the rule that a sale should not be adjourned for a longer period than seven days without a fresh proclamation unless the judgment-debtor consents to waive it. And there is no indication here that the judgment-debtor did so consent. However, it is not this irregularity which forms the basis of our present decision. We merely mention it in passing. We now come to the events of 26th July. There was no sale on that day. And the Court made an order that the auction should be continued for 10 days from the 27th. It further ordered that the sale would be held on 5th August. Moreover, it is clear that the order of the Court was taken as meaning that there would be no auction after 5th August. For the decree-holder forthwith caused notices to be printed and circulated in the villages to the effect that, as per order of the Court, the auction would be held continuously from 26th July to 5th August and would be closed on 5th August. These notices which were headed "sale notices," were not only distributed in the villages and published in a local newspaper but also, presumably under the orders of the Court, were published in the same manner as regular proclamations of sale. They were proclaimed by beat of tom tom in the villages where the lands are situated, and were affixed to posts planted in the lands comprised in the notices. And the fact that these formalities had been observed was certified by the village Munsif, who also obtained in the certificate the attestation of no less than 28 witnesses.

It is abundantly clear therefore that the Court directed that this long drawn out auction would be closed on 5th August: that this fact was made known to all concerned who might have been present at the Court when it was made: and that it was forthwith widely published in the villages where the lands are situated: *see* Ex. 21 series and Ex. 25 and Ex. 26. But there was no sale on 5th August. Nor was the auction closed on that date. On that day the decree-holder represented that the auction sale should be continued for another week and deposited Rs. 3-8-0 for the expenses of conducting the sale on seven more successive days. The Court passed no orders on this request other than an order that the money so paid should be accepted. And the property was in fact put up for auction on 6th August and successive days and eventually knocked down on 12th August for Rs. 32,100 to the decree-holder's father the upset price being Rs. 32,087, the amount of the sale warrant. The Court's action in not selling the property on 5th August or concluding the sale on that day was highly irregular inasmuch as it had been widely proclaimed that that was the latest date of sale. Its action in selling the property on a date subsequent to that date was positively illegal. A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. For that reason we must hold that this sale was vitiated by illegality, that it was a nullity, and must therefore be set aside. We allow the appeal with costs both here and in the lower Court.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 207

BURN AND STODART JJ.

Muhammad Ibrahim — Appellant.

v.

S. Kamal Saheb — Respondent.

Appeal No. 370 of 1937, Decided on 31st August 1939, against order of Commissioner for Workmen's Compensation, Madras, D/- 23rd September 1937.

Workmen's Compensation Act (1923)—Accident—Right of compensation—Accident must be proved to arise out of and in course of employment.

The employment of the deceased was as a bus-driver but at the time of the accident he was travelling as a passenger, standing on the foot-board. In the absence of evidence that he was going to or from his work or that he was going in the bus for the purpose of his employment the deceased's dependants are not entitled to any compensation. [P 207 C 2]

Ch. Raghava Rao, S. Kothandarama Nayanar and N. C. Subbiah — *for Appellant.*

Judgment.—This appeal must be allowed. The learned Commissioner's finding that the deceased was in the employment of the opposite party is a finding of fact with which we cannot, and do not wish to interfere. But there was no evidence whatever on which the learned Commissioner could base his finding that the accident to the deceased arose out of and in the course of his employment. His employment was as a 'bus driver' but at the time of the accident he was travelling as a passenger, standing on the foot-board. There is no evidence that he was going to or from his work or that he was going in the bus for the purpose of his employment. This appeal is allowed with costs here and in the Court of the Commissioner.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 208

VENKATARAMANA RAO J.

Kasi Mangalath Illath Vishnu Nambudiri and others — Appellants.

v.

Pattath Ramunni Marar and others — Respondents.

Second Appeal No. 70 of 1934, Decided on 25th November 1938, against decree of Dist. Court, North Malabar, in A. S. No. 2 of 1932.

(a) Adverse Possession — Public temple— Private individual cannot acquire by prescription any private ownership regarding public temple.

A public temple being "*res extra commercium*" it is not open to a private individual to acquire by prescription any private ownership in regard thereto. The character of the temple as a public temple cannot be taken away by any assertion of private right. [P 208 C 2]

(b) Adverse Possession — Temple—Archakas of subordinate temple openly setting up exclusive right to possession and management of temple adverse to right of management of trustees of main temple—Trustees have no right to oust such archakas.

Where archakas of a subordinate temple have been openly setting up exclusive right to the possession and management of the temple adverse to the right of the management which may inhere in the trustees of the main temple, they acquire the right of being hereditary archakas of the temple and as such to be in possession and management of it. They are therefore entitled to be in possession of the said temple, to perform the puja and appropriate the perquisites and offerings offered at the temple for their own use subject of course to the obligation of performing the puja. The trustees have no right to interfere with the said management except to exercise a general supervision over them as trustees of the main temple. [P 209 C 1, 2]

(c) Court-fee—Refund—Inherent power.

Apart from Ss. 13, 14 and 15, Court-fees Act, the Court has got inherent power to refund court-fee: *A I R 1932 Mad 438, Rel. on.* [P 209 C 2]

K. Kuttikrishna Menon and K. Narayana Marar — *for Appellants.*

P. Govinda Menon — *for Respondents.*

Judgment. — This second appeal arises out of a suit to recover possession of the plaint Siva temple called, Vatakketath by plaintiffs who constitute the board of trustees of the Tiruvangad devaswom appointed by the decree in O. S. No. 8 of 1925 on the file of the District Court of North Malabar. The basis of the claim is that this Siva temple is a shrine subordinate to the Sri Rama temple of the devaswom and situate in the same compound but the defendants who are the archakas of the Siva temple have set up a hostile title thereto alleging that they own it. The main defence is that the plaint temple does not belong to the Tiruvangad devaswom and it is not a subordinate shrine as alleged in the plaint. The defendants further pleaded that the plaint temple belongs to their illom in jenm right and their illom has been in exclusive possession of the plaint temple to the knowledge of and against the trustees of the Tiruvangad devaswom. They also pleaded that the suit was barred by limitation and adverse possession. Two main questions to which both the lower Courts addressed themselves were the following : (1) whether the plaint temple belongs to the Tiruvangad devaswom or whether it belongs to the defendant's illom ; and (2) whether the suit is barred by limitation and adverse possession. Both the Courts have concurrently found that the plaint temple belongs to the Tiruvangad devaswom and is not the private property of the defendants' illom, but in regard to the question of adverse possession the lower Courts differed. The learned Subordinate Judge was of the opinion that the right of the Tiruvangad devaswom to the plaint temple was barred by adverse possession while the learned District Judge held it was not and he therefore gave a decree for possession in favour of the plaintiffs.

Mr. Kuttikrishna Menon on behalf of the defendants-appellants contends that the view taken by the learned District Judge in regard to the adverse possession was wrong, that even assuming the right of the Tiruvangad devaswom was not barred by adverse possession, the plaintiffs can have no right to oust the defendants from their possession of the suit temple on the ground that they have acquired a right to the exclusive management of the suit temple by prescription and that the suit is liable to be dismissed even on the findings of both the Courts. The concurrent finding of both the Courts is that the plaint temple is a subordinate temple of the Tiruvangad devaswom. Tiruvangad temple is admittedly a public temple and there can be no doubt that the plaint temple in also a public temple. In deciding the question of adverse possession it seems to me that both the Courts have not kept in view this fact. Being a public temple and therefore *res extra commercium* it is not open to a private individual to acquire by prescription any private ownership in regard thereto. The character of the temple as a public temple cannot be taken away by any assertion of private right and there is no evidence that the public have ever been excluded therefrom. Mr. Kuttikrishna Menon rightly concedes before me that he would not dispute the fact of the temple being a public temple. The plaint temple must therefore be deemed to be a public temple and a subordinate shrine to the main Tiruvangad temple. But the question still remains, are the plaintiffs entitled to oust the defendants from their possession of the suit temple? The concurrent finding of both the Courts in regard to the possession is that an ancestor of the defendants was introduced into this temple as an archaka and that after his death, his descendants continued to be in possession doing archaka service. Both the Courts have also found that the defendants have set up an exclusive right to the possession and management of the temple at any rate from 1903. None of the trustees of the temple ever sought to interfere with the management or possession of the defendants' family. The learned District Judge observes thus:

> It does not also appear that the trustees of the devasthanam attempted at any time to exercise any acts of control in the plaint temple . . . .

It is in evidence that the defendants' family have been always performing puja and appropriating all perquisites and offerings received at the temple and were generally attending to the management of the temple and at no time the trustees ever interfered with such management or claimed to receive any portion of the perquisites or offerings, even after the open assertion by the defendants of their absolute rights. It is also in evidence that such repairs as were needed have been done by the defendants in assertion of their absolute rights. It may be that the omission of the trustees of the Tiruvangad devaswom to interfere with such control may have been due to long continued mismanagement of the trustees of the main temple which necessitated the framing of a scheme by the Court. But if the defendants have been openly setting up exclusive right to the possession and management of the temple adverse to the right of the management which may inhere in the trustees of the main temple by virtue of the fact that the suit temple was a subordinate shrine, the right of the trustees of the temple would certainly be lost by adverse possession. Probably the absence of such control is due to the fact that the usage is that the archaka should be in such possession and management subject to general supervision the trustees of the main temple may have over them. The terms under which the defendants' ancestor was introduced into the temple are not known. On the findings of both the Courts, there can be no doubt that the defendants' family at any rate for a period of 30 years has been setting up a right of exclusive possession and management to the knowledge of the trustees. Therefore, the facts of this case warrant the inference that the defendants have acquired the right of being hereditary archakas of the suit temple and as such to be in possession and management of it. They are therefore entitled to be in possession of the said temple, to perform the puja and appropriate the perquisites and offerings offered at the temple for their own use subject of course to the obligation of performing the puja. The plaintiffs-trustees have no right to interfere with the said management except to exercise a general supervision over them as trustees of the main temple. The plaintiffs would not therefore be entitled to a decree for possession. In my opinion the defendants are the hereditary archakas of the suit temple subject to the supervision of the trustees of the main temple as mentioned by me aforesaid.

In the view I have taken that the defendants are the hereditary archakas of the suit temple subject to the supervision of the trustees of the main temple as mentioned by me as aforesaid, the decree of the lower Appellate Court negativing their right must be reversed and the decree of the subordinate Judge dismissing the suit must be upheld on the basis that the defendants are entitled to be in possession as hereditary archakas. The result is that the plaintiffs' suit will be dismissed, but I direct each party to bear their own costs throughout. Leave to appeal is refused.

Some doubt was raised by the office with regard to the refund of court-fee in this case. I issued notice to the Government Pleader. Mr. Krishna Rao on behalf of the Government Pleader frankly stated to me that refund should be ordered and I think he is right. Apart from Ss. 13, 14 and 15, Court-fees Act, the Court has got inherent power to refund court-fee: *vide* 55 Mad 641.[1] As the temple in this case is incapable of valuation I think the appellants are entitled to a refund of the excess court-fee

---

[1] Thammayya Naidu v. Venkataramanamma, (1932) 19 A I R Mad 438 = 139 I C 131 = 55 Mad 641=62 M L J 541.

paid by them. The proper court-fee in this case is Rs. 100. The appellants are therefore entitled to a certificate for the refund of the balance. Mr. Govinda Menon asks me to make an order also in his client's favour. I cannot do so in this appeal. If so advised, he is entitled to make an application to the lower Court.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 210

VENKATARAMANA RAO AND NEWSAM JJ.

Vasantharao Ammannamma — Appellant.

v.

Vijiapurapu Venkata Kodanda Rao Panthulu and others — Respondents.

Appeal No. 120 of 1936, Decided on 1st May 1939, against decree of Sub-Judge, Vizagapatam, D/- 31st October 1935.

(a) Hindu Law — Limited estate — Gift to female is not presumed to be limited gift.

There is no presumption that a gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to a widow's estate under the law of inheritance: *30 All 84 and A I R 1919 Mad 557, Rel. on.* [P 211 C 1]

(b) Hindu Law—Will – Construction — Will by Hindu regarding self-acquired properties directing that properties shall go to his widow for life and after her death they shall pass to his daughter and thereafter to his grandsons through daughter—Daughter held took daughter's estate and not absolute estate.

Even in cases where the words used by the testator confer an absolute ownership, the circumstances or the context may be sufficient to show that such an absolute ownership was not intended. The question in all these cases therefore depends upon the intention of the testator which has to be gathered from the words used by him and the will read as a whole in the light of the surrounding circumstances at or about the date of the will. [P 211 C 1]

In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu in respect of devolution of a property: *2 I A 7, Foll.* [P 212 C 2]

A will of a Hindu provided as follows: "My self-acquired properties shall, on my death, be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter, they shall pass to my grandsons through my daughter. As stated hereunder the debts due by me to outsiders, should be discharged hereafter from an annual income derived from the said properties mentioned above. After discharging all the said debts, the person who shall be enjoying the said properties as aforestated shall pay to my four grand-daughters each a sum of Rs. 25 per annum towards pasupukunkuma":

Held that the estate which the testator intended her daughter to take was an estate which she would take under the law of inheritance, that is a limited estate analogous to that of a widow's estate and not an absolute estate. The testator meant to give a daughter's estate rather than a life estate. Hence, there could be no vested remainder liable to be attached. [P 211 C 2; P 213 C 2]

(c) Hindu Law — Limited estate — Vested remainder—It is not possible to have vested remainder after conferring limited estate analogous to that of woman's estate under Hindu law.

It is not possible to have a vested remainder after conferring a limited estate analogous to that of a woman's estate under the Hindu law. The holder of such an estate whether she be a widow or a daughter would fully represent the inheritance. There is nothing to vest in anybody else: *24 W R 168, Rel. on.* [P 213 C 1]

P. Somasundaram — *for Appellant.*

Y. Suryanarayana — *for Respondents.*

Venkataramana Rao J.—The question for determination in this appeal is, what is the nature of the interest taken by the plaintiff and by her sons under the will of her father Maddirala Buchi Sundara Rao Pantulu Garu dated 26th July 1899. It is the case of the plaintiff that she took an absolute estate in the properties bequeathed to her. It is the case of defendant 1 that she took only a life interest and there was a vested remainder in favour of her sons defendants 2 and 3 and her deceased son Bayanna Pantulu whose sons are defendants 4 to 6. Defendant 7 is the son of defendant 3. The suit itself was filed for a declaration that the plaintiff got an absolute estate in the said properties and that the attachment effected by defendant 1 of the interest of defendants 2 to 7 in the property in execution of a decree obtained by him in O. S. No. 36 of 1930 on the file of the Subordinate Judge's Court of Vizagapatam is invalid. The learned Subordinate Judge on a construction of the will held that the plaintiff did not take an absolute estate and dismissed the suit. It is this decision which is challenged in appeal by the plaintiff. The main provisions of the will so far as they are material for the decision of this appeal run thus:

> Out of the aforestated ancestral lands in Dimile and other villages, the one-ninth share of lands to which I am entitled, shall be enjoyed after my death by my wife till her death, and after her death it shall pass to Sundara Rao Pantulu Garu, son of my second elder brother Maddirala Kamaji Rao Pantulu Garu, deceased.
>
> My self-acquired properties . . . . silver and gold and other moveables belonging to me—all the properties aforesaid shall, on my death, be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter, they shall pass to my grandsons through my daughter.
>
> As stated hereunder, the debts due by me to outsiders, should be discharged hereafter from the

annual income derived from the said properties mentioned above. After discharging all the said debts, the person who shall be enjoying the said properties as aforestated shall pay to my four granddaughters each a sum of Rs. 25 per annum towards pasupukunkuma.

The contention of Mr. Somasundaram on behalf of the plaintiff is that the words of disposition in her favour, namely 'after her (wife's) death, they shall pass to my daughter' confer an absolute estate. It is now settled law that there is no presumption that a gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to a widow's estate under the law of inheritance. (*Vide* the dictum of Mitter J. approved by the Privy Council in 30 All 84.[1] This presumption was given effect to in 42 Mad 283,[2] where a gift by a husband to his wife simpliciter was held to confer an absolute estate. The words used in the will in that case were "my senior wife and junior wife shall each take a half." Seshagiri Ayyar J. remarked in the course of the judgment thus:

> Unless there is an express or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted.

This decision, so far as I am aware, has been followed without question by our High Court. If the words used by the testator had stood by themselves, there is a good deal of force in the contention of Mr. Somasundaram. But they do not stand by themselves; closely following them occur the following words:

> Thereafter (whether he used that expression to mean after the daughter's death or after the estate is taken by the daughter—whichever it is, is immaterial) through my daughter they shall pass to my grandson.

Again there are other provisions in the will which have also to be considered. Even in cases where the words used by the testator confer an absolute ownership, the circumstances or the context may be sufficient to show that such an absolute ownership was not intended. The question in all these cases therefore depends upon the intention of the testator which has to be gathered from the words used by him and the will read as a whole in the light of the surrounding circumstances at or about the date of the will. In the light of the principles referred to above, let us see what the intention of the testator was in this case. He was a retired Subordinate Judge on the date of the will. There was ancestral property in which he had a share the division of which was not effected by metes and bounds and wherein not only his brothers but the descendants of his paternal uncles were also interested. The testator was himself a son of one of three brothers and his father had two sons besides the testator. On the date of the will the paternal uncles were dead, the two brothers of the testator were also dead and there was only a daughter by one of his brothers and a son by another brother by name Sundara Rao Pantulu. He himself had a wife and a daughter living and there were sons and daughters by the daughter. His object, as explained by him in the preamble to the will, was to make known how and by whom the property he was possessed of was to be enjoyed after his death without disputes in the family in future. So far as the ancestral property is concerned, he gave a life interest to his wife and after her death, he bequeathed it to the son of his brother, the said Sundara Rao. Therefore so far as that property is concerned, it was his intention to retain it in the family of his brother. It is consistent with the ordinary notion of a Hindu that the ancestral property of the family should be retained in his family.

Coming to the self-acquired property, he directs that his wife should enjoy it during her lifetime. It is immaterial whether it is considered as a widow's estate or a life estate because the wife is dead. He then makes a provision in favour of his daughter to which I have already referred. The question in this case is, what estate did he intend his daughter to take? On a careful consideration of all the clauses in the will we have come to the conclusion that the estate which the testator intended his daughter to take was an estate which she would take under the law of inheritance, that is, a limited estate analogous to that of a widow's estate. It is only then that the intention of the testator would best be effectuated and that every word in the will could be given effect to as it ought to be given effect to as far as possible. The testator had not stopped with the disposition in favour of his daughter but he directs that thereafter (which we think is after the lifetime of the daughter) the estate shall pass to his grandsons. It is clear that the ultimate destination of the estate intended by the testator was to the grandsons.

---

[1] Surajmani v. Rabi Nath, (1908) 30 All 84=35 I A 17=5 A L J 67 (P C).

[2] Ramachandra Rao v. Ramachandra Rao, (1919) 6 A I R Mad 557=52 I C 94 = 42 Mad 283=36 M L J 306.

A good deal of argument was advanced on both sides on the word 'dwara' or 'through' in the disposition in favour of the grandsons. The contention of Mr. Somasundaram is that the testator gave an absolute estate to the daughter at the same time expressing a desire that she should leave it to the grandsons. It is no doubt difficult to understand what exactly the testator meant by the word 'through', but we are not able to accept the contention of Mr. Somasundaram that the words by which he intended that the property should go to the grandsons are mere words of recommendation to the daughter. On the other hand, the intention is pretty plain that the estate must go to the grandsons. It is immaterial whether the testator intended that the property should pass to them in the ordinary course of devolution after the death of the daughter or whether he intended the daughter to convey the said property to them. If the testator had really conferred an absolute estate on the daughter and the words used in favour of the grandsons were only words of recommendation leaving the option to the widow to convey the estate to his grandsons or not, the intention of the testator would be frustrated because the words used are "shall pass." On the other hand, if the estate given to the daughter were to be construed as a life estate or a daughter's estate, the intention would be effectuated and the words used in favour of the grandsons could be given effect to. There is another indication to show that he did not mean to give the daughter an absolute estate. The testator was himself a lawyer and a Judge and knew or may be presumed to have known that under the Hindu law an estate owned by a daughter absolutely would go to her daughters in preference to her sons. Therefore if the daughter took an absolute estate, he must have known that her daughters would get it unless a limitation was placed upon the estate which was going to be conferred upon the daughter. Therefore fully alive to the law he directed that the estate should pass to the grandsons and made a provision in favour of the granddaughters thus:

> After discharging all the said debts, the person who shall be enjoying the said properties as aforestated shall pay to my four granddaughters each a sum of Rs. 25 per annum towards pasupukunkuma.

He would not have cut off his granddaughters with this annuity unless he intended that they should not get the estate and the obligation to pay the annuity was imposed upon the persons who take his property and they are mentioned in the previous paragraph of the will, namely the widow, the daughter and the grandsons. It is common knowledge that a Hindu would ordinarily prefer, in the absence of a male issue, that his estate should go to his daughter's son in preference to his daughter's daughter, both on account of natural love and affection and also on religious grounds which every pious Brahmin might be expected to have in view. The testator knew that the religious efficacy conferred by a daughter's son in regard to funeral ceremonies and oblations is equal to a son. Therefore it is quite natural to expect that a testator like Buchi Sundara Rao would desire that the estate would ultimately go to his grandsons in preference to his granddaughters. As observed by their Lordships of the Privy Council in 2 I A 7,[3] in construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu in respect of devolution of a property. There is again another indication that the daughter was not intended to take the property absolutely. In making a provision for the discharge of debts he enjoins that they should be discharged out of the annual income and he does not empower the widow or the daughter to alienate the corpus. No doubt such a power of alienation is not necessary and it can well be understood to have comprised in a pure gift to a widow or a daughter *simpliciter*. But in the context the absence of express words as to power of alienation would seem to connote that the estate intended to be conferred upon the daughter was not absolute.

The question therefore arises, did he intend to confer only a life estate or a daughter's estate? It seems to us that he meant to give a daughter's estate rather than a life estate. He omits the word "during her life" with reference to the disposition in favour of the daughter. The words "pass to my daughter" would rather indicate that in the ordinary course of devolution the estate should pass to her, that is the daughter, and then to the grandsons. The words used in favour of the grandsons seem to indicate that the estate conferred on the daughter was not a life estate because there is no direct gift in favour of the grandsons, but on the other hand, what he says is that through his daughter the estate shall pass to his grandsons. Either he must have intended that the daughters should convey the property either by will or inter vivos to the grandsons or she having taken the estate, through her it should pass to the grandsons in the ordinary course of devolution. If it was the daughter's estate that was intended to be conferred, there can be no question that the estate taken by the grandsons is not a vested interest. No doubt there have been expressions of view that it is possible to have a vested remainder after a limited estate of a Hindu widow or a daughter: *vide* 26 M L J 616.[4] But it seems to us that it is not possible to have a vested remainder after conferring a limited estate analogous to that of a woman's estate under the Hindu law. The holder of such an estate whether she be a widow or a daughter would fully represent the inheritance. There is nothing to vest in anybody else. The observations of the Privy Council in 24 W R 168[5] seem to be almost decisive of the matter. The question pointedly arose in that case whether an estate taken by a wife under the will of her husband was a life estate or a Hindu widow's estate under the law and the gift over in favour of the adopted son was a vested or a contingent remainder. Their Lordships pointed out that if it was a life estate, the adopted son would take a vested remainder; if it was an estate of a Hindu widow, the estate taken by the adopted son would be a contingent remainder. In that case their Lordships held that the estate taken by the widow was a life estate and that taken by the adopted son was a vested remainder. If it is assumed in this case that there is a direct gift in favour of the grandsons, the estate taken by them would be a contingent remainder. But there is no direct gift in their favour and whether the estate taken by the daughter was viewed as a mere daughter's estate and the words used in favour of the grandsons were intended to connote a power vested in the daughter to convey the property or the words meant that the property should be taken by the grandsons in the ordinary course of devolution is immaterial. But it was not the intention of the testator that the daughter should take an absolute estate but only the limited estate of a daughter.

---

[3] **Mohammad Shumsool v. Shewakaram, (1874) 2 I A 7 = 22 W R 409=16 Beng L R 226=3 Sar 405=3 Suther 43 (P C).**

In the view which we have taken that the daughter took a daughter's estate, there can be no vested remainder which is liable to be attached by defendant 1. But in so far as the plaintiff sued for a declaration that she has got an absolute estate in the suit properties, her suit fails and has to be dismissed. We direct each party to bear his own costs both here and in the Court below.

C.R.K./D.S. *Order accordingly.*

---

[4] Ratna Chettiar v. Narayanaswami Chettiar, (1914) 1 A I R Mad 64 = 24 I C 796 = 26 M L J 616.

[5] Mt. Bhagabutti Daee v. Chowdri Bholanath Takoor, (1875) 24 W R 168.

A. I. R. 1940 Madras 213

BURN AND STODART JJ.

Raja Inuganti Venkata Rayanim Varu — Appellant.

v.

Alluri China Bapanna and others — Respondents.

Appeal No. 95 of 1937, Decided on 15th September 1939, against order of Sub-Judge, Nellore, D/- 22nd September 1936.

Civil P. C. (1908), O. 5, R. 19—Court should observe mandatory provision in O. 5, R. 19—Absence of express order required therein does not however mean that summons has not been duly served.

Though it is desirable that all Courts should observe the mandatory provision in O. 5, R. 19 and either declare that the summons has been duly served or order such further service as it thinks fit, yet the absence of such an express declaration will not involve as a necessary consequence a finding that a summons has not been duly served. [P 213 C 2]

Hence, when four summonses were taken out to a party and they were all returned with reports that the copies had been affixed because the party was absent in some place or other and after fourth return the Judge said that the party being absent he should be treated as ex parte:

Held that there was an implied though not an express declaration of sufficiency of service on the party: *A I R 1933 Mad 466 and A I R 1933 Mad 406, Disting.* [P 214 C 1]

P. V. Rajamannar and K. Subba Rao — *for Appellant.*

K. Venkataramaraju — *for Respondents.*

Judgment.—It is of course desirable that all Courts should observe the mandatory provision in O. 5, R. 19, Civil P. C., and "either declare that the summons has been duly served or order such further service as it thinks fit." But we do not think that the absence of such an express declaration will involve as a necessary consequence a finding that a summons has not been duly served. In the present case no less than four summonses were taken out to the appellant and they were all returned with reports that the copies had been affixed because the appellant was absent in some place or other. After the fourth return of the kind the Court said on 24th March 1933:

> Defendant 7 affixed on 15th March 1933, said to have gone to Tirupattur by the inmates of the house. Called absent. Defendant 7 ex parte.

In the circumstances of this case we see no difficulty in saying that there is here an implied though not an express declaration of sufficiency of service on defendant 7. The decisions in 64 M L J 629[1] and 64 M L J 637[2] are not in point. Moreover, we must agree with the learned Sub-Judge that the appellant really knew all about the suit as it was going on. The mortgagor-defendants were his son-in-law and his grandsons and it is not possible to believe his statements that he knew nothing about the suit until after it had been decreed. We agree with the learned Sub-Judge that the appellant did not prove that he was prevented by any sufficient cause from appearing when the suit came on for trial. We therefore dismiss this appeal with costs, and we do so with no compunction, since the appellant has not and never has had any defence of his own to raise. He wants now, he says, to press a plea actually taken at the trial on behalf of the mortgagor-defendants, but not substantiated by their court-guardian.

C.R.K./D.B. *Appeal dismissed.*

---

[1] Azagappa Chetti v. Ramnath Chettiar, (1933) 20 A I R Mad 466=147 I C 1242 = 64 M L J 629.

[2] Ramaswami Chetti v. Chinnappan Chetti, (1933) 20 A I R Mad 406=142 I C 765 = 64 M L J 637.

A. I. R. 1940 Madras 214

BURN AND STODART JJ.

Juluri Venkataratnam and others — Appellants.

v.

Balabhadruni Chennayya and others — Respondents.

Appeal No. 49 of 1938, Decided on 5th September 1939, against order of Sub-Judge, Vizagapatam, D/- 3rd March 1937.

Civil P. C. (1908), S. 39 and O. 21, Rr. 5, 8 — Transmission for execution to Sub-Court — Transferee Court and not the District Court has jurisdiction to entertain application for execution — Decree has to be sent to the District Court under O. 21, R. 5 only for transmission.

The order transferring a decree to another Court takes effect from the date on which it is passed and the transferee Court has jurisdiction to entertain application for execution from the date of the passing of the order of transfer : *A I R 1933 Mad 627, Rel. on.* [P 214 C 2]

The decree under O. 21, R. 5 has to be sent to the District Court for mere transmission to the transferee Court and therefore no application lies to the District Court and O. 21, R. 8 has no application to such a case : *22 Cal 764, Dissent.* [P 214 C 2]

N. Vasudeva Rao — *for Appellants.*

G. Lakshmanna and G. Chandrasekhara Sastry — *for Respondents.*

Judgment.—The decision of the learned Subordinate Judge is, we think, clearly wrong. It is opposed to the decision in 56 Mad 692.[1] With respect, we are unable to agree with the decision in 22 Cal 764.[2] Rr. 5 and 8 of O. 21, Civil P. C., are distinct and independent. Under S. 39, Civil P. C., the Court which passed the decree may send it for execution "to another Court . . . " The Court which passed the decree in this case had power to send the decree for execution to the Sub-Court, Vizagapatam, and in fact that was the order passed by the learned Subordinate Judge, Guntur, on 29th August 1936. The decree, under R. 5, O. 21, had to be sent to the District Court, Vizagapatam, for mere transmission to the Sub-Court, Vizagapatam: *vide* C. R. P. No. 139 which forbids the decree-holder to make any application to the District Court. R. 8 of O. 21 applies only to those cases in which the decree is sent for execution to the District Court in another district, (or for that matter in the same district). In such cases, the District Court is not obliged to execute the decree itself but may transfer it for execution to any Subordinate Court having jurisdiction. If the decree is not sent for execution to the District Court, the District Court cannot execute it but must merely transmit it to the Court specified in the order of the Court which passed the decree: *vide* S. 38, Civil P. C., which shows that the only Courts competent to execute a decree are (1) the Court which passed it, (2) the Court to which it is sent for execution.

Following 56 Mad 692,[1] we hold that the order of transfer in this case took effect from 29th August 1936, that the Sub-Court, Vizagapatam, had jurisdiction to execute it thereafter and that the decree-holder's application on 31st August 1936 was not barred by limitation. The order of the lower Court is accordingly set aside and the petition must be restored to file and disposed of according to law. The appellants will recover their costs here and in the lower Court from the contesting respondent 1.

---

[1] Modali Ademma v. Venkatasubbaya, (1933) 20 A IR Mad 627=144 I C 923=56 Mad 692=65 M L J 137.

[2] Debi Dial Sahu v. Moharaj Tingh, (1895) 22 Cal 764.

C.R.K./G.N. *Order set aside.*

A. I. R. 1940 Madras 215

WADSWORTH J.

G. R. Naidu and others — Appellants.

v.

Yerramsetti Venkataswami Naidu — Respondent.

Appeal No. 96 of 1937, Decided on 12th September 1939, against appellate order of Dist. Court, Guntur, D/- 1st October 1936.

(a) Execution — Limitation — Amendment— Application returned for amendment has no judicial existence – When it is re-presented after being time barred, without any prayer to excuse delay, it cannot be deemed to be pending application and any order passed upon it cannot save limitation for fresh application.

When an execution petition is returned for amendment, it has no judicial existence pending its re-presentation. If it is re-presented within time duly amended, the date of the original presentation will be the date of the execution application and the same position would result if it is re-presented late and accompanied by application to excuse delay and the delay is excused. But if the returned petition is withheld for an inordinately long period and re-presented after it has become time-barred without any application to excuse delay merely in the hope of saving limitation for fresh application it cannot be deemed to be a pending application and any order passed upon it cannot save limitation for the fresh application presented contemporaneously: *AIR 1939 Mad 841, Rel. on.* [P 216 C 1, 2]

(b) Limitation Act (1908), Art. 182, cl. (5)— Execution application without correct number of suit is not one in accordance with law.

An application which does not contain the correct number of the suit, the decree in which it is proposed to execute, cannot be deemed to be an application made in accordance with law within the meaning of Art. 182, cl. (5). [P 216 C 1]

T. S. Nagaswamy Ayyar — *for Appellants.*

A. Lakshmayya — *for Respondent.*

Judgment.—This appeal deals with a question of limitation in execution. The decree was dated 10th October 1925. The last execution petition about which there was no dispute was dismissed on 28th June 1930. On 19th June 1933, an execution petition was presented bearing the wrong number of the suit and it was returned for rectification with the endorsement "Suit number is wrong; names of parties do not tally." Seven days time was allowed, the date of the return being 5th July 1933. This execution petition was not re-presented at all until 29th August 1935 when a fresh execution petition was filed and along with it the returned execution petition was re-presented with the suit number corrected, but the endorsement re-submitting the execution petition was unsigned and there was no application to excuse the delay, nor was there any explanation for the delay. On this the order was passed on 9th September 1935 "Fresh execution petition filed. Vakil has not signed. Dismissed." The defective execution petition was never numbered at all, not even after this somewhat irregular re-presentation. The appellants, representing the decree-holders, seek to rely on this order of dismissal to save limitation for the fresh execution petition which was presented on 29th August 1935, that is to say, some 11 days before the order of dismissal was passed.

It was decided in a very recent case, 1939 M W N 769,[1] by a Bench of this Court that if an execution petition is returned for amendment and the decree-holder takes no further action upon it, it should be treated as if he had not put in an application at all; that it is not permissible for the decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. It was also held that such execution petitions not re-presented within the proper time cannot save limitation and that an order returning an execution petition for rectification by advocates is not a final order within the purport of Art. 182 (5) nor can one read into the order for the purpose of Art. 182 (5), Limitation Act, a clause that in default of re-presentation within the time allowed, the application will stand dismissed.

In a very recent case I followed that decision in applying it to facts very similar to those with which I have now to deal. In A. A. O. No. 18 of 1936 there was an execution petition returned for defects and not re-presented for four years. Then a fresh execution petition was filed along with the previously returned petition and an attempt was made to treat the previously returned petition as having been continuously pending, so that the new petition would be in time. This was based on an interpretation of a decision in 64 M L J 401[2] which has been dissented from by the learned Judges in the case just quoted. I held that, when an execution petition is returned for amendment, it has no judicial existence pending its re-presentation. If it is re-presented within time duly amended, the date of the original presentation will be the date of the execution application and the same position would result if it is re-presented late and accompanied by an application to excuse delay and the delay is excused. But if the returned petition is withheld for an inordinately long period and re-presented without any application to excuse delay merely in the hope of saving limitation for a fresh application, I held that it could not be deemed to be a pending application so as to save limitation for the fresh application.

---

[1] Chidambaram Chettiar v. Murugesam Pillai, (1939) 26 A I R Mad 841=1939 M W N 769.

[2] Muhammad Abu Bakkar v. Ramkrishna Chettiar, (1933) 20 A I R Mad 540=144 I C 167=64 M L J 401.

An attempt is made to distinguish the present case on the ground that the executing Court actually passed a final order of dismissal on the application in spite of the fact that it was re-presented long after the time allowed. I do not see how the appellants' position is improved by this order, which in effect was nothing more than an order of rejection of an unfiled execution application re-presented long after the period allowed. When the fresh execution petition was filed along with the re-presented petition, both of them were in fact barred by limitation. It is impossible to my mind to contend that limitation is saved for the new petition by the subsequent order of dismissal passed on the re-presented petition. The re-presented petition cannot be deemed to have been pending at the time when the new petition was filed and the new petition was not filed within three years of the final order on an application made in accordance with law. I may also state that, in my opinion, an application which does not contain the correct number of the suit, the decree in which it is proposed to execute, cannot be deemed to be an application made in accordance with law. Not only does the Code in O. 21, R. 11 prescribe the number of the suit as the first requirement in an execution petition, but commonsense also indicates that an essential feature of an execution petition is that it should be identifiable with the suit under which it is filed. It seems to me that in the present case the defective application was not an application in accordance with law, that it had no judicial existence after it was returned without being filed for rectification and that when re-presented it was barred by limitation and any order upon it passed subsequently cannot avail to save limitation for the fresh execution petition presented contemporaneously. The appeal is therefore dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 216

LAKSHMANA RAO J.

In re Muthu Goundan and others
Petitioners.

Criminal Revn. Case No. 172 and Petn. No. 156 of 1939, Decided on 15th September 1939, to revise judgment of Sub-Divisional Magistrate, Gobichettipalayam, in C. A. No. 53 of 1938.

Penal Code (1860), S. 283 — Accused by building stone wall across cart track lying in his patta land claiming right to close it—He cannot be convicted under S. 283.

Where a cart-track lay in the patta land of the accused and he claims a right to close it by putting a wall across the track, he cannot be convicted under S. 283, Penal Code. Proper course is to proceed against him under S. 133, Criminal P. C. [P 216 C 2]

G. Gopalaswami and N. Shankar Bhat—*for Petitioners.*

Public Prosecutor — *for the Crown.*

Facts. — The case against the accused was that they obstructed a public cart track leading from one town to another by constructing a stone wall across it and thereby caused annoyance and obstruction to the members of the public using the cart track and that they are guilty of an offence under S. 283, I. P. C. The accused admitted that they had put up the wall but stated that it was in their private land and that therefore they had not committed any offence. The accused's plea in other words was that the cart track is not a public one. The learned Sheristadar Magistrate convicted the accused of an offence under S. 283, I. P. C., and on appeal the Sub-Divisional Magistrate upheld the conviction. Against this order the present Criminal Revision Petition has been filed.

Order. — The cart-track in question lies in the patta land of the petitioners, who claim a right to close it, and the proper course would be to proceed against them under S. 133, Criminal P. C. The conviction of the petitioners under S. 283, I. P. C., is therefore set aside and the fines if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 217

VENKATARAMANA RAO AND
ABDUR RAHMAN JJ.

Chimalakonda Ramasubbaraya Sastri and others — Appellants.

v.

Ganapathiraju Venkata Appalanarasimharaju and others — Respondents.

Appeal No. 61 of 1936, Decided on 25th August 1939, against decree of Sub-Judge, Rajahmundry, in O. S. No. 31 of 1929.

Hindu Law—Partition — Alienation is not recognized as a mode of severance of a joint family—Suit to set aside alienation and recovery of plaintiff's share in property alienated cannot be construed as suit for partition in the absence of clear indication to hold the share in severalty in the plaint or other evidence showing such intention.

The strict theory of Hindu law does not recognize alienation as a mode of severance of a joint family. An alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated. He continues to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the joint family property other than what he has transferred : *21 Bom 797 ; 25 Mad 690 and AIR 1926 Mad 774, Rel. on; AIR 1930 Mad 51, Dissent.* [P 219 C 2]

Therefore where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other than the father and recovery of possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. If the institution of such a suit should be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty there must be a clear indication to that effect in the plaint or there must be some other evidence to show that it was his intention to so hold the share which he seeks to recover. [P 219 C 1 ; P 220 C 2]

P. V. Vallabhacharyulu—*for Appellants.*

Advocate-General and P. Satyanarayana Raju — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment and decree of the learned Subordinate Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a half-share in certain immovable properties described in Sch. B to the plaint. The said property admittedly belonged to one Suryanarayanaraju and his son Venkatapatiraju. It is the plaintiffs' case that the said property was leased in 1868 by Suryanarayanaraju as the father and head of the joint family consisting of himself and his son Venkatapatiraju for a period of 50 years, that subsequent to the said lease the said Suryanarayanaraju and Venkatapatiraju became divided in status, that Venkatapatiraju was entitled in severalty to a half share in the said property, and that on the death of his widow Butchi Bangarayya on 21st January 1927 plaintiff 1 became entitled to the said property as the next reversioner. The defendants trace their title to the entirety of the said property to the father Suryanarayanaraju who alienated the reversion in the said lands. Their case is that there was no division in status between the father and the son and on the death of the son the whole property survived to the father by survivorship and he was competent to alienate the same and confer a good title upon them. They also deny the relationship of plaintiff 1 to Venkatapatiraju. Two questions fell to be decided by the lower Court, (1) whether plaintiff 1 was the next reversioner to Venkatapatiraju and (2) whether there was a division in status between Venkatapatiraju and his father Suryanarayanaraju. On the first question the learned Subordinate Judge held that plaintiff 1 had not made out his title as the next reversioner; but on the second question the learned Subordinate Judge held that there was a division in status between Venkatapatiraju and his father Suryanarayanaraju by reason of the judgment and decree in O. S. No. 8 of 1878 on the file of the District Court, Godawari. As an adverse finding on either of the issues entailed a dismissal of the plaintiff's suit, the learned Subordinate Judge dismissed the suit. [His Lordship then discussed the evidence on the first question and concluded that on a consideration of the entire oral and documentary evidence in the case the title of plaintiff 1 as next reversioner to Venkatapatiraju III was made out and proceeded.] We must therefore set aside the finding of the learned Judge in this behalf.

The learned Advocate-General who appeared for the alienees did not advance any argument which would enable us to come to a different conclusion on this matter but he contended that apart from this finding if he could show that the son died undivided from his father, the plaintiffs would be out of Court and that the finding of the learned Judge that the decree and judgment in the prior litigation operated as a severance in status was wrong. We are inclined to think that this contention is well founded. It is now settled law that a coparcener can become separate in estate by an unambiguous declaration of his intention to separate himself from the family. It is enough for us to refer to the latest decision of the Privy Council in A I R 1939 P C 174,[1] where Sir George Rankin cites with approval the following passage from the judgment of Sir George Lowndes in 58 I A 220 = 53 All 300[2]:

> It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his cosharers of his desire to sever himself from the joint family. This was laid down in 35 All 80=40 I A 40.[3] The question was further examined in 43 Cal 1031=43 I A 151[4] and the principle was re-affirmed.

In 43 Cal 1031[4] at p. 1047, after pointing out that a separation involving the severance of joint status is distinct from the de facto division into specific shares of the joint property their Lordships proceeded to explain that

> the former was a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status.

Thus the test laid down is the intention to sever oneself from the joint family. The question we have therefore to determine is, did the son intend to sever himself from the father? As pointed out in 43 Cal 1031[4] at p. 1047, the intention to become separate may be evidenced in many different ways, either by explicit declaration or from conduct. If it is an inference drawn from conduct it will be for the Court to determine whether it was unequivocal and explicit. The institution of a suit for partition by a member of a joint family against the other members has always been taken to be a manifestation of an unequivocal intention to separate himself from the other members of the family. As pointed out in 39 All 496,[5] the commencement of a suit for partition would effect a separation from the joint family. Their Lordships found in that case that by the plaint the plaintiff claimed a fifth share in the joint family property and that the claim amounted to an intimation to the cosharers of the plaintiff of an unequivocal desire for separation from the joint family. Therefore a suit must in substance be a suit for partition with a desire on the part of the plaintiff to hold his share in severalty without being subject to the obligations of the joint status.

Having these principles in view, we have to see whether the prior litigation was a suit for partition and the decree and judgment therein operated as severance in status. The prior litigation was commenced by a suit by Venkatapatiraju in the District Court of Godawari in 1878 (O. S. No. 8 of 1878). A copy of the plaint was not filed in the lower Court because an authentic copy was not available but as a printed copy of the said plaint in the said suit which came up in appeal before this Court was available, we had it marked in this appeal. A reference to the plaint shows that the plaintiff sought to set aside several alienations made by his father including the leases which were executed on 1st and 2nd October 1868 in favour of defendant 2 and the father of defendants 3 and 4 in that suit. The plaint was confined only to the property alienated. No doubt there was an assertion made in the plaint that the alienations comprised the entire joint family property but that was not a correct statement of fact, since there was other property which was not alienated but was subsequently alienated by the father or the son subsequent to the date of suit. The plaint alleged that the plaintiff demanded all the defendants to make over his half-share in each of the properties and they refused to do so and therefore he claimed possession of a half-share therein. The demand for delivery of possession of a half-share could only be on the alienees because the father was admittedly out of possession and there was no evidence of any demand made on the father prior to the said litigation. The plaint does not mention whether there was any moveable property belonging to the family or whether there were liabilities of the family and it was not framed in the way a plaint in a suit for partition would have been framed. In answer thereto, the defendants contended that it was not open to the plaintiff to recover his half-share without suing for a partition.

The judgment in that suit confirmed all the alienations including the leases and set

---

1. Ram Narain Sahu v. Mt. Makbana, (1939) 26 A I R P C 174=181 I C 929=I L R (1939) All 681 (P C).
2. Bal Krishna v. Ram Krishna, (1931) 18 A I R P C 154=132 I C 733=58 I A 220=53 All 300 (P C).
3. Suraj Narain v. Ikbal Narain, (1913) 35 All 80 =18 I C 30=16 O C 129=40 I A 40 (P C).
4. Girja Bai v. Sadashiv Dhundiraj, (1916) 3 A I R P C 104=37 I C 321=43 Cal 1031=43 I A 151 =12 N L R 113 (P C).
5. Kawal Nain v. Budh Singh, (1917) 4 A I R P C 39=40 I C 286=39 All 496=44 I A 159 (P C).

aside only two gifts of the joint family property made by the father, one made in favour of the plaintiff's sister and the other, in favour of the Guru of the family. The actual decree in the suit was that the plaintiff as a coparcener with defendant 1 be put in possession of a half share of the lands gifted away and in regard to the rest of the properties the suit was dismissed. There was no declaration as in a partition suit that the plaintiff and defendant 1 were entitled to equal shares in all the joint family properties and that in regard to lands covered by leases the plaintiff will be entitled to recover possession of a half share on the termination of the leases. No account of joint family property was directed to be taken nor an account of any liabilities and no declaration was given in regard thereto, whereas, if it was intended to be a suit for partition, the Court would have raised an issue as to the assets and liabilities of the joint family and ascertained what they were and effected a division thereof. The case was carried in appeal and the Appellate Court confirmed the above decision except in regard to a small item.

It is thus clear that the said suit was not a suit for partition. Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other than the father and recovery of possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. But it is contended by Mr. Vallabhacharyulu that an alienation by a member of his share in the joint family property operates as a severance in status and he becomes a divided member of the family from the date of alienation and if the alienation relates to a share in a particular item, in respect of that item. A suit for recovery by the plaintiff of his share from the alienee would according to him be a clear indication on his part to hold his share in severalty when recovered ; and plaintiff 1 must therefore be deemed to have become divided in status from his father by suing to recover his share. Before examining the soundness of this contention it may well be stated that the father did not purport to alienate his share in any item but purported to alienate the entirety of the items including the son's share therein as the father and the managing member for family necessity and no question of any severance of status would result from such alienations, assuming that an alienation would entail the legal consequence of division in status as contended for. But in our opinion an alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated. The preponderance of judicial opinion in this Court has been in favour of this view. In 25 Mad 690[6] at p. 717 Bhashyam Ayyangar J. expressed himself thus:

> An undivided member of a family, though he may alienate either the whole or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the joint family property other than what he has transferred.

In the learned Judge's view he would be an undivided member even in respect of the shares of the other members in the property alienated. This is in accord with the strict theory of Hindu law which does not recognize alienation as a mode of severance of a joint family. The notion that it would operate as a severance was based on the analogy of English law where a joint tenancy would be disrupted by an alienation of his share by the joint tenant. But the concept of a joint tenancy and the legal incidents attaching thereto are not the same as in the case of a joint Hindu family. It is wrong therefore to infer the same legal consequences from an act which operates differently under different systems of law. A Bench of this Court in 53 Mad 188[7] at p. 195 has taken the view that a member would become divided in respect of the property alienated by him and Mr. Vallabhacharyulu relies on the observations of Ramesam J. in that case. Referring to the observations of Bhashyam Ayyangar J. in 25 Mad 690[6] Ramesam J. remarks as follows :

> If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at p. 717 amounts to. It almost implies that so far as the properties in which the whole or part of the members' share is

---

6. Aiyyagari Venkataramayya v. Aiyyagari Ramayya, (1902) 25 Mad 690 (F B).

7. Lakshmi Achi v. Narayanaswami Naicker, (1930) 17 A I R Mad 51=124 I C 497=53 Mad 188=57 M L J 746.

sold, are concerned, he must be regarded as divided from the other members.

With all respect to the learned Judge, the interpretation placed by him on the observations of Bhashyam Ayyangar J. does not appear to be correct. In support of his view Bhashyam Ayyangar J. referred to 21 Bom 797.[8] On a reference to 21 Bom 797[8] it will be seen that the following observations of the Chief Justice in that case are directly against the view of Ramesam J.:

> It seems to follow from it that the sale of a coparcener's interest in joint family property cannot affect the position of such coparcener in the joint family or alter the rights of the several coparceners inter se . . . . . Basappa's (alienating coparcener's) rights to succeed to his brother's shares by survivorship were not therefore affected by the sale of his interest in the last item of joint family property to Gurpadappa so long as the purchaser did not proceed to work out his rights by partition (page 803).

This is a definite pronouncement that an alienating coparcener continues undivided even in respect of the share of the other members in the property alienated so that on the death of any member he will succeed to his share by survivorship along with the other members. In 51 M L J 99[9] at p. 104 a view different from Ramesam J. was expressed by Devadoss J.:

> When a coparcener brings a suit for a declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his for the alienating coparcener still continues a member of the joint family and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. . . . . . When a member of a joint Hindu family sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family.

The view of the learned Judge appears to be that the fact that the alienating coparceners recover their share would not ipso facto effect severance in status in respect of the property alienated because at a final partition the share alienated may be set apart for the alienor's share which would be taken by the alienee. There is authority for the view that the mere recovery by the coparcener of his share in the property alienated would not prevent the alienee from bringing a suit for a general partition and have the property alienated allotted to his share: *vide* 43 Bom 17.[10] We do not think it necessary to examine the soundness of this view. If the correct principle is that alienation per se by a member of his share or part thereof in joint family property does not operate as a severance in status in respect of the property alienated the mere recovery of their shares by the other members would not alter the status of the family. It would therefore rest on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption would be that they intend to hold the shares as joint family property. And the same legal consequences do not therefore follow from a suit by a plaintiff to set aside an alienation by his coparcener of a certain item of property as not being binding on him and to recover the plaintiff's share therein as would follow from a suit for partition without more. If the institution of such a suit should be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty there must be a clear indication to that effect in the plaint or there must be some other evidence to show that it was his intention to so hold the share which he seeks to recover. The Court will have to determine if there was any such intention expressed in the plaint and come to a conclusion on the point. In its absence the conduct of the parties either during the course of the litigation or subsequent thereto will have to be considered in determining this question of intention.

The decree in this case provides that the plaintiff as coparcener with defendant 1 should recover the share. It would seem to indicate that no severance in status between the plaintiff and his father was effected. The judgment of the learned District Judge in O. S. No. 8 of 1878 was pronounced on 30th September 1879. One of the alienations which have been set aside by the judgment as already observed was a gift made by the father in favour of his daughter Venkayya, the plaintiff's sister. On 23rd June 1880 Venkayya executed a mortgage with possession (Ex. 11) in favour of one Ramayya and this document was attested both by the plaintiff and his father. Therefore though the alienations were set aside the plaintiff confirmed the alienation. The appellate judgment in the case is Ex. N, dated 26th October 1880. On 30th August 1882, the plaintiff in O. S. No. 8 of 1878 by Ex. DD effected a sale of the joint family property which was not included in the suit. In that sale the recital is "the house site which has been acquired by our ancestors and which is continuing in our possession," thus clearly indicating the jointness of the family. In O. S. No. 8 of 1878 as the decree of the learned District Judge confirmed the leases and dismissed the suit as against the lessees, costs were awarded against the plaintiff. The lessees were executing the decree for costs against the son Venkatapatiraju but before execution was completed he died. Thereupon the father Suryanarayana Raju was brought in as his legal representative under the description of "undivided father." In execution the reversion in the suit property was sought to be attached. The objection taken by the father was that as the entire interest of the son devolved on him by survivorship the property could not be attached. This objection was upheld and the execution petition was dismissed. Thus, the lessees were unable to recover costs. These proceedings probabilize the contention of the defendants that the prior litigation did not effect a partition, that the son and the father were undivided in status and that the persons whose interest it was to assert that they were divided did not do so. It would be hardly likely that if the son was divided in status from the father, the son's widow would not have been brought on record and the son's separate interest would not have been attached and the money due to the lessees for costs would not have been recovered.

---

[8] Gurlingappa v. Nandapa, (1897) 21 Bom 797.

[9] Kandaswamy Udayan v. Velayutha Udayan, (1926) 13 A I R Mad 774=96 I C 993=50 Mad 320=51 M L J 99.

[10] Hanmandas Ramdyal v. Vallabdas, (1818) 5 A I R Mad 101=46 I C 133=43 Bom 17=20 Bom L R 472.

In 1890 the father effected an alienation of the reversion in the land but no objection was taken by the widow though she lived up to 1927. The conduct of the widow from the date of the death of her husband up to 1927 for a period of over forty years in not asserting any claim to succeed to her husband's interest renders probable that the son and the father were undivided in status. Ex. 3, dated 28th November 1894 lends support to this view. It is a deed of relinquishment executed by the son's widow in favour of one Ramaraju, an alienee from the father of one of the items which was covered by the suit O. S. No. 8 of 1878. What was relinquished under the said document was the "maintenance right" owned by her. Further there is evidence in the case on behalf of the defendants that the father and the son continued to live and mess together. We see no reason why we should not act on that evidence as the evidence is consistent with the testimony afforded by the documentary evidence. On a consideration of the entire evidence we have come to the conclusion that by the litigation in the prior suit the father and the son did not become divided in status and that Suryanarayanaraju after the death of the son, was competent to alienate the reversion in the lands. In this view the plaintiffs' suit fails and the appeal is dismissed with costs. The memorandum of objections is dismissed. No costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 221

LAKSHMANA RAO J.

Delhi Bather — Petitioner.

v.

Corporation of Madras — Respondent.

Criminal Revn. Case No. 405 and Petn. No. 386 of 1938, Decided on 8th November 1938, to revise order of Second Presidency Magistrate of the Court of the Presidency Magistrates, G. T. Madras, D/- 9th May 1938.

Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (d) — Butter offered for sale in sealed tins containing extra moisture admixed in process of manufacture — Conviction under S. 5 (1) (d) is bad.

Where butter which is offered for sale in sealed tins in the condition in which it was purchased contains extra moisture which had got unavoidably admixed in the process of manufacture of the butter, the conviction under S. 5 (1) (d) cannot be sustained. [P 221 C 2; P 222 C 1]

V. Rajagopalachari and K. Sanjiva Kamath — *for Petitioner.*

A. Suryanarayanayya—*for Respondent.*

C. V. Nagaraja Sastry for Crown Prosecutor — *for the Crown.*

Order.—The petitioner is the proprietor of an Oilman Stores in the Moore Market and he has been convicted under S. 5, cl. (1) (d), Madras Prevention of Adulteration Act of 1918 for offering for sale butter containing more than twenty percent of water. The butter was offered for sale in sealed tins in the state in which it was purchased by the petitioner from Lord's Butter Company and the evidence of the Assistant Manager of the Lord's Dairy Farm shows that the extra moisture must have got unavoidably admixed in the process of the manufacture of the butter. Proviso (ii) to S. 5 provides that no offence under that

Section shall be deemed to have been committed in such cases and the conviction of the petitioner cannot be sustained. It is therefore set aside and the fine if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 222

KUNHI RAMAN J.

Viswanathan Chettiar — Petitioner.

v.

Official Receiver, Coimbatore — Respondent.

Civil Revn. Petns. Nos. 1381 of 1936 and 947 of 1937 and C. M. P. No. 3086 of 1937, Decided on 18th August 1939, to revise order of Dist. Munsif, Udumalpet, D/- 16th June 1936.

Insolvency — Decree against father and son and property belonging to them attached — Subsequent insolvency of father — Execution can be allowed to continue as against interest of son in property attached.

It is only when the property proceeded against is the property of the person who has been adjudicated insolvent that the Court is bound to deliver it to the receiver. When a decree-holder in execution of decree against father and son has attached property belonging to them and subsequently the father is adjudicated insolvent, execution can be allowed to proceed as against the right, title and interest of the son in the attached property: *A I R 1935 Mad 651, Expl.; A I R 1939 Mad 572, Rel. on.* [P 223 C 1, 2 ; P 224 C 1]

P. N. Appuswamy Iyer — *for Petitioner.*

S. Ramachandra Iyer and P. S. Ramachandran — *for Respondent.*

Order.—These petitions arise out of execution proceedings which were started by the petitioner in the Court of the District Munsif of Udumalpet. The petitioner had obtained a decree against one Madha Naicken and his son on 8th July 1935, the decree amount being Rs. 2702-12-0. On 21st October 1935 he filed an execution petition for attachment of the immovable properties of the judgment-debtors. Attachment was ordered on 1st November 1935. Subsequently on 6th November 1935 Madha Naicken, the father who was one of the judgment-debtors filed I. P. No. 199 of 1935 in the Court of the Subordinate Judge at Coimbatore for being adjudicated insolvent. On 1st September 1936 he obtained an order of adjudication and the Official Receiver of Coimbatore was appointed interim receiver of his properties. Thereupon the Official Receiver in his capacity as interim receiver applied to the District Munsif on 26th March 1936 for stay of execution proceedings and his request was granted by the learned District Judge of Coimbatore who has upheld the order of the District Munsif. Against that order, the petitioner has filed C. R. P. No. 1381 of 1936. He had also appealed to the District Munsif staying execution proceedings. In his judgment the learned Judge has also upheld the contention urged on behalf of the respondent that no appeal lay, the petition of the Official Receiver before the District Munsif being in the nature of a claim petition. Against the order of the learned Judge the petitioner has filed C. R. P. No. 947 of 1937. He has also presented C. M. P. No. 3086 of 1937 to convert C. R. P. No. 947 of 1937 into a Civil Miscellaneous Appeal, should it be held that the order of the learned Judge is appealable and that consequently no revision petition lies to the High Court. It is however not necessary to deal with these aspects of the case since no technical objection has been taken on behalf of the respondent to anticipate which these different petitions have been filed.

The learned advocate for the petitioner contends that the District Munsif of Udumalpet has refused to exercise a jurisdiction that is vested in him in making the order against which the first civil revision petition is presented. To appreciate this argument, it is necessary to refer to the reasons given in the order of the learned District Munsif for staying execution proceedings. Subsequently to the insolvency of Madha Naicken, the petitioner was trying to bring the properties of Madha Naicken's son to sale in executing the decree that he had obtained against both the father and the son. His contention before the learned District Munsif was that he was entitled to proceed with the sale of the son's share because the son has not been adjudicated insolvent and consequently the son's share did not vest in the Official Receiver. He also contended that even if the Official Receiver wanted to proceed against the son's share on the ground that the father's right to dispose of the son's share had become vested in him on the insolvency of the father, that argument could be successfully met by the petitioner relying on the order of attachment of the son's share which, as already stated, was obtained by him on 1st November 1935. This attachment being prior to the insolvency of the father, the Official Receiver's right, if any, to exercise the father's privilege of selling the son's share for his debts has been destroyed.

The contentions urged before the learned District Munsif on behalf of the Official Receiver were that the property that was sought to be attached by the petitioner was the self-acquired property of the father Madha Naicken and not his joint family property and that consequently the son of Madha Naicken did not have any interest in it. The learned District Munsif states in his judgment that the question which he has to determine is whether the properties are the self acquisitions of Madha Naicken or the joint family properties of Madha Naicken and his son Ramaswami Naicken. Following the decision in 58 Mad 1056,[1] he has held that the proper Court to determine this question is the Sub-Court at Coimbatore before which the insolvency proceedings took place as otherwise it might lead to multiplicity of proceedings of a conflicting nature. He granted a stay of the execution proceedings as prayed by the Official Receiver and directed the petitioner to apply to the Sub-Court at Coimbatore under S. 4, Provincial Insolvency Act.

The learned advocate for the petitioner argues that by making this order the learned District Munsif has in effect upheld the contentions of the respondent that the properties that were sought to be attached are the self acquisitions of Madha Naicken. He also argues that the decision quoted above does not debar the learned District Munsif from allowing the execution proceedings to continue as against the right, title and interest of Madha Naicken's son in the property sought to be attached whatever those rights may be. It seems to me that these contentions are well founded. The judgment reported in 58 Mad 1056[1] shows that the view taken is that it is only when the property proceeded against is the property of a person who has been adjudicated insolvent that the Court is bound to deliver it to the receiver. This is clear from the following sentences that occur in the judgment:

> Whatever has been proceeded against as the property of the person who was subsequently adjudicated insolvent has to be delivered to the receiver .... I am of opinion that the policy of S. 51 is really to put an end, as it were, to the powers of the executing Court to proceed against or do anything in respect of property against which it has issued execution as soon as it is found that the judgment-debtor as whose property it was proceeded against has been adjudicated an insolvent, and an application is made by the receiver under S. 52 of the Act.

Therefore it is only where the property is sought to be attached as the property of the judgment-debtor who has been adjudicated insolvent that these observations can apply. In the present case the petitioner wanted to continue execution proceedings against the interest of the insolvent's son who was also a judgment-debtor and who admittedly has not been adjudicated insolvent. The judgment in the case mentioned above shows that there also the judgment-debtors were an insolvent father and his son and that the order that was upheld by Pandrang Row J. was the order made by the Subordinate Judge permitting the Official Receiver in that case to take possession only of the interest of the insolvent father in the attached properties and allowing the decree-holders to proceed with the execution of their decrees so far as the insolvent's son's interest in the attached properties was concerned. Therefore as contended by the learned advocate for the petitioner, the proper order was not to stay execution proceedings altogether but to direct a stay only so far as the petition related to the interests of Madha Naicken, the insolvent. So far as the proceedings related to the interest if any of Madha Naicken's sons in the attached properties they should have been permitted to be continued by the petitioner.

The petitioner's learned advocate also invites my attention to the decision reported in 1939 M W N 367.[2] This is a decision of a Bench of two Judges of this Court. Reliance is placed on the following sentences in the judgment:

> The learned advocate for the Official Receiver, has quoted the decision of Pandrang Row J. (sitting alone) in 1938 M W N 455.[3] The learned Judge does appear to have formed the opinion that in the case of the insolvency of a Hindu father S. 28 (2), Provincial Insolvency Act, does prevent the creditors of a son from attaching the son's share in the family property without the leave of the insolvency Court. As I have indicated I do not share this view and as I have also indicated it is opposed to the decisions of two Benches of this Court: 51 Mad 342[4] and Manicka Pillai v. Vel-

---

[1] Official Receiver, Kistna v. K. Ramayya, (1935) 22 A I R Mad 651 = 157 I C 826 = 58 Mad 1056=68 M L J 681.

[2] Arunachalam Chettiar v. Sabaratnam Chettiar, (1939) 26 A I R Mad 572=185 I C 159=I L R (1939) Mad 585= (1939) 1 M L J 889 = 1939 M W N 367.

[3] Baluswami Naidu v. Official Receiver, Madura, (1938) 25 A I R Mad 752=179 I C 564=(1938) 1 M L J 824=1938 M W N 455.

[4] Gopalakrishnayya v. Gopalan, (1928) 15 A I R Mad 479 = 111 I C 505 = 51 Mad 342 = 54 M L J 674.

layya Naicken (A. A. O. No. 253 of 1939). The position is that while the interest of the son remains unsold, or unattached the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and, he loses it if the interest of the son is attached by a creditor of the son.

The present case seems to fall within the scope of the observations which form the basis of the decision in the case referred to. The respondent's learned advocate then contends that the petitioner has a remedy open to him, namely to go before the Court in which the insolvency proceedings of Madha Naicken are pending and ask for suitable relief and that therefore he must not be permitted to resort to a civil revision petition in which the granting of the relief asked for is discretionary. I am not able to accept this contention as well founded. When it is clear that the Court below has refused to exercise a jurisdiction that is vested in it, that is a typical case in which the High Court will interfere in revision. The petitioner had attached the interests of the insolvent Madha Naicken and his son prior to Madha Naicken's insolvency and his execution proceedings before the learned District Munsif were only in respect of the son's share in the attached properties and therefore even according to the decision reported in 58 Mad 1056[1] the learned District Munsif had jurisdiction to direct the execution proceedings to continue against the right, title and interest, if any, of Madha Naicken's son in the attached properties. The refusal of the learned District Munsif to make such an order cannot be supported. I therefore allow the civil revision petitions and order that the stay granted by the learned District Munsif so far as it relates to proceedings in execution as against the right, title and interest of the insolvent Madha Naicken's son be cancelled and that the petitioner be permitted to continue his execution proceedings against such interest, whatever that may be, in the Court of the learned District Munsif. The petitioner is entitled to his costs and I allow one set of costs in the three applications payable out of the estate.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 224

LAKSHMANA RAO J.

Thanammal and others — Petitioners.

v.

Alamelu Ammal — Respondent.

Criminal Revn. Case No. 407 and Petn. No. 376 of 1939, Decided on 10th October 1939, to revise the judgment of Special Honorary Presidency Magistrate, Egmore, Madras, in C. C. No. 1637 of 1938.

Madras City Police Act (3 of 1888), S. 75— Conviction under S. 75 is no bar to prosecution under Ss. 323 and 352, Penal Code.

A conviction under S. 75, City Police Act, is no bar to the trial for an offence under Ss. 323 and 352, Penal Code. [P 224 C 2]

K. V. Rajagopalan and S. V. Rama Ayyangar — *for Petitioners.*

K. M. Balasubramaniam — *for Respondent.*

Public Prosecutor — *for the Crown.*

Facts.—A-1 was charged under S. 352, I. P. C., for assaulting P. W. 1. A-2 and A-3 under S. 323 causing hurt to P. W. 1. P. W. 1 and accused 1, live in different rooms in the same house. A-2 is accused 1's son and A-3 is A-1's brother-in-law. P. W. 1 was cleaning her vessels at the top and accused 2 who was cleaning his face spat near the vessels. P. W. 1 protested. A-2 abused her in return and accused also joined in the abuse. Accused caught P. W. 1 by her hair and accused 2 struck P. W. 1 on the face. P. W. 1's lower lip was split and bled. A-3 turned up and cut P. W. 1 on the back of her wrists with the knife causing bleeding wound. In the meanwhile the police arrived on the scene and charged P. W. 1, her husband and brother and all accused 1 to 3 under S. 75, Madras City Police Act. In the case under S. 75, Madras City Police Act, A-1, A-2 and A-3 were convicted and the others were acquitted. Accused 1 and 2 and 3 were again convicted under Ss. 352 and 323, I. P. C., respectively. In the revision it was contended that as the accused were already convicted under S. 75, Madras City Police Act, a second conviction under Ss. 352 and 323, I. P. C. was barred.

Order. — The conviction under Sec. 75, City Police Act, is no bar to the trial for an offence under Ss. 323 and 352, I. P. C., and the evidence justifies the conviction of the petitioners. The fines are not excessive and the revision is dismissed.

C.R.K./G.N. *Revision dismissed.*

A. I. R. 1940 Madras 225

KUNHI RAMAN J.

Parasuram Mangacharyulu and others — Petitioners.

v.

Parasuram Balarama Krishnamacharyulu and another — Respondents.

Civil Revn. Petn. No. 1495 of 1936, Decided on 25th August 1939.

Civil P. C. (1908), O. 1, R. 10 —Addition of parties — A person may be added as party where his presence is necessary to enable Court effectually and completely to adjudicate upon and settle all questions involved in suit and not merely those between parties—Person may be impleaded as defendant even if he counter-claims against plaintiff.

A person may be added as a party to a suit when his presence before the Court is necessary to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit and not merely the questions between the parties to the suit. [P 227 C 1]

In a suit for declaration of title to certain rights a person claimed joint interest in those rights with one of the plaintiffs and denied the title of the other plaintiffs. On his application to be impleaded as a defendant:

Held that his presence was necessary within the language of O. 1, R. 10: *AIR 1929 Mad 443 and 5 Mad 52, Rel. on*; *Case law referred*. [P 227 C 2]

V. Govindarajachari — *for Petitioners.*

P. Satyanarayana Rao — *for Respondents.*

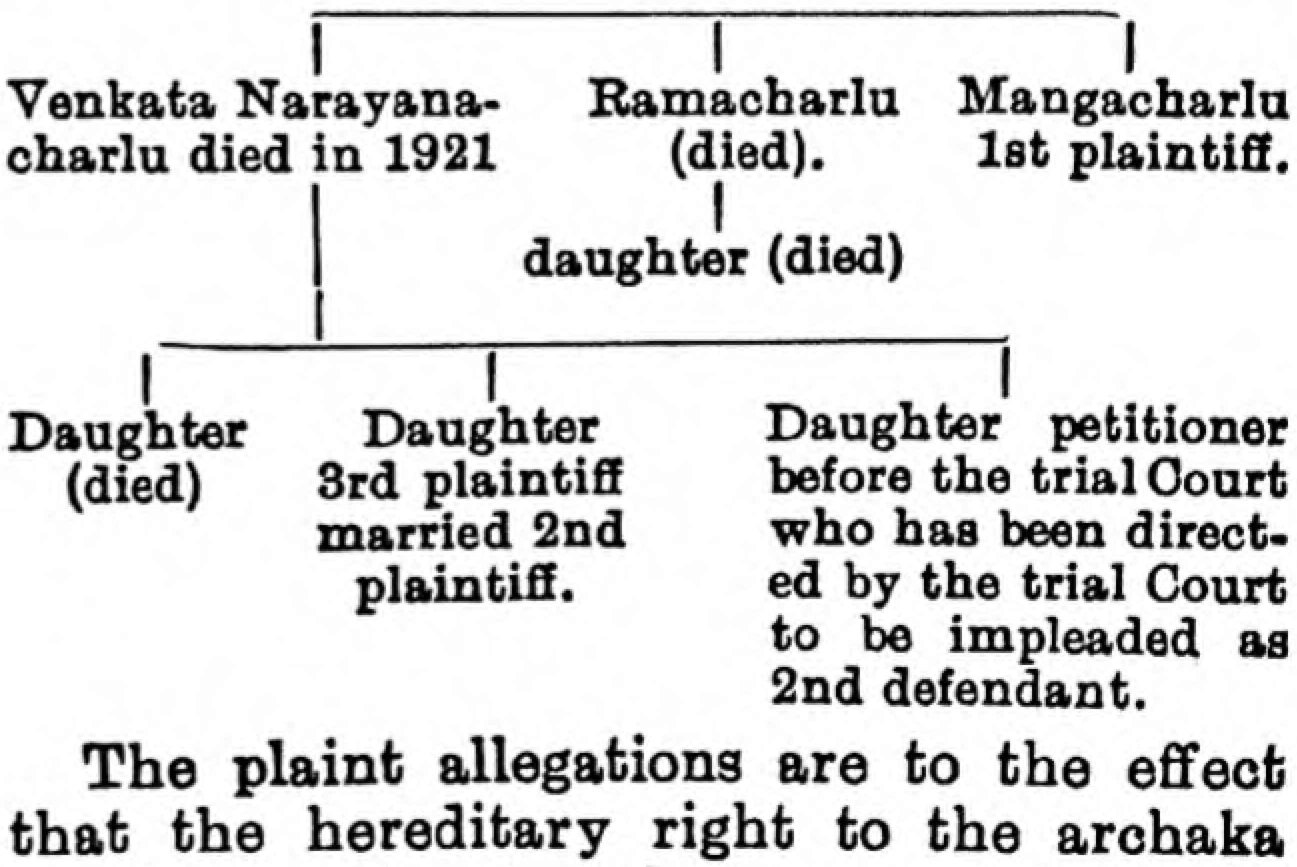
Order.—This is an application to revise an order made by the learned District Munsif of Tenali by which he allowed a petition presented on behalf of respondent 2 here that she may also be impleaded as a party to a suit O. S. No. 66 of 1935. The application was presented under O. 1, R. 10, Civil P. C. The relevant portion of the rule is worded as follows:

> The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just order . . . . that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

It is obvious from this provision that the Court in making an order directing a new party to be added must be satisfied either that that party ought to have been joined as plaintiff or defendant or that the presence of that party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. From the order of the learned District Munsif it appears that at the hearing of the application, the vakil for the plaintiffs was absent and only plaintiff 1 was present in person to represent his objections. The learned District Munsif says that plaintiff 1 was unable to explain what detriment would be suffered by him if the petition was granted. Then he says that he sees no detriment that would be caused to the plaintiff if respondent 2 here were brought on record as defendant 2. He also says that he does not see how it widens the scope of the suit or changes the character of it. From these statements contained in the order it is clear that the learned District Munsif did not apply his mind to the essential requisites prescribed by O. 1 R. 10 and therefore it became necessary for the learned advocates for the parties to address lengthy arguments before me in support of their respective contentions. The suit was filed by three plaintiffs and the main reliefs asked for in the plaint were the following:

> (1) To declare the plaintiff's hereditary right to perform archaka service in the Chennakesava Anjeneya Swamy Varu temple situated in the village of Nidubrolu; (2) to remove the defendant from the position of archaka . . . . and to declare that the defendant has absolutely no right to the archaka service; (3) to remove the defendant from possession of the house mentioned as item 2 in the schedule to the plaint and to put the plaintiffs in possession thereof; (4) to direct the defendant to give the plaintiffs the property mentioned in item 3 of the schedule to the plaint or its value; and (5) to grant a permanent injunction restraining the defendant from interfering in future with the plaintiffs' enjoyment of the rights to perform archaka service.

The following genealogical table is necessary to understand the plaintiffs' case as disclosed in the plaint.


Venkata Narayanacharlu died in 1921
Ramacharlu (died).
Mangacharlu 1st plaintiff.
daughter (died)
Daughter (died)
Daughter 3rd plaintiff married 2nd plaintiff.
Daughter petitioner before the trial Court who has been directed by the trial Court to be impleaded as 2nd defendant.

The plaint allegations are to the effect that the hereditary right to the archaka service in the temple was vested in the ancestors of Venkata Narayanacharlu and Ramacharlu who were both the brothers of plaintiff 1, that these two brothers are now dead but that during their lifetime they were both of them performing the archaka service personally each of them doing duty alternately for six months at a time in the year and that as remuneration for such service they were enjoying separately in two shares the archaka service inam lands. Plaintiff 1's case according to the plaint is that on the death of Ramacharlu his right to enjoy one-half of the archaka service inam lands and his right to perform acharka service for a period of 6 months in the year devolved on plaintiff 1. The case of plaintiffs 2 and 3 according to the plaint is that on the death of Venkata Narayanacharlu, whose daughter plaintiff 3 is, the corresponding rights which vested in Venkataranarayanacharlu devolved on plaintiff 3 and her husband, plaintiff 2. How plaintiff 3's husband, plaintiff 2, became entitled to this right is not explained in the plaint. The plaint goes on to say that plaintiff 2's father Rajagopalacharlugaru was in actual management of the right mentioned above on behalf of the plaintiffs and while he was in such management he had appointed the defendant as a temporary clerk for performing the archaka service and had put him in possession of the house mentioned in Sch. B to the plaint on the distinct understanding that he should relinquish archaka service and deliver possession of the house whenever he was called upon to do so. Subsequently, an arrangement was made between plaintiff 1 on the one hand and plaintiffs 2 and 3 on the other according to which the latter were to perform the archaka service alternately for six months at a time in the year and the first period of the six months ended on 30th June 1933. Thereupon plaintiff 1 caused plaintiffs 2 and 3 to send a registered notice to the defendant informing him that plaintiff 1's right to perform the service for six months commenced on 1st July 1933 and that since the plaintiffs had decided to perform the service themselves the defendant should relinquish such service and deliver possession of the house and other perquisites that were given to him during the time that he was called upon to perform such service. To that notice the defendant replied stating that he was appointed archaka not on behalf of the plaintiffs but by the trustees of the temple appointed under the Hindu Religious Endowments Board.

Defendant 1 in his written statement alleged inter alia that plaintiff 1 was not entitled to any relief in respect of the temple because he had been given away in adoption to another family as a result of which he had lost all his rights in his natural family and that on the death of Venkata Narayana Charlu, his rights devolved on his two daughters, viz. plaintiff 3 and her sister, the respondent who has now on her application been directed by the Court below to be impleaded as defendant 2. Thus defendant 1's version was that neither plaintiff 1 nor plaintiff 2 had any interest whatsoever in the archaka service or in the service inam lands but that the right involved in the suit was vested in plaintiff 3 and her sister, respondent 2, to this application. Defendant 1 also asked in his written statement for further particulars as to how the right that was vested in Venkata Narayanacharlu devolved upon plaintiff 3 and her husband, plaintiff 2, and stated that on such particulars being furnished he would plead further. It was after this written statement was filed that respondent 2 who as already stated is the sister of plaintiff came forward with her application to be impleaded as a party to the suit. Her version in the petition filed by her was that during the minority of herself and plaintiff 3 their uncle Rajagopalacharlu Garu who is also the father-in-law of plaintiff was invested with the right of managing the temple and the service Inam lands and also performing the archaka service on behalf of the two sisters. Her case therefore was that she was entitled to one-half of the suit properties, that she had an equal joint interest with plaintiff 3 in the suit property and that consequently she was a necessary party to the suit. This application was resisted before the trial Court on behalf of the three plaintiffs who contended that in case the petition was allowed and the respondent was impleaded as a party, it would lead to a triangular fight about title and that the effect of including her as a party would be to convert the suit which was one in ejectment into a suit based on title. They also pleaded that the right of the present respondent if any to the temple lands had become barred by limitation. These are the main contentions that are urged before me on behalf of the petitioners by their learned advocate Mr. Govindarajachari. He relies on the English decisions reported in (1892) 1 Ch 487[1] and also on the decision of a single Judge of this Court reported in 50 Mad 34.[2] There are other reported cases relied on by him in support of his contention that respondent 2 should not have been impleaded as a party to the suit and those are the decisions reported in 68 M L J 236,[3] 41 Bom L R 249,[4] at p. 256, A I R 1929 Mad 443[5] and 28 C W N 805.[6]

---

[1] Moser v. Marsden, (1892) 1 Ch 487=61 L J Ch 319=66 L T 570=40 W R 520.

[2] Prayaga Dossjee Varu v. Board of Commissioners for Hindu Religious Endowments, Madras, (1926) 13 A I R Mad 836=95 I C 214 =50 Mad 34=51 M L J 148.

The learned advocate for the respondent on the other hand contends that the subject-matter of the suit concerns the newly added party and that the suit is not a simple suit in ejectment but that it is a suit for a declaration that the three plaintiffs are solely entitled to a hereditary right to perform Archaka service in the temple and to enjoy the service inam lands. He contends that as a joint interest in those rights is claimed by respondent 2 her presence as a party to the suit is necessary to avoid multiplicity of suits. In support of his contentions he relies mainly upon the decision in 5 Mad 52[7] which has been followed by Venkatasubba Rao J. in the decision reported in A I R 1929 Mad 443.[5] He also relies upon the decision in (1895) 2 Q B 321,[8] A I R 1935 Mad 353,[9] (1937) 1 M L J 597[10] and A I R 1929 Mad 403.[11] I am satisfied that the contentions of the learned advocate for the respondents are well founded in view of the main relief asked for by the three plaintiffs in their plaint. This, in my view, is a case in which the presence of defendant-respondent 2 before the trial Court is necessary within the meaning of O. 1, R. 10, Civil P. C., to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. By avoiding to implead her as a party to the suit the plaintiffs are seeking to obtain a relief which will not completely dispose of all the matters in controversy involved in the suit. The learned Judges who decided the case reported in 5 Mad 52[7] were Sir Charles Turner C. J. and Muthusamy Ayyar J. The decision turned on the scope of S. 32, Civil P. C. of 1877. Under that Section also the Court had the power of directing a person to be made a party

> whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

These are the words that occur in O. 1, R. 10 (2) of the present Code also. Dealing with these words the learned Judges say as follows:

> Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit ? or is it meant completely and effectively determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties ? To accept the more restricted interpretation involves the addition of words which we do not find in the Section, namely 'between the parties to the suit.'

This seems to me to be a complete and effective answer to a similar argument addressed in the present case by the learned advocate for the petitioner. Following the decisions reported in 5 Mad 52[7] and A I R 1929 Mad 443,[5] I therefore hold that the learned District Munsif acted correctly in allowing the petition of respondent 2 to be impleaded as a party to the suit. This Civil Revision Petition is in the circumstances dismissed with costs. The order staying the trial before the Court below is cancelled.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 227

LAKSHMANA RAO J.

In re M. R. V. Venkatachalam Chettiar and others — Petitioners.

Criminal Revn. Case No. 935 and Petn. No. 877 of 1937, Decided on 9th August 1938, to revise judgment of Sub-Divisional Magistrate, Devakottah, in Cr. A. Nos. 41 and 42 of 1937.

Madras Gaming Act (3 of 1930), S. 9—Servants not gambling.

Where the servants of the keeper of the common gaming house were not found to be gambling, they cannot be convicted under S. 9. [P 227 C 2; P 228 C 1]

V. T. Rangaswami Iyengar and G. N. Chary — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The evidence justifies the conviction of petitioners 1 to 3 and their sentences are not excessive. But the evidence is that petitioners 4 to 11 were the servants of petitioner 1, the keeper of the common gaming house, and it is not suggested that they were gambling. They cannot therefore be convicted under Sec. 9, Madras Gaming Act, and their conviction is set aside. Their fines if levied will be refunded and otherwise the petition is dismissed.

---

[3] Narayanaswami v. Subbaramulu, (1935) 22 A I R Mad 394=156 I C 628=68 M L J 236.

[4] Virbhadrappa Shilvant v. Shekabai, (1939) 26 A I R Bom 188 = 182 I C 539=I L R (1939) Bom 232=41 Bom L R 249.

[5] Secretary of State v. Murugesa, (1929) 16 A I R Mad 443=118 I C 780.

[6] Abdul Gafur v. Ali Miah, (1925) 12 A I R Cal 26=82 I C 369=28 C W N 805.

[7] Vydianada v. Sitarama, (1882) 5 Mad 52.

[8] Montgomery v. Foy, Morgan and Co., (1895) 2 Q B 321=65 L J Q B 18=14 R 575=73 L T 12=43 W R 691=8 Asp M C 36.

[9] Sivarama Pillai v. Ganesarathnam Pillai, (1935) 22 A I R Mad 353=159 I C 899.

[10] Krishnaswami v. Municipal Council, Bellary, (1937) 24 A I R Mad 641=(1937) 1 M L J 597.

[11] Bavajee v. Annapurnamma, 1929) 16 A I R Mad 403=115 I C 812.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 228

KUNHI RAMAN J.

V. E. R. M. K. Krishnan Chettiar by agent Rama Ayyangar — Petitioner.

v.

P. L. P. Devarayan Chettiar — Respondent.

Civil Revn. Petn. No. 526 of 1937, Decided on 30th August 1939, to revise decree of Dist. Court, Coimbatore, in C. M. A. No. 162 of 1936.

Provincial Insolvency Act (1920), Ss. 53 and 54 — Fraudulent preference — Transfer made under threat of legal proceedings — Dominant motive not to prefer mortgagee to other creditors — Mortgage cannot be challenged under Ss. 53 and 54.

Where the dominant motive of the debtor when he executes the mortgage is not to prefer the mortgagee to his other creditors but the debtor is compelled to execute the mortgage deed under a threat of legal proceedings which would have led to costs being incurred by the debtor, the mortgage cannot be challenged under Ss. 53 and 54 : *A I R 1938 Mad 177 and (1883) 23 Ch D 695, Rel. on; A I R 1925 Mad 1089, Disting.* [P 229 C 2; P 230 C 1]

T. V. Ramiah — *for Petitioner.*

T. K. Sundararaman — *for Respondent.*

Order. — This is a petition to revise the order of the learned District Judge of Coimbatore allowing an appeal in the following circumstances: The Official Receiver of Coimbatore applied before the learned Subordinate Judge of Coimbatore under Ss. 53 and 54, Provincial Insolvency Act, to annul, on the ground of fraudulent preference, a mortgage deed executed by a person whose estate was, after his death, adjudicated insolvent. The mortgage deed was executed on 7th July 1931 in favour of the petitioner here who was the respondent in the Court of the Subordinate Judge. The petition to have the mortgagor adjudicated insolvent was presented on 9th September 1931. Subsequently, the mortgagor died, and after his death, the adjudication took place after his sons were brought on record to represent his estate. The learned Subordinate Judge held on the evidence before him that no case of fraudulent preference was made out and that the mortgage was executed as a result of pressure which the mortgagee who was a bona fide creditor of the insolvent brought to bear on him. To the mortgage the minor sons of the insolvent were also parties and the point was raised before the learned Subordinate Judge that even if it be found that there was fraudulent preference, the mortgage must be held to be binding on the shares of the minor sons of the insolvent. Since the Subordinate Judge found that there was no fraudulent preference, he states in his judgment that it is unnecessary to consider the second point that was pressed before him on behalf of the mortgagee.

As already stated, the proceedings before the Subordinate Judge were started by the Official Receiver of Coimbatore. From the decision of the Subordinate Judge an appeal was preferred to the District Court of Coimbatore. This was done not by the Official Receiver but by one of the creditors of the insolvent who it is conceded was entitled to do so. The learned District Judge has allowed the appeal holding that all the circumstances point to the fact that the insolvent, while unable to pay his debts, had with a fraudulent motive given preference to one of his creditors by executing the mortgage deed. This finding of the learned District Judge is attacked in revision.

The learned advocate for the mortgagee petitioner argues that the lower Appellate Court does not seem to have applied its mind at all to one of the most important documents relied upon by the petitioner in both the Courts below in support of the contention that there was pressure exercised by the creditor in whose favour the mortgage deed was executed. This document is Ex. 5 which would show that the mortgagee was pressing the mortgagor for payment of the debts which both the lower Courts have found were lawfully due to him and were in addition old debts due to him by the mortgagor. This letter which bears date 18th June 1931 shows also that the creditor was threatening to file a suit. In this letter the mortgagor therefore appeals to the creditor not to sue him. He says that he is prepared either to sell or mortgage his lands and points out that even after money is expended in filing a suit and obtaining a decree against him the creditor can ultimately proceed only against these properties. He points out further that when he is willing to give these properties as security there is no need for the creditor to resort to litigation. The genuineness of this letter was not questioned before the lower Courts.

The learned Subordinate Judge relied upon this letter and the oral evidence adduced before him. There is the evidence of the Official Receiver's own witness P. W. 3 who was a gumastah employed in the mortgagee's shop on the date the mortgage was executed but whose services were dispensed with subsequently. On the date on which the witness was examined before the Subordinate Judge he was not in the service of the mortgagee. His evidence is that he had attested the mortgage deed Ex. 1, that the mortgagee had made a demand and that the debtor had said that he would execute a mortgage. The witness said at first in examination in chief that "no pressure was brought to bear on the debtor." In cross-examination he states that his master's firm was making demands for payment and that it was after that that the mortgage deed was executed. He also admits that the creditor was threatening to sue the debtor. A day prior to the execution of the mortgage deed a varthamanam letter was passed by the debtor to the creditor in which the former asked for a month's time to pay off the debt. In spite of that he was made to execute the mortgage on the following day. The respondent's first witness has given an explanation for this expeditious passing of the security and this has been accepted by the learned Subordinate Judge. It was that the witness who was one of the persons responsible for obtaining the mortgage deed was afraid that his master, the creditor, might object to a month's time being given to the debtor to pay his debts and therefore a day after the varthamanam letter was passed, the mortgage deed was taken from the debtor. It may be mentioned here that it was a second mortgage. The law on the subject of fraudulent preference is summarised in Mullah's Law of Insolvency at pp. 443 and 448. Regarding the test to be applied this is what the learned author says :

> In order to avoid a transaction as fraudulent preference it is not sufficient that the creditor was preferred ; it is essential that the transfer or payment was made with a view to give preference to that creditor over the other creditors. The view to prefer must have been the dominant or substantial view ; it is not necessary that it should have been the sole view.

Again at p. 448 occur the following sentences :

> The transfer or payment made under a threat of legal proceedings whether civil or criminal, does not amount to a fraudulent preference, even though there is no immediate power of rendering the threat available by taking legal steps. Similarly a transfer or payment made under an apprehension of legal proceedings even though there has been no threat, demand or pressure from the creditor, does not amount to a fraudulent preference.

The case reported in (1937) 2 M L J 868,[1] is strongly relied on by the petitioner's learned advocate in support of his contentions. That was a case in which the debtor had executed a sale deed in favour of his nephew and son-in-law who was one of his creditors. At the trial, the vendee even stated in cross-examination that as he was the debtor's son-in-law the debtor wanted to pay him first. In spite of these circumstances it was held, applying the test laid down by Bowen L. J. in the case reported in (1883) 23 Ch D 695,[2] that the debtor had no idea of giving preference to the creditor, that such an idea was not the operative effectual view and that consequently there was no fraudulent preference of the creditor. The learned advocate for the respondent contends that in this decision the debtor had already committed a criminal offence and that it was to avoid the consequences that he executed the sale deed in question, but whether the proceedings threatened were civil or criminal will not according to the decision make any difference. So long as there was threat of civil proceedings to avoid which the debtor has made the alienation and so long as his dominant motive was not to fraudulently prefer a particular creditor the validity of the alienation cannot be challenged under Ss. 53 and 54, Provincial Insolvency Act. The case reported in 49 M L J 562[3] which is relied on by the learned advocate for the respondent seems to have no application to the present case. As contended by the learned advocate for the petitioner the question whether there was fraudulent preference or not is mainly a question of fact and it will depend upon the circumstances of each case. In 49 M L J 562[3] it was found by the learned Judges that one of the mortgage deeds executed by the debtor was undoubtedly a fraudulent transaction and that it was impossible in deciding the question of the debtor's motive in respect of another mortgage executed at or about the same time to treat the two transactions as absolutely distinct and separate from each other. There was a distinct finding in that case that the facts disclosed that at the time the alienation was made by the insolvents they were in desperate circumstances and were trying to part with their assets recklessly and desperately not caring what the consequence might be.

---

[1] Ranga Reddy v. Official Receiver, Anantapur, (1938) 25 A I R Mad 177=176 I C 652=(1937) 2 M L J 868.

[2] Ex parte Hill, In re Bird, (1883) 23 Ch D 695 =52 L J Ch 903=49 L T 278=32 W R 177.

[3] Arunachalam Chettiar v. Official Receiver, Tanjore, (1925) 12 AIR Mad 1089=91 I C 522 =49 M L J 562.

In the present case on the evidence placed before him, the learned Subordinate Judge had arrived at the conclusion that the dominant motive of the debtor when he executed the mortgage was not to prefer the mortgagee to his other creditors but that the debtor was compelled to execute the mortgage deed under a threat of legal proceedings which would have led to costs being incurred by the debtor. The existence of the debt was not disputed. Even the learned District Judge states in his judgment that the consideration for the mortgage was not assailed before him. It seems to me in these circumstances that there was no warrant for the District Judge interfering with the finding of fact arrived at by the learned Subordinate Judge that in this case there was no fraudulent preference. The learned District Judge seems to have fallen into an error because he does not seem to have applied his mind to Ex. 5, the genuineness of which was not attacked at any stage and which shows unmistakably that the creditor was pressing for payment and was threatening to file a suit against the debtor shortly before the execution of the mortgage deed. One of the reasons that induced the learned District Judge to hold that there was no pressure or threat of legal proceedings seems to be what is stated in para. 6 of his judgment namely that the creditor did not even send a registered notice to the insolvent threatening him with a suit. The conclusion is irresistible that had the learned Judge looked at Ex. 5 he would certainly have been satisfied that the creditor was threatening to sue the debtor and the debtor was appealing fervently to the creditor not to resort to litigation. In these circumstances I am satisfied that the view taken by the learned Subordinate Judge is correct and that there was no valid reason for setting aside his decision.

Another defect in the learned District Judge's judgment is brought to my notice and that is that he has failed to deal with the second point that was raised before the learned Subordinate Judge, namely that even though the mortgage is found to be fraudulent within the meaning of Ss. 53 and 54, Provincial Insolvency Act, in respect of the insolvent's interest in the property yet the transaction must be held to be binding on the shares of the minor sons of the insolvent on whose behalf also he had executed the mortgage. This is a serious omission, but in view of the finding that I have recorded about the nature of the alienation it is not necessary to say anything more about it; nor is it necessary now to consider the question of the validity of the mortgage in respect of the shares of the insolvent's sons, since the finding of the learned Subordinate Judge is upheld here. I therefore set aside the decision of the learned District Judge and restore that of the learned Subordinate Judge. The petitioner shall have his costs both here and in the lower Appellate Court.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1940 Madras 230

LAKSHMANA RAO J.

Hajee Mohammad Kadir Sheriff — Petitioner.

v.

Rahimatullah Sahib — Respondent.

Criminal Revn. Case No. 743 and Petn. No. 706 of 1938, Decided on 15th February 1939, to revise judgment of Sub-divisional First Class Magistrate, Tanjore, in C. C. No. 44 of 1938.

Penal Code (1860), S. 171 (g) — Publication by one of contestants to election that other is leper knowing it to be untrue is not offence under S. 171 (g).

Publication by one of the contestants to an election that the other contestant is a leper, knowing it to be untrue with the mala fide intention of injuring the latter's reputation and humiliating him before the public does not constitute an offence under S. 171 (g). [P 230 C 2; P 231 C 1]

T. R. Srinivasan — *for Petitioner.*

K. S. Jayarama Iyer and G. Gopalaswami — *for Respondent.*

Public Prosecutor — *for the Crown.*

Facts. — The petitioner and the respondent in this criminal revision petition contested Municipal elections in Tanjore and at the time the nomination papers were filed by the petittioner the respondent is alleged to have published in the crowded Municipal Meeting Hall that the petitioner is a leper, knowing it to be untrue with the mala fide intention of injuring the complainant's reputation and humiliating him before the public. The petitioner preferred a complaint under S. 500, I. P. C., and the respondent raised a preliminary objection that the facts constituted an offence under S. 171 (g), I. P. C., and that a complaint under this Section was not legal without the sanction of the Government. The Sub-Magistrate upheld the objection relying on

1931 M Cr C 115,[1] 1934 M Cr C 13,[2] 1937 M Cr C 289[3] and 1937 M Cr C 305[4] and dropped the further proceedings. The revision petition is filed against that order.

Order.—The facts alleged do not constitute an offence under S. 171 (g), I. P. C., and the order of the Sub-divisional Magistrate is unsustainable. It is therefore set aside and there will be further inquiry into the complaint in accordance with law.

C.R.K./D.S. *Order set aside.*

---

[1] Dholliah v. Sub-Inspector of Police, (1931) 18 A I R Mad 702=1931 Cr C 942=134 I C 813 = 32 Cr L J 1215 = 54 Mad 1018 = (1931) 4 M Cr C 115=61 M L J 770.

[2] In re Gajendra Naidu, (1934) M Cr C 13.

[3] Ramaswami Ayyangar v. Panduranga Mudaliar, (1938) 25 A I R Mad 173=171 I C 943= 39 Cr L J 1=(1937) 2 M L J 757=1937 M Cr C 289.

[4] In re Rami Reddi, (1937) M Cr C 305.

A. I. R. 1940 Madras 231

MOCKETT J.

District Board, West Tanjore — Petitioner.

v.

Ponnuswami Pallavarayar — Respondent.

Civil Revn. Petn. No. 306 of 1939, Decided on 21st July 1939, to revise order of Dist. Munsif, Pattukottai, D/- 19th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 4 (c)—Arrears of rent due by lessee of properties of religious endowment under management of District Board under S. 63, Madras Local Boards Act, is sum due to local authority and comes under S. 4 (c), Madras Agriculturists Relief Act.

Clause (c) of S. 4 comprehends any money due to a local authority. Income from endowments and trusts under the management of a District Board comprise income from endowments and trusts whether derived by reason of the operation of S. 63 or S. 64, Madras Local Boards Act. That income is the district fund. It is recoverable and must be recoverable only by the local authority. It is a sum due to them, viz. the local authority. Hence, arrears of rent due by lessee of properties of religious endowment under management of District Board is amount due by lessee to local authority and comes under S. 4 (c), Madras Agriculturists' Relief Act. [P 231 C 2 ; P 232 C 2]

T. R. Venkatarama Sastry — *for Petitioner.*

Order. — This Civil Revision Petition raises a nice question under S. 4, cl. (c), Madras Agriculturists' Relief Act of 1938 read with certain provisions of the Madras Local Boards Act. The respondent has unfortunately not been represented but I have had the advantage of hearing Mr. T. R. Venkatarama Sastriar who has placed before me all the relevant provisions of the Acts relating to the matter under consideration. The only facts that need be stated are that under S. 63, Madras Local Boards Act, the administration of the Mukthambalapuram Chatram at Orathanad was made over by the Board of Revenue to the District Board. The defendant is a lessee of certain properties, part of the trust, and a decree has been obtained against him by the District Board of West Tanjore in respect of arrears due under the lease. The defendant calls in aid the provision of the Madras Agriculturists' Relief Act. It is conceded that he is an agriculturist within the meaning of that Act but the petitioners rely upon the provisions of S. 4, cl. (c) which, they say, places the respondent outside the protection of the Act. S. 4 reads as follows :

> Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads :
>
> (c) Any tax or cess payable to any local authority or any other sum due to them, by way of loan or otherwise.

It will be seen that clause (c) of S. 4 is worded as comprehensively as possible and it seems to me to comprehend any money due to a local authority, but the learned District Munsif has taken the view that the respondent is entitled to the protection of the Agriculturists Relief Act because, to put it shortly, the amount due from him is not money due to a local authority but money due to this Chatram itself. The learned Munsif has dealt with the matter with the utmost care but I am unable to share the view which he has taken of this question. The relevant provisions of the Madras Local Boards Act are as follows : S. 63 provides for the Board of Revenue making over to Local Boards the management and superintendence of any charitable endowment in respect of which powers and duties attach to the Board of Revenue under the provisions of the Madras Endowments and Escheats Regulation, 1817. "Thereupon" says the Section,

> all powers and duties which attach to the Board of revenue in respect thereof shall attach to the Local Board as if it had been specially named in the said regulation, and the Local Board shall manage and superintend such endowment.

Section 64 says :

> A Local Board may accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied.

So it would seem that under S. 63 there is power given to the Board of Revenue to make over to the Local Board the management and superintendence of any charitable endowment. Under S. 64 a Local Board can accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied. S. 112 sets out the purpose to which local funds may be applied and under cl. (iii), sub-s. 1 of that Section one of those purposes is for the construction and maintenance of choultries. S. 114 says: "There shall be constituted for each district a district fund and for each village a village fund."

Section 115 states:

> The rules embodied in Sch. 5 regarding ..... district funds respectively, and regarding the administration of those funds, shall be read as part of this chapter.

The provisions of the schedule are of the utmost importance in arriving at a decision in this petition. It will be seen at the top of Sch. 5 that first the words appear "it shall be the duty of every Local Board to provide for the payment of" and then a number of matters are set out. Under 1-B:

> A District Board shall have power to make such provision as it thinks fit for carrying out the requirements of the district in respect of the following matters. .... (c) the establishment and maintenance of choultries in the district classified as district choultries.

And it is well to recall that S. 112, as I have pointed out, states that the funds received under the Act may be applied for the purpose of choultries among others. Under the heading "district funds" is found item (9) "income from endowments and trusts under the management of the District Board;" and Mr. Venkatarama Sastriar has naturally relied very strongly on that provision because obviously if these charitable funds are made part of the income of the District Board, it should necessarily follow that all the provisions for the recovery of that income should be opened to the District Board itself. Now those are the provisions and of course at this stage there has yet been no decision on the matter at all. The only decision that has been referred to is in 34 Mad 333,[1] which is of interest because it will be seen that the Bench consisting of Benson and Krishnaswami Ayyar JJ. took the view that when a charity was handed over to a local authority the local authority was absolved from the actual provisions of the deed dedicating the charity. That of course is no direct authority but it seems to convey to my mind the notion that when these charities are handed over, they to a large extent lose their identity and become part of the local authority at least to this extent that it was held it was not necessary that accounts should be made accessible to all persons as would have been the case if it had not been handed over. At page 336, the Bench uses these words:

> The duty to keep and give inspection of accounts is part of the function of management. When it is transferred by a special law to a statutory body we must look to that law and not to the instrument of trust for the duties of the manager.

The reason why the lower Court in this case decided against the petitioner can, I think, be shortly stated. The learned Judge takes the view in para. 9 that there is a distinction between funds receivable under S. 64, Local Boards Act, and S. 63. The learned Judge also takes the view that

> under S. 64, Local Boards Act, a Local Board can accept a trust if its income can be utilized exclusively for the purposes laid down in the Act. If the donor wants to endow the Local Board with an endowment with the object of utilizing its funds for purposes other than the purposes for which the Local Board's own income can be utilized, then the Local Board cannot accept such an endowment. There the case laid down under S. 63 is different from the one in S. 64.

I have endeavoured to indicate that in my view the only difference between Ss. 63 and 64 is that S. 63 provides for the transfer of trusts by the Board of Revenue; S. 64 enables the local authority to accept trusts provided that they relate exclusively to the furtherance of any purpose to which its funds may be applied. Of course, a choultry would come under that provision because one of the things which the Local Board may do is to provide choultries. But the learned Judge has distinguished between funds derivable under transactions under these two Sections although he seems to concede that if the funds, the subject of this case, come under Sch. V (9) then the respondent would have been unable to invoke the Agriculturists' Relief Act. It seems to me clear that income from endowments and trusts under the management of a District Board comprise income from endowments and trusts whether derived by reason of the operation of S. 63 or S. 64. That income is the District Fund. It is recoverable and must be recoverable only by the local authority. I cannot see how it can be possibly said that that is not a sum due to them, viz. the local authority. It seems to me that for all relevant purposes the identity of the chatram is merged in the local authority and I can imagine nothing more inconvenient than that the position should be that for the purpose of recovering this particular item of the Board's funds the Board should be placed in one position but in respect of amounts due to them from the public in another. In view of the facts I think that the order of the lower Court should not be allowed to stand. The learned Munsif obviously withheld jurisdiction vested in him and in consequence his order will be set aside. The petition is allowed with costs.

---

[1] Neelayathakshi Ammal v. The Taluk Board, Mayavaram, (1911) 34 Mad 333=8 I C 488 = 21 M L J 885.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 233

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

T. V. Duraiswami Pillai — Appellant.

v.

P. Venkata Reddy and others — Respondents.

Second Appeal No. 845 of 1935, Decided on 28th September 1939, against decree of Sub-Judge, Vellore, in A. S. No. 37 of 1935.

Mortgage—Usufructuary mortgage deed providing for payment of peshkush to Government by mortgagee—Suit by mortgagor for redemption and preliminary decree passed—Mortgagee throughout failing to pay peshkush, mortgagor suing mortgagee to recover amount of peshkush which mortgagor was compelled to pay—Subsequent final decree in redemption suit—Mortgagor held entitled to rely on mortgage deed in his suit for recovery of amount of peshkush and entitled to recover by way of damages what he was compelled to pay during six years preceding suit.

According to a usufructuary mortgage deed the mortgagee was to pay annually to the Government the amount of peshkush. Mortgagor brought a suit for redemption and obtained a preliminary decree. As the mortgagee had throughout failed to pay the amount of peshkush the mortgagor brought a suit to recover the amount of peshkush which he had been compelled to pay to the Government to avoid sale of the property. Subsequently, the sum under the mortgage was paid and a final decree was passed:

Held that as the mortgage deed subsisted at the date of the mortgagor's suit for recovery of the amount of peshkush, he was entitled to rely on the mortgage deed and as the mortgagee was guilty of breach of contract contained in registered deed the mortgagor was entitled to recover by way of damages what he was compelled to pay during the six years preceding the suit: *A I R 1931 P C 226, Rel. on.* [P 235 C 1]

D. Ramaswamy Iyengar — *for Appellant.*

T. L. Venkatarama Iyer — *for Respondents.*

Leach C. J.—In order to appreciate the questions which arise in this appeal it is necessary to set out the course of events preceding the suit. The appellant is a mittadar in the North Arcot District. On 27th February 1875 his predecessor-in-title mortgaged a village in the mitta to the respondent's predecessor-in-title to secure a loan of Rs. 9000. The mortgage was a usufructuary mortgage and the deed provided that the mortgagee should pay annually to Government Rs. 170-13-2, the amount of the peshkush. In the year 1914 the appellant filed a suit in the Court of the Subordinate Judge of Vellore for the redemption of the mortgage, and obtained a preliminary decree. The respondent was dissatisfied with the terms of the decree and appealed to this Court which modified it in certain respects which do not call for mention. It is sufficient to say that the preliminary decree was allowed to stand with further directions with regard to the taking of the account. 1st July 1924 was the date fixed for redemption. The appellant did not pay the amount due under the mortgage and on 1st July 1924 the respondent obtained a final decree for the sale of the property. The respondent and his predecessors-in-title have not fulfilled their obligation to pay the peshkush due to Government. Throughout, the appellant or his predecessors-in-title have been compelled to pay the peshkush in order to prevent the Government from selling the property.

On 16th January 1933 the suit out of which this appeal arises was filed by the appellant to recover the amounts which he had been compelled to pay to Government as peshkush during the six years immediately preceding the suit. After the suit had been instituted the appellant paid the amount due to the respondent under the mortgage. The payment was effected by the adjustment of certain accounts in which the parties were interested. On 7th March 1933 satisfaction of the mortgage decree was entered and the appellant was given possession of the property. The adjustment between the parties which led to the discharge of the mortgage debt did not however take into account the amount due by the respondent to the appellant in respect of the peshkush which the appellant had been compelled to pay in order to safeguard the property, and in these circumstances the suit proceeded. The respondent denied all liability and various issues were framed, but the case really only involved the consideration of two questions. The first question was whether the appellant was entitled to rely on the mortgage deed and claim damages on the basis of a breach of a contract in writing registered in which case he was entitled to recover the total amount paid by him as peshkush for the six years preceding the suit. The second question was whether the position was governed by S. 69, Contract Act, in which case, the appellant could only recover the amounts paid for three years. The District Munsif held that the appellant was only entitled to rely on S. 69, Contract Act, and granted him a decree in respect of the amount paid by him in respect of the three years immediately before suit. On appeal, the Subordinate Judge of Vellore concurred in the decision of the District Munsif. The appellant contends that he is entitled to recover the full amount, of his claim as damages for breach of a registered contract and has relied on the decision of the Privy Council in 59 Cal 463.[1] For the respondent three contentions have been raised. In the first place it is said that 59 Cal 463[1] is not an authority for the proposition that the appellant could file a separate suit for damages for breach of the respondent's covenant in the mortgage deed after the final decree had been passed in the redemption suit. In the second place it is said that even if that decision does apply the mortgage deed cannot be relied on in this case as the mortgage was redeemed on 7th March 1933 and in consequence the relationship of the mortgagor and the mortgagee ceased. The third contention is that a suit is not maintainable by reason of the provisions of O. 34, R. 10, Civil P. C. It may here be mentioned that the second and the third contentions were not advanced in the Courts below.

An examination of the judgment in 59 Cal 463[1] makes it manifest that the appellant is entitled to rely on the mortgage deed notwithstanding the passing of the final decree. In that case the plaintiff sued to enforce a mortgage. Defendant 7 was impleaded because he was entitled to a usufructuary mortgage of an earlier date and to certain simple mortgages which had been created after the plaintiff's mortgage. A final decree for sale was obtained by the plaintiff, but before the sale took place he brought a second suit to recover the amount of the revenue which he had been called upon to pay in respect of the mortgaged property. The mortgagor had by the mortgage deed covenanted to pay this revenue. The question was whether the mortgagee was entitled to bring the second suit. It was argued that inasmuch as there had been a final decree the mortgage deed could not be looked at. The decree had, it was said, taken the place of the deed. In this connexion reliance was placed on the decisions in 34 Cal 150[2] and 54 Cal 161.[3] The Board did not accept the argument and held that the appellant was entitled to institute the second suit and to have the amounts which he had paid in respect of the Government revenue made a first charge on the sale proceeds.

In dealing with the argument based on the decisions in 34 Cal 150[2] and 54 Cal 161,[3] the Judicial Committee pointed out that in the earlier case (which was followed in the later case) all that was decided was that, under the Transfer of Property Act, the effect of a preliminary decree is to convert the mortgage claim into a judgment-debt, and the mortgagee into a judgment-creditor or decree-holder, and, consequently to deprive him of any right to further interest at the contract rate in respect of his mortgage claim covered by the decree. Their Lordships then proceeded to say :

> As regards the present question, the only effect of the preliminary decree was to make the mortgaged property security for the judgment-debt pending realization by sale as provided in the decree, and, pending such realization, the plaintiff, as a secured decree-holder, was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted and their Lordships see no reason why he should not be entitled, in accordance with the opinion of the Board in the case already cited, 11 M I A 241,[4] to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested.
>
> In the present case, the same result is reached as to subsequent encumbrances by reference to the mortgage deed itself. The authority conferred upon the mortgagee by that deed to pay the Government revenue in respect of which the mortgagors make default is not limited in point of time. It is necessarily intended to continue so long as the mortgagee remains interested under the mortgage in the mortgaged properties. When the payment is so made, it becomes, by the very terms of the deed, a further charge upon the properties which presumably is enforceable as such.

Their Lordships here clearly regarded the mortgage deed as still subsisting and that the plaintiff was entitled to enforce the covenant by which the mortgagor had undertaken to pay the Government revenue. The decree had decided what was to be paid under the mortgage and had settled the question of interest. To that extent the decree and not the mortgage deed had to be looked at. In the light of this decision, it is not possible for the respondent to contend that by virtue of the final decree the appellant is to lose all benefit of the covenant under which the respondent was bound to pay the peshkush. As the mortgage deed subsisted at the date of the suit the appellant was entitled to rely on it. The respondent had broken a term of the contract embodied in the deed and he was guilty of a breach of a contract in writing registered which gives the appellant the right to recover by way of damages what he was compelled to pay during the six years preceding the suit. The decision of the lower Courts that the appellant was only entitled to rely on S. 69, Contract Act, is erroneous.

---

[1] Manohar Das Mohanta v. Hazarimull, (1931) 18 A I R P C 226=134 I C 645=58 I A 341=59 Cal 463 (P C).

[2] Sunder Koer v. Sham Krishan, (1907) 34 Cal 150=34 I A 9=5 C L J 106 = 11 C W N 249 (P C).

[3] Jagannath Prosad v. Surajmal Jalal, (1927) 14 A I R P C 1= 99 I C 686 = 54 I A 1=54 Cal 161 (P C).

[4] Nugenderchand Ghose v. Kaminee Dossee, (1866-67) 11 M I A 241=8 W R 17=2 Suther 77=2 Sar 275 (P C).

There is no substance in the respondent's second and third contentions. The amount which was paid by the appellant to redeem the property did not, as has been pointed out, take into consideration the amounts which the respondent ought to have paid by way of peshkush. The adjustment which led to the redemption of the property took no account of this suit which was already on the file. Therefore what happened in the redemption suit cannot be deemed to have put an end to what the appellant was entitled to as the result of the breach of the respondent's covenant to pay the peshkush. The position was that the appellant as mortgagor paid what was due by him under the mortgage, but the respondent did not pay what he was liable to pay under the covenant. O. 34, R. 10 provides for the adding to the mortgage money the costs of the suit and other costs, charges and expenses which have been incurred by the mortgagee since the date of the preliminary decree. This rule was added to the Code in 1930. The decree for sale in this case was in 1924 and therefore this rule can have no application. Nor can it affect rights which exist independently of the rights conferred by the preliminary decree. For the reasons indicated the appeal succeeds. The respondent has not objected to the decree passed by the trial Court which gave the appellant the amount claimed for the three years immediately preceding the suit with interest. The amount and interest awarded in respect of the peshkush paid for the three years immediately preceding the suit will therefore stand and the appellant will get in addition the amount claimed for the first three years of the six years with interest from the date of the suit to the date of the decree. There will be interest on the decretal amount at the Court rate from the date of the trial Court's decree to the date of payment or realization. The appellant is entitled to the costs awarded below and in addition he will get costs throughout based on the further amount awarded to him by the decree of this Court.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 235

MOCKETT J.

Jupalli Narasimha Nayanim Varu — Petitioner.

v.

K. Venkatarama Naidu Garu — Respondent.

Civil Revn. Petn. No. 871 of 1939, Decided on 16th October 1939, to revise order of Court of Special Deputy Collector, Chandragiri, D/- 14th March 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 15 (3)—S. 15 (3) not self contained—Whole of S. 15 controlled by proviso to S. 15 (1) — Payment by tenant could be credited under S. 15 (3) towards rent due for fasli 1347 only where conditions of proviso to S. 15 (1) were fulfilled.

Sub-clause (3) of S. 15 is not a self contained enactment and cannot be read by itself. When the beginning of the Section expressly excludes from the whole operation of the Section a person who has not satisfied the conditions of the proviso to cl. (1) it would be a strange proposition to say that sub-s. (3) of that Section should be read entirely by itself. [P 236 C 1]

Sub-section (3) of S. 15 is necessarily part of the main S. 15 and as the proviso to sub-s. (1) of S. 15 quite clearly states that "no tenant shall have the benefit of this Section" which must include sub-s. (3) "unless he has paid in respect of his holding the rent due for fasli 1347 on or before 30th September 1938," that condition cannot be said to be fulfilled if the rent has been paid on 3rd December 1938. [P 236 C 1]

P. Srikantam — *for Petitioner.*

R. Karunakaran and U. Lakshmana — *for Respondent.*

Order. — The petitioner is an agriculturist. He owed no rent for fasli 1345 or for any previous fasli but he did, on 3rd December 1938, owe for faslis 1346 and 1347. On that date he made a payment declaring it to be in respect of fasli 1346 (S. 64, Madras Estates Land Act.) The respondent sought to bring the property to sale in respect of fasli 1347 before the Special Deputy Collector. The petitioner claimed that, notwithstanding his declaration the rent should be credited to fasli 1347 under S. 15 (3) of Act 4 of 1938. The petition was rejected by the Special Deputy Collector. I think his order was right. S. 15 (3) no doubt exempts from consideration any agreement or any payment under S. 64, Madras Estates Land Act, and enacts that

> any payment of rent made by a tenant after the commencement of this Act shall be credited towards the rent due by him for fasli 1347.

But sub-s. (3) is necessarily part of the main S. 15 and the proviso to sub-s. 1 of S. 15 quite clearly states that "no tenant shall have the benefit of this Section," which must include in my judgment sub-s. (3) "unless he has paid in respect of his holding the rent due for fasli 1347 on or before 30th September 1938." That had not been done in this case because the rent was paid on 3rd December 1938. It was argued that sub-s. (3) was a self contained enactment and must be read by itself disregarding the rest of the Section. It seems to me a strange proposition that when the beginning of a Section expressly excludes from the whole operation of the Section a person who has not satisfied a certain condition it should afterwards be argued that a sub-section of that Section should be read entirely by itself. For this reason I consider that the order of the Special Deputy Collector was right and this petition must be dismissed with costs. It has been further argued that the petitioner is not entitled to the benefit of this Act at all because he does not come under the conditions in S. 15 (1) there being no arrears for 1345 fasli or before; but I do not consider it necessary to decide this point in view of my decision on the main point argued.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 236

VENKATARAMANA RAO J.

Koraprolu Veerabhadrayya—Appellant.

v.

Jajala Seethamma and others — Respondents.

Second Appeal No. 1148 of 1936, Decided on 5th October 1938, against decree of Sub-Judge, Ellore, in A. S. No. 43 of 1935.

(a) Deed—Construction—Gift or will — Matters to be taken into consideration in determining whether document is gift or will stated.

The question whether a certain document is testamentary or a transfer inter vivos depends not upon the mere form of the document but upon the intention gathered from the document itself in the light of the surrounding circumstances. Various tests are formulated by Courts for determining whether a certain document is a deed of gift or a will. The name by which a document is styled, the registration of it, the reservation of a life estate the reservation of a power of revocation and the use of the present or future tense are all circumstances which are taken into consideration in coming to one conclusion or other; all these are indications to find out the intention taken singly or cumulatively. [P 238 C 1]

(b) Adverse possession — It depends upon animus.

The question of adverse possession depends upon animus. [P 239 C 2]

(c) Cosharers—Property belonging to several tenants-in-common in possession of stranger claiming adversely to them — Suit by one co-tenant for recovery of his share — Other co-tenants impleaded as parties—Partition claimed as ancillary relief — Decree directing partition and awarding possession to other co-tenants of their shares cannot be made.

Where property belonging to several tenants in common is in the possession of a stranger claiming title adversely to them, it is open to any one of them to sue and recover possession of his share or to recover possession of the entire property. Where a tenant-in-common sues to recover possession of the entire property, it may be open to him to join other tenants-in-common as parties to the suit and claim to recover joint possession on behalf of himself and the other co-tenants. But where a tenant-in-common only sues to recover possession of his share making the other co-tenants parties to the suit and claims partition as an ancillary relief a decree directing partition and awarding possession to other co-tenants of their shares cannot be made: *A I R 1919 Mad 736, Rel. on; A I R 1928 Mad 555, Disting.* [P 239 C 2; P 240 C 1, 2]

V. Govindarajachari and B. V. Ramanarasu — *for Appellant.*

P. Satyanarayana Rao, V. Parthasarathy and S. Venugopala Rao — *for Respondents.*

Judgment. — This second appeal arises out of a suit in ejectment instituted by the plaintiff to recover a sixth share of the properties alleged to have been left by her maternal grandmother one Chinna Subbamma. The said Chinna Subbamma was the daughter of one I. Veeravadhanulu. The properties in suit are described in Schs. A and B to the plaint. The basis of the plaintiff's claim is that under a deed Ex. A dated 2nd October 1887, the said Veeravadhanulu gifted the said properties absolutely to his daughter, the said Chinna Subbamma, that Chinna Subbamma had two daughters, the mother of the plaintiff and defendants 4 and 5, and the mother of defendants 2 and 3, and both the daughters predeceased her, that Chinna Subbamma died in 1922, that on her death the plaintiff and defendants 2 to 5, as the daughter's daughters of the said Chinna Subbamma, have become entitled to the said property and that the plaintiff is entitled to a one-sixth share therein being a third of the half-share which the plaintiff and defendants 4 and 5 would get in right of their mother, defendants 2 and 3 being entitled to the remaining half-share. It was alleged in the plaint that defendant 1, who is the son of the said Chinna Subbamma, wrongfully possessed himself of the said property and declined to surrender possession. Therefore, the plaintiff's suit is to recover possession of her one-sixth share. In addition to defendant 1, she impleaded defendants 2 to 5 and incidentally prayed that a partition may be effected for the purpose of giving her the one-sixth share. The plaint was valued on the basis of one-sixth share and a claim for mesne profits as appertaining to that share. Defendant 1 resisted the suit on the ground that in respect of the B schedule property Chinna Subbamma had no right because it was gifted to him by his grandfather Veeravadhanulu under a deed of gift Ex. 9 dated 7th October 1887, that ever since the date of the gift he has been in enjoyment and possession thereof and assuming that the deed of gift would not confer any title on him, he has acquired title thereto by adverse possession. He further pleaded that Chinna Subbamma before her death left a will in and by which she bequeathed all the property she died possessed of to him, and that if the B schedule properties were to be properties which she must be deemed to have got from her father both sets of properties would pass to him under the will and neither the plaintiff nor defendants 2 to 5 would have any manner of right thereto. He also set up title to the A schedule property by adverse possession. Defendants 2 to 5 supported the plaintiff's case and prayed that in case the plaintiff succeeded they may also be given their shares in the property on the payment of the necessary court-fee.

Several questions fell to be decided in the pleadings between the parties. In regard to Sch. A property the title of Chinna Subbamma was undisputed and the only question was whether she left a will. In regard to the Schedule B properties there was the further question whether the deed of gift in favour of defendant 1 was operative. The contention of the plaintiff in regard thereto was that under the document Ex. A, dated 2nd October 1887, even the B schedule property was gifted away and the deed of gift, Ex. 9 dated 7th October 1887, under which defendant 1 claimed, was later in date and therefore any gift thereunder could not prevail over the earlier gift and defendant 1 acquired no title thereunder. On the other hand, the contention of defendant 1 is that Ex. A was not a deed of gift but only a will and it was competent to Veeravadhanulu to revoke any disposition therein and he effectually did so by means of a deed dated 7th October 1887. The question for decision in regard to the B schedule properties is whether the document Ex. A is a deed of gift or a will, because if it is a will, Ex. 9 would be a valid and operative document and if Ex. A is a deed of gift, it is conceded that Ex. 9 would be invalid. There was also the alternative contention of defendant 1 that even the B schedule properties were disposed of under the will by the other. Another question therefore that fell to be decided was whether defendant 1 acquired title to A or B schedule properties or both by adverse possession. The learned District Munsif was of the opinion that Ex. A was a deed of gift and Ex. 9 was therefore invalid, that Chinna Subbamma was entitled to both sets of properties and that she bequeathed them to defendant 1 under her will. On those findings he dismissed the plaintiff's suit. On appeal the learned Subordinate Judge found that the will of Chinna Subbamma was not genuine but Ex. A was a will and not a deed of gift and that Ex. 9 was a valid and operative document. Only so far as A schedule property is concerned, he declared the plaintiff's title to it and gave a decree for a one-sixth share. He also gave a decree in favour of defendants 2 and 3 and defendants 4 and 5 for their share of the properties by directing partition on payment of the necessary court-fee by them.

This appeal has been preferred by defendant 1 and on his behalf Mr. Govindarajachari has raised three contentions : (1) the finding of the learned Subordinate Judge in regard to the genuineness of the will left by Chinna Subbamma is wrong; (2) defendant 1 must be deemed to have acquired title by adverse possession in regard to both sets of properties, or at any rate, in regard to the Sch. B properties, and (3) the form of the decree is wrong because the learned Subordinate Judge ought not to have directed a partition and delivery of the shares to defendants 2 and 3 or 4 and 5. A memorandum of objections has also been filed on behalf of the plaintiff raising the contention that the learned Subordinate Judge is wrong in his view that Ex. A is a will and not a deed of gift. The finding as to the genuineness of the will is a question of fact. No doubt, Mr. Govindarajachari was able to point out that in the judgment of the learned Subordinate Judge there are many observations which are either irrelevant or are not borne out by facts. But the learned Judge has still given reasons which to my mind can support the finding he has arrived at. I am not therefore inclined to disturb it in second appeal.

I will now deal with the contention relating to the construction of Ex. A and the validity of Ex. 9. The question is whether Ex. A is a will or a deed of gift. The question whether a certain document is testamentary or a transfer inter vivos depends not upon the mere form of the document but upon the intention gathered from the document itself in the light of the surrounding circumstances. Various tests are formulated by Courts for determining whether a certain document is a deed of gift, or a will. The name by which a document is styled, the registration of it, the reservation of a life estate, the reservation of a power of revocation and the use of the present or future tense are all circumstances which are taken into consideration in coming to one conclusion or other; all these are indications to find out the intention taken singly or cumulatively. Let us see in this case what the surrounding circumstances were on 2nd October 1887. Veeravadhanulu had a wife, Chinna Subbamma, the third daughter, a grandson by his second daughter and a grandson and two grand-daughters by the third daughter and he wanted to make provision for all of them. Between 2nd October 1887 and 7th October 1887, he executed three documents. Ex. A is the first document dated 2nd October 1887, Ex. P is the second, dated 5th October 1887 and Ex. 9 is the third, dated 7th October 1887. The document Ex. P dated 5th October 1887 is a deed of gift in favour of one Nethi Narasimha Somayajulu, the son of his second daughter. The document dated 7th October 1887 is a deed of gift of B schedule properties in favour of defendant 1, the son of his third daughter. But under the document dated 2nd October 1887 he purported to deal with the B schedule properties also along with certain other properties which are now comprised in Sch. A to the plaint. All these three documents were registered on the same date. Exs. P and 9 are styled as deeds of gift and registered as such, but Ex. A is not styled by any name and is registered as a will. The operative portion of Ex. A runs thus:

> This and the inam land of the extent of 2 acres 89 cents bearing Survey No. 136 aforesaid in the village of Kovvur and the other jeroyati lands and building relating to this village and the inam lands relating to the other villages shall be enjoyed by me and my wife till our death; and after our death, you shall take possession of the lands, etc. of the above particulars and enjoy the same from son to grandson and so on in succession with powers of alienation such as gift, sale, paying the quit rent, etc. payable to Government. Besides, the debts already contracted on the said lands, I shall not incur any further debts, etc. hereafter.

It is clear from the language that the disposition in favour of Chinna Subbamma is to operate only in the future, that is, after the death of Veeravadhanulu and his wife. But it is contended that Veeravadhanulu reserved a life interest in his favour and after his death in favour of his wife and the disposition in favour of Chinna Subbamma is a vested remainder. But there is no direct gift in favour of his wife except a statement that it shall be enjoyed by her till her death. If the expression "shall be enjoyed by me and my wife" were to be taken literally, it might mean that they were intended to take the property together, that is a joint life interest must be said to have been conferred on them both; but it is not contended that such an interest was conferred. In this connexion I should like to refer to the observations of the Privy Council in 10 Cal 792[1] at p. 802. In that case, dealing with the language of a will which is couched in much stronger terms than the one now in question, namely where a testator expressed "during my lifetime, I shall hold and enjoy," their Lordships observed as follows:

> So with respect to the reservations of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Therefore the expression in this will that "the property shall be enjoyed by me and by my wife till our death" indicates nothing more than an intention that so long as he is alive, he will be the owner, that after his death his wife shall be the owner and thereafter only the property should go in the manner indicated by him. In my opinion there is no divestiture of ownership or a transfer of ownership *in præsenti* in favour of anybody and the only operative portion of the clause is that relating to Chinna Subbamma which is intended to take effect only after his death and testamentary in its character. The conduct of Veeravadhanulu about the time also indicates that he intended the disposition to be testamentary in its nature. Within five days after the execution of Ex. A and even before registration of the said document, he executes Ex. 9 and withdraws from the operation of Ex. A, the property described in Sch. B. All the three documents Exs. A, P and 9 must be taken together and the intention of Veeravadhanulu should be ascertained. The fact that Exs. P and 9 were styled as deeds of gift and registered as such and that Ex. A was registered as a will is a very strong circumstance to indicate what the intention of Veeravadhanulu was. If he had not intended Ex. A to be a will, it is hardly likely that he would have revoked the disposition so far as the B schedule property was concerned.

---

[1] Thakur Ishri Singh v. Thakur Bal Deo Singh, (1884) 10 Cal 792=11 IA 135=4 Sar 528 (PC).

Mr. Satyanarayana Rao urged that there was a covenant in Ex. A to the effect that Veeravadhanulu agreed not to incur any debts after the date of Ex. A and this would be meaningless unless the document was construed as a deed of gift. Such expressions of intentions are not uncommon in wills. The covenant does not bind anybody and even if he contracts debts, it will be certainly binding on his life interest even if the document is construed as a deed of gift. It is nothing more than a pious declaration of his intention to leave the property at the date of his death unencumbered. I am therefore of the opinion that Ex. A is a will and not a deed of gift and that Ex. 9 is a valid and operative document to confer title of the B schedule properties on defendant 1. Even assuming that the view which I have taken is not correct, there can be no doubt that Veeravadhanulu intended that the B schedule property should go to defendant 1 and with that object he executed and registered Ex. 9. From the date of the gift the property has been in the enjoyment of defendant 1 and the enjoyment must be presumed to be in accordance with the rights conferred under Ex. 9. Even assuming that the title to Sch. B property passed under Ex. A to Chinna Subbamma, still the enjoyment by defendant 1 in accordance with the rights conferred under Ex. 9 will be adverse to Chinna Subbamma. Not a document has been produced before me to show that any lease was taken in respect of the lands in favour of Chinna Subbamma or that any rent was collected in respect thereof and paid to her. Mr. Satyanarayana Rao urged that the same plea was urged even with regard to the property described in Sch. A and defendant 1 was in management of both Sch. A and B properties and the title by adverse possession in respect of those properties having been negatived, it cannot be presumed in favour of Sch. B properties. The question of adverse possession depends upon animus. So far as the Sch. A property is concerned, having regard to the relationship between the mother and the son, the prima facie presumption would be that the enjoyment was on behalf of the mother because the property was exclusively conferred upon her under Ex. A, whereas in the case of Sch. B properties, no such presumption could be drawn because there was Ex. 9 under which the property was exclusively conferred upon defendant 1. Therefore it was incumbent upon the mother or those who claimed under her to establish that defendant 1 managed the properties on behalf of the mother. From the evidence it is clear that so far as Sch. B property was concerned, the enjoyment of defendant 1 was in his own right and therefore he acquired title thereto by adverse possession and neither the plaintiff nor defendants 2 to 5 have any right to claim any portion of the said property.

The result of these findings is that the plaintiff would be entitled to claim one-sixth share in the Sch. A property and mesne profits appertaining thereto. There can be no question that the decree of the lower Appellate Court, so far as the plaintiff is concerned, is correct, but the question remains whether the decree directing partition and delivery of shares to defendants 2 to 5 is correct. Where property belonging to several tenants-in-common is in the possession of a stranger claiming title adversely to them, it is open to any one of them to sue and recover possession of his share or to recover possession of the entire property. Where a tenant-in-common sues to recover possession of the entire property, it may be open to him to join other tenants in common as parties to the suit and claim to recover joint possession on behalf of himself and the other co-tenants. But where a tenant-in-common only sues to recover possession of his share making the other co-tenants parties to the suit, the question is, will it be open to the other co-tenants to claim and recover possession of their shares? No doubt for the delivery of possession of one-sixth share a partition may be incidental and for that purpose the other tenants-in-common may be proper parties to the proceeding, the actual division to be effected being ancillary relief to be given to the plaintiff. The suit against a stranger in adverse occupation of the property being in substance one in ejectment he would certainly be not interested in the claim for partition among the co-tenants. His defence against each of the tenants-in-common may be different. Some of the tenants-in-common may be adults and some minors. It may be that the claim on the part of the adults to recover their shares may be barred by limitation whereas the claim on behalf of the minors may not.

Again, in regard to the question of mesne profits he may have distinct defences. Prima facie a suit claiming both the reliefs would be open to attack on the ground of misjoinder of causes of action. But it may be open to the Court to have the issue relating to partition adjudicated upon after the relief for possession has been determined and effect a division and give delivery of separate shares to the respective sharers. It is on this principle that in suits for partition among the members of a joint family alienees or persons who are in adverse occupation of the property are sometimes added as parties and relief prayed against them is valued as in a suit for possession of the entire property because after recovering possession, a partition can be directed among the persons entitled to the property. But it is unnecessary to deal with that question in this case because so far as the relief claimed in this case is concerned, it is not a relief on behalf of all the tenants-in-common but a relief on behalf of the plaintiff alone and the relief of partition was only claimed as ancillary to the relief to be given to the plaintiff in respect of the cause of action in ejectment against defendant 1. In 35 M L J 153,[2] it was held that a decree similar to the one passed in this case in exactly similar circumstances was not proper. I respectfully adopt the view taken in that decision. The case reported in A I R 1928 Mad 555[3] was relied on by Mr. Satyanarayana Rao, but that case is distinguishable. The decision therein was based expressly on the question of estoppel. No doubt incidentally their Lordships observed that the decision in 35 M L J 153[2] would not apply to the case which they were dealing with on the ground that nothing beyond the plaintiff's right was put in issue in 35 M L J 153.[2] But on a reference to the facts of that case it will be seen that an issue was incidentally raised whether the alienation in that particular case was not binding not only on the plaintiff but also on the defendants who were cosharers. But the ground on which 35 M L J 153[2] proceeded was that it was not a comprehensive case for partition, meaning thereby a case in which relief must be sought in the plaint not only on behalf of the plaintiff but also on behalf of the cosharers and valued as a claim common to the plaintiff and to the cosharers. Therefore the decree directing partition and awarding possession to defendants 2 to 5 of their respective shares in A and C schedule properties must be set aside. In the result the decree of the lower Appellate Court is modified and the appellant will have his costs in the second appeal, from respondents 2 to 5 and pay the costs of respondent 1, in the second appeal. The memorandum of objections is dismissed with the costs of the appellant. Leave to appeal is refused.

C.R.K./D.S. *Decree modified.*

---

[2] Adhikari Vishnumurthiayya v. Authaiya, (1919) 6 A I R Mad 736=47 I C 533=35 M L J 153.

[3] Varada Appala Naidu v. Annam Naidu, (1928) 15 A I R Mad 555=111 I C 688.

A. I. R. 1940 Madras 240

LAKSHMANA RAO J.

In re Addagalla Venkanna and others — Petitioners.

Criminal Revn. Case No. 801 and Petn. No. 761 of 1938, Decided on 18th October 1938, to revise order of Stationary Sub-Magistrate, Narsapur, D/- 8th October 1938.

Evidence Act (1872), S. 123 — Accidents register.

The accidents register is not a privileged document. It can therefore be sent for, if required. [P 240 C 2]

V. Viyanna — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—The view of the Sub-Magistrate that the accidents register is a privileged document is erroneous and his refusal to send for it on that ground is unsustainable. The order of the Sub-Magistrate is therefore set aside and the register will be sent for, if still required.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 241

BURN AND STODART JJ.

H. Chennana Gowd and others —
Appellants.

v.

Official Receiver, Bellary and others —
Respondents.

Appeal No. 69 of 1938, Decided on 28th September 1939, against order of District Court, Bellary, D/- 6th January 1938.

(a) Hindu Law—Joint family business—Debts contracted by some members in actual control of business for benefit of business—Other members not partaking in direction of business are not personally liable for such debts.

In joint family business those members who do not partake in the direction of a joint family business are not personally liable for the debts of those members who actually conduct the business. The ordinary law is that a member of a joint Hindu family is not personally liable for a debt contracted by another member but that if the money was borrowed for a necessary purpose binding on the family the undivided family property can be sold in order to discharge the debt including that interest, in the property which belongs to the members who did not join in the borrowing. In the case of a family business those members only are personally liable for the debt of the business who are in control and management of it or who have acquiesced in the course of the business in which the particular contract was entered into, so as to warrant their being treated as parties to the contract : *A I R 1936 Mad 64, Foll.; Case law discussed.* [P 242 C 2; P 243 C 2]

(b) Hindu Law—Joint family business — Act of insolvency by manager of family business cannot be imputed to other coparceners.

A man cannot be adjudicated insolvent at the instance of a creditor with whom he has never had any dealings express or implied and for an act which he had never committed or acquiesced in. Hence, where the manager of an undivided family business commits an act of insolvency, the other coparceners cannot be deemed to have committed that act : *A I R 1937 Mad 13 and A I R 1937 Pat 665, Rel. on.* [P 245 C 2; P 246 C 1]

V. S. Narasimhachar — *for Appellants.*

Ch. Raghava Rao, D. R. Krishna Rao and S. Kothandarama Nayanar —
for Respondents.

Stodart J. — This is an appeal against an order in insolvency by which the learned District Judge, Bellary, adjudicated seven persons insolvent. The first five of these are brothers, the sons of Ayyanna Gowd, deceased. The sixth and seventh are sons of another brother Mallanna Gowd who died in 1915. The first and third do not appeal. They had already filed an insolvency petition when the present petition was filed. The others are the appellants in this appeal. The petition was filed on 29th July 1936 by four creditors. The admitted facts are that Ayyanna Gowd had a shop in Bellary and that was a family business carried on for the benefit of the joint family consisting of himself and his sons; and on his death this shop was continued by the first and second sons Ranganna Gowd and Narasanna Gowd trading under the name of Ranganna Gowd and brothers. The four petitioning creditors based their right to file this petition on debts due to them by this firm. They alleged that the other three brothers and two nephews (the present five appellants) took an active part in the business of the firm and so were also personally liable to them in respect of the said debts ; and one of the questions we have to decide is whether the appellants did in fact take a part in the management of the business. Secondly, the petitioners contended that certain acts of insolvency were committed which must be deemed to be the acts of all the seven persons aforesaid. The learned District Judge held in effect that all seven counter-petitioners participated in the business and were personally liable for its debts and from this finding it would follow that they were jointly indebted to the petitioners. As for the acts of insolvency the Judge's finding is not very clear. He found that the execution of a sale deed, Ex. G of a large portion of the family lands by the two nephews (appellants 4 and 5) less than three months before the petition was filed, was an act of insolvency, and that the other members of the family took part in it. He said :

> Ex. G is an act of insolvency and the respondents took part in it apart from their liability on account of the other acts of insolvency—the closing of the business.

Various acts of insolvency were alleged by the petitioners but the learned District Judge has recorded no clear finding whether, in his opinion, any or all of them were committed except in the sentence just quoted. In one part of his judgment he states that

> after the business was finally closed there was some difficulty in tracing respondents 1 and 3 and in discovering the accounts and the first counter-petitioner was ultimately found with the accounts in a building attached to a ginning factory, where he was apparently secreting himself.

In another part, referring to Ex. G, he states that it was executed at the time the shop was closed, or closing, and there appeared no reason for its execution unless it was really for the purpose of protecting the property against the creditors of the business. The only acts of insolvency therefore which appear to have been relied on by the learned District Judge are (1) that respondents 1 and 3 absented themselves and secluded themselves and (2) that respondents 6 and 7 executed Ex. G in order to defeat the creditors of the firm in circumstances which show that Ex. G was the act of all the members of the family. These appellants now appeal on the grounds: (1) That they are not indebted to the petitioner. (2) That they have not committed any acts of insolvency. (3) That they are not affected by any act of insolvency which may have been committed by Ranganna Gowd and Narasanna Gowd.

It may be stated at the outset that the plea of partition advanced by these appellants and negatived in the Insolvency Court has not been pressed before us. The facts are, that these appellants with Ranganna Gowd and Narasanna Gowd formed a Hindu joint family, that they owned landed property and that Ranganna Gowd and Narasanna Gowd had the shop in Bellary which was a joint family business. The first question we have to decide is whether appellants are right in their contention that they took no part in that business. We think that they are. The learned District Judge was not particularly impressed with the evidence led on behalf of the petitioners to prove that these appellants personally attended to the business of the shop. That evidence only amounted to this: that one or other of the appellants was occasionally seen in the shop helping to write up the accounts. That in itself would not be proof that they had any say in the direction of the business. But the learned Judge relies on the fact that the shop went by the name of Ranganna Gowd and brothers and on certain documentary evidence. That documentary evidence consisted in (a) a promissory note Ex. J-1, executed by all five brothers in renewal of a promissory note executed previously by Ranganna Gowd alone. The promisee, Mundlur Gangappa, examined on behalf of the appellants — he is not one of the petitioning creditors — deposed that this was for a trade debt contracted by Ranganna Gowd, (b) entries in the ledgers of two creditors of the firm showing that moneys were paid out to, and received from, appellants 1, 2 and 3. We do not think that this documentary evidence is at all conclusive on the point in issue. The payments out to and receipts from appellants 1, 2 and 3 are of small sums and look as if the money was conveyed by them as messengers. It is not alleged that they had any authority to pledge the credit of the firm nor do their names appear as debtors in the books of the firm's creditors. As for the promissory note Ex. J-1 it is consistent with the appellant's case. The fact that this single liability of Ranganna Gowd, namely the debt evidenced by Ex. J-2, was guaranteed as it were by his four brothers would show that in respect of his liabilities in general they did not hold themselves personally responsible. We have no difficulty in finding therefore that the firm Ranganna Gowd and brothers was solely managed by Ranganna Gowd and Narasanna Gowd. It was urged nevertheless by learned counsel for the creditors (who appear as respondents in this appeal) that since the shop was a family business respondents 1 and 3 in contracting debts acted as the agents for the other members of the family so that the latter are personally liable for the shop debts. In this view we cannot concur. Members of a joint family may be jointly concerned in a commercial venture just like any other association of partners. In that case they are all personally liable for debts contracted in the course of the business and the acts of one will bind the rest. But conversely these members who do not partake in the direction of a joint family business are not personally liable for the debts of these members who actually conduct the business. The ordinary law is that a member of a joint Hindu family is not personally liable for a debt contracted by another member but that if the money was borrowed for a necessary purpose binding on the family the undivided family property can be sold in order to discharge the debt including that interest in the property which belongs to the members who did not join in the borrowing: *see* 22 Mad. 166.[1] We do not see that it makes any difference to this principle that the money was borrowed by one member who was in sole charge of a family business. In 29 All 176[2] it was held that a member of a joint Hindu trading family who after attaining majority never took any active part in the business or had any concern with its management could not be held personally liable for debts incurred by the managing member of the business. 40 M L J 327[3] was a case where two members of a family one being an advocate and one a member of the Indian Civil Service were sought to be made liable for a debt incurred by a firm carried on by other undivided members of their family. The District Judge held that they were personally liable. On appeal the Chief Court of the Punjab held that they were liable not personally but only to the extent of their interest in the partible property. This case was taken on appeal by Amar Nath, one of the brothers, to the Privy Council but not on the point now in issue.

---

[1] Chalamayya v. Varadayya, (1899) 22 Mad 166 =9 M L J 3.

[2] Bishambar Nath v. Fateh Lal, (1907) 29 All 176=4 A L J 94=1907 A W N 13.

[3] Amar Nath v. Hukam Chand Nathmal, (1921) 8 A I R P C 35 = 60 I C 379= 48 I A 162=2 Lah 40=40 M L J 327 (P C).

The Privy Council judgment however concludes with the words, "the appellant's liability is of course a liability in respect of his share in the family property." There was no cross-appeal by the respondent in that case objecting to the finding of the Punjab Chief Court that the appellant was not personally liable. Then there is the case, A I R 1936 Mad 64,[4] decided by Cornish J., lately of this Court, sitting singly. That case is on all fours with the present. Three persons, members of a joint family, having been adjudicated insolvents, on the petition of a creditor to whom money was due in the course of a business carried on for the benefit of the family but carried on only by one of them, the others appealed. Cornish, J. held that unless there is a personal liability in respect of the debt there is no such relation of debtor and creditor as will serve to support an adjudication order. And he held that the petitioners before him were not proved to have taken such a part in the management of the business that it could be inferred that they were parties to the contract upon which the debt arose. In our opinion, the mere fact of the present appellants being members of the joint family to which this business belonged cannot make them parties to the contracts entered into by those who conducted the business. It is only by importing into the argument the notion that in respect of a family business the members of the family are in the position of partners that personal liability can be imputed to them. This proposition seems at one time to have found some favour in the Courts. See the judgment of Sadasiva Ayyar J. in the Full Bench decision of this Court in 41 Mad 824.[5] But we have now S. 5, Partnership Act, 1932, which sets that somewhat debatable point at rest. The relevant words of that Section are, "the members of a Hindu undivided family carrying on a family business as such are not partners in such business." Prior to 1932 the law of partnership was contained in Ss. 239 to 266, Contract Act, 1872.

Under S. 248 of that Act a partner who did not on coming of age repudiate his liability, became liable for the debts of a business to the benefits of which he had been admitted during minority even including debts contracted during his minority. In the case cited Sadasiva Ayyar J. held that S. 248 applied, when the business was a business belonging to a Hindu joint family; so that the minor members of the family became on attaining majority personally liable for the debts of the business. After the passing of the Partnership Act, it is no longer possible to apply the rules relating to partnership to a Hindu joint family. It appears to us that in the case of a family business these members only are personally liable for the debts of the business who are in control and management of it or who, to borrow the words of Cornish J. in A I R 1936 Mad 64,[4] have acquiesced

> in the course of the business in which the particular contract was entered into, so as to warrant their being treated as parties to the contract.

In the case of other members, it appears to us that business debts are on exactly the same footing as other family debts. If they are lawfully incurred for the benefit of the family or for the necessary purposes of the family, then to discharge them the family property may be sold without excluding the interest therein of the coparceners who were no parties to the contract. But they cannot be levied from the latter in any other way. Learned counsel for the respondents has relied very strongly on 49 Mad 217.[6] In that case the debt on foot of which the petitioning creditor sought to adjudicate the respondent, was incurred by the respondent's father and in the insolvency petition which was filed to adjudicate the son after the latter's death it was alleged that the creditor had pressed the respondent to pay the debt and the respondent had asked for time. The District Judge dismissed the petition holding that since the respondent was not personally liable for the debt the relation of debtor and creditor did not exist between him and the petitioning creditor. Devadoss and Waller JJ., reversing this decision, held:

---

[4] Krishna Iyer v. Pierce Leslie & Co., (1936) 23 A I R Mad 64=160 I C 478.

[5] Official Assignee v. Palaniappa Chetti, (1919) 6 A I R Mad 690=49 I C 220=41 Mad 824=35 M L J 473.

[6] Muthuveerappa Chettiar v. Sivagurunatha Pillai, (1926) 13 A I R Mad 133=92 I C 603=49 Mad 217=49 M L J 697.

> There is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family. Each case would depend on its circumstances. If the petitioner makes the necessary allegations and proves them then the Court would be justified in adjudging the members of a joint family insolvents.

Then, after observing that on the death of a father the debts are binding on the other members of the family who succeed to him the Court referred to an unreported case of a Bench of this Court (A. A. O. No. 47 of 1916) in which it was laid down that the relation of creditor and debtor existed between the lender and the members of a joint family in respect of debts incurred by the family. And finally the Court remanded the petition for disposal according to the provision of S. 24, Provincial Insolvency Act. So far as we can see, all that this decision meant was that there were grounds for inquiry whether the relation of creditor and debtor existed. "Each case," the Court said, "would depend on its circumstances," which implies that, in its opinion, mere membership of a joint Hindu family did not carry with it a personal liability for the family debts. And the Court as we have said, remanded the case for disposal under S. 24 of the Act. S. 24 is:

> On the day fixed for the hearing of the petition the Court shall require proof (a) that the creditor ..... is entitled to present the petition, etc.,

which means that the creditor must prove under S. 9 that there is a debt owing to him by the person whom he wishes to have declared insolvent and that the debt amounts to at least five hundred rupees. This case was considered in the following year by another Bench of this Court in 50 Mad 981.[7] The facts in that case were somewhat similar to those in 49 Mad 217.[6] A son had succeeded to the estate of his father on the latter's death and was sought to be adjudicated on the strength of a debt due to the petitioning creditor by the father on which the creditor had obtained a decree against the son. Venkatasubba Rao J. (as he then was) stated the question for decision as follows:

> When a debt is due from a person in his representative character is he liable to be adjudicated an insolvent under the Provincial Insolvency Act?

and after stating the facts said:

> There is no doubt that the decree as it now stands excludes altogether the personal liability of the appellant .... The proposition that any person who happens to be a debtor in his representative capacity is liable to be adjudicated an insolvent cannot be seriously argued .... It is said that in the case of a coparcener in a Hindu joint family the position is different. I am not prepared to accept this contention.

Then referring to the case in 41 Mad 824[5] the learned Judge said;

> It will be seen that on whatever other matter there was a difference of opinion, all the Judges were agreed in this, that if the debts could not be personally enforced the debtor could not be adjudicated an insolvent.

And construing 49 Mad 217[6] and the argument based on it by counsel for the respondent the learned Judge said:

> I do not think that the learned Judges intended to lay down the general rule that a coparcener as such is liable to be adjudicated an insolvent in respect of the debts incurred by the manager and binding on the family.

The case here, we think, is stronger. There is no decree against these appellants. They are not personally liable for the debt. Their only liability arises out of the fact that the debt was contracted in the course of a family business so that assuming that it was properly incurred and binding on the family, property of the family may be sold to discharge it without excluding the appellants' interest in that property. One case has been cited to support the opposite view, namely A I R 1929 Mad 573.[8] But in that case though the debt due to the petitioning creditor was a decree debt which could only be recovered by sale of the family property and not from the debtor personally, nevertheless, Phillips J. (as he then was) held that the debtor was personally liable for the debts of the firm. The debtor in that case was actually a member of the firm the business of which was carried on by all the members of the family consisting of the debtor and his uncle and his uncle's son. The observations of Reilly J. in the concluding portion of his judgment in that case are clearly made with reference to the circumstances of the case. We do not think we can give them general application.

On this part of the appeal therefore we find: (1) on the question of fact that the appellants took no part in the conduct of the business so as to make them personally liable for the debts of that business, and (2) on the point of law that merely as members of the undivided family to which the business belonged they are not personally liable for its debts. From these findings it follows that the relation of debtor and creditor did not exist between these appellants and the petitioning creditors, the respondent. That is sufficient to dispose of this appeal.

---

[7] Nagasubramania Mudaliar v. Krishnamachariar, (1927) 14 A I R Mad 922 = 104 I C 642=50 Mad 981=53 M L J 403.

[8] Somasundaram v. Kanu, (1929) 16 A I R Mad 573=118 I C 494.

The second main point raised in the appeal however is important and has been argued before us at some length. It is that even if these appellants are held to be indebted to the respondents within the meaning of the Provincial Insolvency Act, they have committed no acts of insolvency. The acts of insolvency which, so far as we have been able to discover were relied on by the learned District Judge, were (a) the execution of the sale deed, Ex. G by the nephews (appellants 4 and 5) which was attested by all their uncles and (2) the fact that Ranganna Gowd and Narasanna Gowd who conducted the business of the shop, absented and secluded themselves at or about the time of the closing of the shop. On the point of fact we do not think that these acts of insolvency have been made out. The sale deed was certainly executed. And it certainly disposes of a large amount of property. The learned District Judge held that there appeared to be no reason for the sale unless it was really for the purpose of protecting the property against the creditors of the business. The learned Judge was obviously of opinion that this sale deed fell under the class of acts described in S. 6 (b) of the Act: making a transfer of property with intent to defeat or delay creditors. But he does not state the facts on which he based his opinion that that was the intention of Ex. G nor does he cite any circumstances which show that Ex. G did in fact operate so as to defeat or delay creditors. Twelve witnesses were examined for the respondents in the Insolvency Court. Nowhere in their evidence is any single fact alleged which would lead to the inference that Ex. G was executed with the intention aforesaid or that the family property which remained after taking away the property alienated in Ex. G was not sufficient to discharge the debts of the firm.

Then there are the acts of Ranganna Gowd and Narasanna Gowd consisting in their absenting themselves or secluding themselves. The questions that arise in regard to these acts are : (1) Are they proved to have been committed ? (2) Can they be deemed to be the acts of these appellants ? The learned District Judge if in fact he takes these acts as proved is evidently referring them to Ss. 6 (d) (ii) and (iii) of the Act. These clauses are :

> A debtor commits an act of insolvency if with intent to defeat or delay his creditors (ii) he departs from his dwelling house or usual place of business or otherwise absents himself; (iii) he secludes himself so as to deprive his creditors of the means of communicating with him.

We do not find sufficient warrant in the evidence for the conclusion that either Ranganna Gowd or Narasanna Gowd committed these acts. [After examining the evidence of certain witnesses the judgment proceeded further.] In this state of the evidence we are unable to hold that Ranganna Gowd either departed from his dwelling house or otherwise absented himself or that he secluded himself so as to deprive his creditors of the means of communicating with him. As far the other partner Narasanna Gowd, there is no evidence about him at all tending to show that he committed an act of insolvency by absenting himself or secluding himself from his creditors. Next we have to decide whether even if Ranganna Gowd did commit acts of insolvency of the nature described in Ss. 6 (d) (ii) and 6 (d) (iii) of the Act, these acts can be imputed to the appellants. Learned counsel for the respondents relies on the explanation to S. 6 which is "for the purposes of this Section the act of an agent may be the act of the principal." The terms of this explanatory clause imply that there may be acts of the agent which amount to acts of insolvency but which do not become the acts of the principal. Act authorized by the principal either expressly or by implication would presumably be acts of the principal. If the matter were one of first impression, we would find it difficult to hold that by reason of the agent committing the acts described in S. 6 (d) (ii) or S. 6 (d) (iii) the principal had committed an act of insolvency unless of course he had expressly commanded or authorized the agent to do what he did. There is however authority in the point which we have no hesitation in following. On the particular case provided for in S. 6 (d) (iii) it has been recently held by a Bench of this Court, in a case where three brothers were partners in a business that the act of secluding himself by the managing partner who had been left in sole charge of the business was not attributable to the other partners : *see* 71 M L J 730.[9] On the much broader question of law, whether when the manager of an undivided family commits an act of insolvency, the other coparceners can be deemed to have committed that act, there is also a very recent case decided by a Bench of the Patna High Court in which the point was directly in issue: *see* 16 Pat 724.[10] Manohar Lal J. observed in that case:

---

[9] Siva Reddy v. Official Receiver, Bellary, (1937) 24 A I R Mad 13=166 I C 80=71 M L J 730.

> Although the manager of a joint Hindu family can act on behalf of the family, the recognized restrictions on his power, so to act in his representative capacity as to impose any personal liability on other members of the family, render it impossible to treat any act of insolvency committed by him as an act committed by other members of the family also.

In that opinion we respectfully agree. We think it contrary both to good sense and natural justice that a person should be liable to be adjudicated insolvent for an act done by another which he has never authorized either expressly or by a course of conduct from which authority might be implied. The state of being insolvent involves many and onerous personal disabilities. If, for the debts lawfully incurred by a family manager in the ordinary course of business the other members are not personally liable, much more are they personally exempt from the consequences of acts done by the manager which amount to acts of insolvency.

On the case generally we think that it is pushing the theory of joint family responsibility to extremes to hold that a man can be adjudicated insolvent at the instance of a creditor with whom he has never had any dealings express or implied and for an act which he had never committed or acquiesced in. How anomalous for instance it would be if in 40 M L J 327,[3] the Indian Civil Servant holding a post in the Central Provinces could be adjudicated at the instance of a creditor of his father's firm in Ferozepore in the Punjab, and on the strength of an act of insolvency committed at Ferozepore by a member of that firm. In the result holding that these appellants are not debtors within the meaning of the Provincial Insolvency Act and that moreover they have not committed any acts of insolvency we set aside the order of the lower Court. These appellants will have their costs of this appeal and of the proceedings in the lower Court.

C.R.K./D.S. *Order set aside.*

---

[10] Mahabir Prasad v. Ram Tahal Mandar, (1937) 24 A I R Pat 665=172 I C 737 = 16 Pat 724 = 18 P L T 839.

A. I. R. 1940 Madras 246

SOMAYYA J.

Sri K. C. Manavikraman, Zamorin Raja Avergal of Calicut, Trustee of Guruvayur Devaswom — Plaintiff.

v.

Madras Hindu Religious Endowments Board and another — Defendants.

Civil Suit No. 140 of 1939, Decided on 11th October 1939.

(a) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A as amended by Act 12 of 1935—Scope—Notification proceedings under Chap. 6-A are confined to cases where Board was not party to suit in which schemes were framed by Civil Courts and to cases where no scheme has been framed by Civil Court—Procedure under S. 65 cannot be started unless there is gross mismanagement by trustee and unless scheme framed by Court is given fair trial.

There is nothing in the Amending Act 12 of 1935, enabling the Board to set at naught the decree of the Civil Courts by taking proceedings under Chap. 6-A on the ground that in its view the Court scheme is not in the best interests of the institution. When a scheme has been finally settled by the Court in a suit to which the Board was a party, it is not open to the Board to start proceedings under Chap. 6-A at any rate without giving that scheme an opportunity of working. [P 249 C 2; P 250 C 1]

The proceedings under the notification Chap. 6-A are confined to cases where the Board was not a party to a suit in which schemes were framed by Civil Courts and to cases where no scheme has been framed by the Civil Court. [P 251 C 2]

The procedure under S. 65-A cannot be resorted to unless there is gross mismanagement justifying restriction of the powers of the trustee and unless the scheme framed by the Court is given a fair trial: *A I R 1939 Mad 682, Rel. on.* [P 250 C 2; P 251 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 65 B as amended by Act 12 of 1935—Applicability.

Section 65 B may well be taken to apply to cases where schemes were settled by Civil Courts in suits to which the Board was not a party. [P 251 C 2]

(c) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A as amended by Act 12 of 1935—Question of appointment of manager decided by High Court in favour of trustee—Board cannot flout decision by procedure under Chap. 6-A in absence of allegation that appointment did not work well.

Where there is no allegation or suggestion that the appointment of manager by trustee did not work well, it is not open to the Board to go behind the express adjudication by the High Court, entitling the trustee to appoint the manager, in the appeal to which the Board was a party and to set at naught the decision of the High Court by arrogating to itself the power of appointing the manager under the indirect procedure of Chap. 6-A. It is a fraudulent exercise of the powers given to the Board under Chap. 6-A to re-agitate a matter which was decided against it by the High Court. It is the grossest abuse of the powers given under Chapter 6-A. [P 256 C 1, 2]

K. Kuttikrishna Menon and D. A. Krishna Wariar — *for Plaintiff.*

P. V. Rajamannar, K. Subba Rao, Y. Govindarajulu and D. H. Nambudripad — *for Defendants.*

Judgment. — This suit raises certain important questions as to the power of the Madras Hindu Religious Endowments Board to start notification proceedings under Chap. 6-A of Madras Act 2 of 1927, as amended by Act 12 of 1935, in cases where schemes have been settled by the Civil Courts in suits to which the Board was a party. The plaintiff in this case is the Zamorin of Calicut, who is one of the trustees of the famous temple of Guruvayur situated in South Malabar. Defendant 1 is the Hindu Religious Endowments Board and defendant 2, Malliserri Nambudiri, is a joint trustee along with the plaintiff. The plaintiff is the chief trustee and is in charge of the affairs of the temple. This suit is filed to have it declared that the proceedings which defendant 1 started under S. 65-A (1) of Madras Act 2 of 1927, as amended by Madras Act 12 of 1935, are without jurisdiction and void and that the Board has no right to go on with the enquiry. The chief contesting defendant is defendant 1. Defendant 2 supports the plaintiff's case.

The plaintiff's case may be briefly stated thus: The Zamorin of Calicut and his predecessors have been the hereditary trustees of the suit temple and of various other temples situated in that part of the country. The Court of Wards were in sole management of the temple between the years 1914 and 1927. In 1927, the Court of Wards handed back to the then Zamorin the management of the suit temple. After the Madras Hindu Religious Endowments Act was passed, a scheme was framed by the Board under Ss. 62 and 63 of the Act on 3rd November 1928, by which the Zamorin was constituted the sole trustee. Thereupon, defendant 2 filed O. S. No. 1 of 1929 on the file of the District Court of South Malabar to have the scheme modified; certain worshippers of the temple filed another suit, O. S. No. 2 of 1929, for the same purpose; and the two suits were tried and heard together. In a common judgment, the District Court of South Malabar framed a scheme; the matter was taken up on appeal, A. S. Nos. 211 of 1930 and 212 of 1930 on the file of this Court, and by its judgment dated 21st November 1930 this Court held that plaintiff and defendant 2 were joint trustees and modified the District Judge's scheme in important matters. In particular this Court gave the right of appointing a manager for the suit temple to the trustees of the temple and provided for the appointment of a cashier.

Not content with the scheme framed by the High Court, a suit was filed by certain worshippers in O. S. No. 1 of 1933 on the file of the District Court of South Malabar making the plaintiff, defendant 1 and defendant 2 all defendants. The suit was contested by all of them; in particular defendant 1 filed a written statement and took a leading part in the trial of the suit, and the District Court after considering all the circumstances of the case and having considered the various pleas and arguments and the suggestions put forward by the various parties framed a scheme by its final decree dated 10th September 1938. All the parties acquiesced in the said judgment, filed no appeal and allowed the judgment to become conclusive. Having allowed the District Judge's judgment to become final defendant 1 Board started notification proceedings by its notice dated 19th December 1938 issued under S. 65-A (1) of the Act. The various reasons given in the notice issued by the Board under the above Section are not available to the Board for the reason that most of them were actually put forward by the Board in the various litigations to which it was a party and the Courts adjudicated upon them after hearing the Board, rejecting some of those contentions. Therefore the Board is precluded from relying upon those very grounds as the basis for starting notification proceedings under Chap. 6-A of the Act. Reasons 1, 3, 5 and 6 mentioned in the notice were adjudicated upon by the Civil Courts in the litigations to which the Board was a party and the other reasons 2, 4 and 7 were never even mentioned by the Board before the Civil Courts for the obvious reason that there is absolutely no substance in them. No sort of mismanagement is even alleged against the present trustees and not one of the reasons mentioned in the notice refers to anything that transpired after the decree of the High Court passed in November 1930 or of the District Court passed in September 1938. Without giving a fair trial to the scheme framed by the District Court in the suit to which defendant 1 was a party and without seeing whether the scheme would work well or not, the Board has no right to start proceedings which is a deliberate attempt to set at naught the findings of the High Court and of the District Court in suits to which it was a party and this is a contrivance to get behind the decrees and circumvent the decision of the Civil Courts. In any event, the Board is not entitled to rely upon any of the grounds which were adjudicated upon adversely to it by the Civil Courts.

The plaintiff filed objections before the Board and the Board consisting of three members, before whom it comes on in the first instance as provided in S. 65-A (4), conceded that nothing had transpired after the decrees abovementioned and yet overruled the preliminary objections put forward by the plaintiff and directed the parties to adduce evidence. The plaintiff comes forward at this stage with this suit and asks for the above and other reasons stated in the plaint that he may be given a decree declaring that the notification proceedings started by the first defendant Board under Chap. 6-A of the Act by its notice dated 19th December 1938 in the matter of the suit temple are without jurisdiction and void and that the Board has no right to go on with the enquiry regarding the various reasons alleged in the said notice. In the alternative, he asks for a decree that in any event the Board has no right to enquire into the reasons 1, 3, 5 and 6 set out in the notice which were duly considered and rejected by the Civil Courts and also for a declaration that in the circumstances of this case, the action of the Board is capricious, biassed, unwarranted and that it is absolutety invalid. He asks for an injunction restraining defendant 1 from proceeding with the enquiry under Chap. 6-A of the Act.

Defendant 1 admits almost all the allegations of fact mentioned in the plaint, particularly in paras. 1 to 7 of the plaint. The defence of the Board is that it has not acquiesced in the decision given by the District Court of South Malabar in O. S. No. 1 of 1933. It states that various attempts were made to have the defects rectified by a proper modification of the High Court scheme, which it says was found to be entirely unsatisfactory, that the public filed O. S. No. 1 of 1933 in the District Court of South Malabar to have the scheme modified and that defendant 1 having found that a proper modification with effective control was not possible, allowed the litigation in O. S. No. 1 of 1933 to take its own course from 1933 to 1938 (para. 3). It is also stated that in the interests of the proper administration of the temple, proceedings under S. 65-A of the Act had to be resorted to as the only remedy available since the High Court scheme as modified by the District Court in O. S. No. 1 of 1933 had not effected the necessary changes for the proper administration of the temple (para. 4). It further states that it is the primary consideration of the Board to enhance the efficiency of the management as much as possible by instituting proceedings under S. 65-A. It is alleged that in this case the Civil Courts, confined to the pleadings before them, have come to a conclusion, which the Board is convinced is not conducive to the proper and efficient management of the institution (para. 5). Therefore, the Board states that it had no option except to proceed under Chap. 6-A because the management ordered by the Civil Court is, in its view, against the best interests of the institution (para. 7).

The Board further denies that it has no jurisdiction to start proceedings under S. 65-A and states that it acted bona fide and in the best interests of the temple. In reply to the plaint allegations that the Board has no right to put forward the very grounds decided against it by the Civil Courts, the Board states that it has full power to go into evidence on every ground which it considers necessary under the new Chap. 6-A, which it says was specially framed empowering the Board to secure effective control of the temple (para. 10). Finally, it sums up the whole position in para. 11 by stating

> that the procedure under S. 65-A is the only remedy known to law in order effectively to safeguard the best interests of the temple and its endowments.

Documents evidencing the various proceedings in the District Court and the High Court are exhibited as also the notice issued by the Board and the objection statements filed by the plaintiff. Two questions arise in this case. One is whether the Board has the right to start proceedings under Chap. 6-A when the Civil Courts framed a scheme for the management of the temple in a suit to which the Board was a party after considering the contentions of the Board and the suggestions made by it for the best administration of the temple, at any rate, without giving that scheme a fair trial. The other question is whether in a proceeding under Chap. 6-A the Board is entitled to urge the very questions which were specifically decided against it by the Civil Courts. I propose to confine my judgment to a case where the Board is a party to the litigation in which the scheme is framed by a Civil Court.

If a decree is passed by Civil Courts framing a particular scheme for the management of the temple in a suit to which the Board is a party, is it open to the Board to start proceedings under S. 65-A at all? Can it do so in any event without giving that scheme a fair trial? Is it open to the Board to say, as it does in para. 7 of its written statement that it has the right to proceed under Chap. 6-A for the sole reason that the management ordered by the Civil Court is, in its view, against the best interests of the institution? Is it open to say as it does in para. 5 that the Civil Courts were bound by the pleadings before them and that consequently the conclusion, which the Courts arrived at on the pleadings placed before them, may be ignored by the Board on the ground that it is convinced that the decision of the Civil Court is not conducive to the proper and efficient management of the institution? Can it say as it does in para. 3 that it felt that it was not possible to secure from Civil Courts a proper modification (of the High Court scheme) with effective control, and that therefore it allowed the proceedings in O. S. No. 1 of 1933 to take its own course? As regards the plea put forward in para. 3 of the written statement, I am of opinion that the Board has no right to assume that Civil Courts would not render justice and then urge it as a ground for its not taking part in the proceedings, to ignore the decree in the suit altogether and to issue notice under the new Chapter. One thing is clear that under the Act the Board is not yet constituted the actual trustee of all the temples in the land. It can get the control which the law gives it and nothing more. In cases of dispute, who is to decide the question except the Courts? If the Board thinks that it cannot get from the Court "a proper modification with effective control," it can only be for the reason that it wants a control which it is not authorized by law to get. No litigant, no statutory body, can flout the decisions of the Court in suits to which they were parties by saying "I cannot get from the Court the power that I want. So, I shall sit quiet, allow the Court to spend years and years to decide the suit. I shall then ignore the decision" and start proceedings under the new Chapter. It is equally not open to the Board to say "the Civil Courts are bound by pleadings. So I can ignore their decisions confined as they are to the pleadings in the suit" and this in cases where the Board is a party. Whoever prevented the Board from putting forward in its pleading all its view points? What the Board evidently wants is a right to have matters decided without any regard to the pleadings in the case. Is it open to the Board to say that the Civil Court was wrong and that it can straightway start proceedings under Chap. 6-A and nullify the effect of the Civil Court's judgment? The answer to this question is not open to any serious doubt. If the Board was actually a party to a suit, put forward various suggestions and the same were considered by the Court and a decision rendered one way or the other, it is impossible to accept the contention that the Board which was a party to the suit and to the decree can start proceedings under Chap. 6-A. Opinions may differ as to whether a particular scheme is or is not better than another scheme which may be suggested by another party. When a scheme has been finally settled by the Court in the presence of the Board, it is not open to the Board to start proceedings under Chap. 6-A at any rate without giving that scheme an opportunity of working.

Before the Amending Act (Madras Act 12 of 1935), the position was this. In respect of excepted temples the Board may issue a notice to the trustee to show cause why a scheme should not be framed in any one of the cases mentioned in S. 62, viz. where the Board has reason to believe that there is mismanagement or that the trustee has improperly alienated trust property or when 20 worshippers apply to the Board stating that it is in the best interests of the institution that a scheme should be framed. If after an enquiry under S. 63 the Board finds mismanagement or an improper alienation of trust property, or agrees with the twenty worshippers that it is in the best interests of the temple to have a scheme framed, the Board may frame one. Then provisions are made for a dissatisfied party to go before the Court to have the scheme modified or set aside under S. 63 (4) and the Court may modify or alter the Board's scheme. In cases where there is no suit under S. 63 (4) the Board itself may, at any time, modify or cancel a scheme settled by it under S. 63 (1). In cases where the scheme framed by the Board was taken to a Civil Court under S. 63 (4) and a decree passed by the Court, if later events necessitate a change in that scheme, the change can be made by a suit filed for that purpose either by the Board or by the trustee or by the worshippers interested in the temple (S. 65). Even now as regards the trustee and the worshipper they can seek a change only by a suit filed under S. 65 of the Act. Under the Amending Act the Board is given the power to start notification proceedings under the new Chap. 6-A, while retaining Ss. 63 (4) and 65. The contention of the Board is that this power is an absolute power to start proceeding under the new chapter in every case including cases where schemes were settled by Civil Courts in suits to which it was a party. It further contends that where a scheme framed by the Civil Courts is in its view against the best interests of the institution it can proceed under the new Ch. 6-A even without giving that scheme a fair trial.

Dealing first with the latter contention, as far as I can see there is nothing in the Act of 1935 enabling the Board to set at naught the decrees of Civil Courts by taking proceedings under the new chapter on the ground that in its view the Court scheme is not in the best interests of the institution. If the scheme framed by the Court is given a fair trial and if, after working it for some time, defects are found in it, it may be that it is then open to the Board to file a suit under S. 65 or to start notification proceedings under the new chapter. The claim put forward in para. 7, i. e., the right to start proceedings under the new Chapter because in its view the decision of the Court did not come up to its expectations is to render nugatory the right of suit given under S. 63 (4) and to bring the administration of justice by Civil Courts into contempt and ridicule. Proceedings under S. 63 (4) will be reduced to a farce, because, in every case, immediately after the judgment is rendered by the Civil Court, notification proceedings can be started by the Board. Ch. 6-A does not, in my opinion, give such arbitrary and absolute powers to the Board. I am fortified in the view taken by me by what Venkataramana Rao and Newsam, JJ. say in their judgment in 1939 M W N 643.[1] In that case a scheme was framed by the Board and modified by the District Court under S. 63 (4) and an appeal was pending in the High Court. The appeal was filed by the trustee contending that the temple was not a public temple and that the scheme framed by the Court below was not a proper scheme. The Board was a party to the suit and the appeal; during all this time the scheme was suspended and did not function even for a short time. While the appeal was pending in the High Court, the Board started proceedings under Ch. 6-A to have the temple notified and an injunction was granted by a learned Judge of this Court restraining the Board from proceeding with the inquiry pending the appeal. A Letters Patent appeal was filed against the order of the learned Judge in the injunction application. This Letters Patent appeal and the main appeal against the decree of the lower Court were both heard by Venkataramana Rao and Newsam JJ. In the main appeal they decided that the temple was a public temple and that there was no reason to modify the scheme framed by the Court below. They therefore dismissed the appeal. In dealing with the proceedings started by the Board under Ch. 6-A of the Act, this is what they say at p. 645 of the report:

> It seems to us very undesirable that the Board should have taken any steps in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of the temple as would justify an ouster of the trustees in charge of a temple from their office. The scheme was framed in 1933 and proceedings relating to its modification were pending in the District Court and the scheme had not been given any fair trial. It could not possibly be said that the scheme was not worked satisfactorily by the trustees and that therefore in the interests of proper administration of the temple it was necessary for the Board to take the drastic step of having the temple notified. We trust and hope that the Board would drop all proceedings in the matter and allow the scheme as modified by the District Court and as modified by us to be given a fair trial and would give the trustees a fair opportunity to carry on the administration in accordance with the scheme.

Adopting what the learned Judges say in the above passage, I hold that the procedure under S. 65-A cannot be resorted to unless there is gross mismanagement justifying restriction of the powers of the trustee and that at any rate without giving the scheme framed by the Court a fair trial, the Board cannot take proceedings under Chap. 6-A. If after the Court settles a scheme under S. 63 (4) a suit is filed under S. 65 immediately or a short time thereafter, it is obvious that the Court will not entertain the suit. The right of suit provided by S. 65 is to secure a modification if, after a fair trial, defects are found in the working of the scheme ordered under S. 63 (4). Notification proceedings which the Board says are alternative remedy cannot stand on a higher footing.

---

[1] Ponnuman Dikshitar v. Board of Commissioners for the Hindu Religious Endowments Madras, (1939) 26 A I R Mad 682 = (1939) 2 M L J 11=1939 M W N 643.

But, is the Board entitled at all to resort to the procedure under the new chapter when a scheme is framed by the Civil Courts in a suit to which the Board is a party ? When a suit is filed against a person and judgment is delivered against him, he is bound by that decision unless it is set aside on appeal or review. In cases relating to administration of religious and charitable institutions when a scheme is framed under S. 92, Civil P. C., a further right is given ; it is always open to a person who is a party to that decision to file another suit with the necessary sanction of the Advocate-General or the Collector of the District, if in the working of the scheme, defects are found which necessitate a change in the scheme already framed by the Court. Even in cases of suits relating to the administration of temples, a party to a suit is bound by the decree in the suit unless in a later suit filed for that purpose with the necessary sanction, the Court sees reason to alter or modify the scheme and frames a fresh scheme. Till then the rights of the parties are regulated by the original decree. The same result ought to follow in the case of the Endowments Board where it is a party to a suit for the framing of a scheme, such for instance, a suit under S. 63 (4) of the Act. It will be nullifying the proceedings of the Civil Courts to allow a party to a decree to change that decree without resorting to those Courts.

Section 65 expressly provides that the Board or a trustee or a person interested in the institution, may in a case where a scheme was settled in the presence of the Board in a suit under S. 63 (4), file a suit in the Civil Court for the purpose of modifying the scheme settled under that Section. Normally therefore the Board ought to proceed under S. 65 when it seeks to modify a scheme which was settled in a suit to which the Board was a party. There is no indication in the Amending Act that the Board is exempted from the fundamental rule of law that a party to a suit is bound by the decision in that suit unless it is set aside by an appeal, review or a fresh suit. In cases where schemes were not settled in a suit to which the Board was a party, it may be open to it to resort either to S. 65 or to the notification proceedings under the new chapter. In a case where the Board was not a party to a scheme decree and it takes proceedings under the new chapter, instead of resorting to a suit under S. 65, the principle that a party to a decree ought not to be allowed to indirectly set at naught that decree is not violated. It may well be that the Legislature contemplated giving the Board power to proceed either by way of a suit in a Civil Court or by notification proceedings under the new chapter in cases where the Board was not a party to a scheme framed by the Civil Courts or where there is no scheme framed by a Court.

To my mind the proper way of reading the various Sections would be to confine the procedure under the notification chapter to cases where the Board was not a party to a suit in which schemes were framed by Civil Courts and to cases where no scheme has been framed by Civil Courts. S. 65 expressly provides for a suit to alter or modify a scheme which was settled in a suit to which the Board was a party. The notification Sections following immediately upon S. 65 must be so read as to harmonise with that Section and with the principle that a party to a suit is bound by the decree unless it is set aside by appeal, review or fresh suit. Under S. 63 (1), the Board frames a scheme. S. 63 (4) gives the dissatisfied party a right to file a suit to alter or set aside that scheme; the Court modifies the Board's scheme and passes a decree. S. 64 says that where no suit was filed under S. 63 (4) the Board itself may alter its own scheme, i. e., the one framed under S. 63 (1); S. 65 says that schemes settled under S. 63 (4) and schemes deemed under S. 75 to be settled under the Act may all be the subject of a fresh suit to modify those schemes. Then comes the new chapter providing for notification proceedings. How are these to be read together? The only way of doing it is to confine the notification procedure as indicated above. S. 65-B on which Mr. Rajamannar laid stress, may well be taken to apply to cases where schemes were settled by Civil Courts in suits to which the Board was not a party.

Assuming that the notification provisions apply even to schemes settled in suits to which the Board is a party, such proceedings cannot be started without giving that scheme a fair trial and without specifying in the notice under S. 65-A (1) (a) the reasons with full particulars of the defects found in the working of the scheme framed by the Civil Court. It would not be enough to say merely that the scheme was found wanting. The Board has to give reasons and the trustee is entitled to meet those reasons. Therefore the reasons must be such as would be capable of being met. They must be sufficiently specific to give a reasonable opportunity to the other party to show cause against those reasons. This is the minimum which I think ought to be done before notification proceedings are started. As to points which were specifically decided by the Civil Courts against the Board in suits to which it was a party, they cannot be re-opened under the guise of the notification proceedings. The decisions on those points are binding on the Endowments Board when it proceeds under S. 65-A. Take a case like this. One of the charges against the trustee is that he misappropriated a sum of Rs. 20,000 in 1925 and the Board finds this misappropriation under S. 63 (1) and frames a scheme. The trustee files a suit under R. 63 (4) making the Board a party and the Court after elaborate enquiry finds that the trustee did not misappropriate that sum and the finding is upheld on appeal by the highest tribunals in the land. Then notification proceedings are started under the new chapter. Can the Board give the alleged misappropriation of Rs. 20,000 in 1925 by the trustee as a reason under S. 65-A (1) and decide the question against the trustee and notify the temple ? Not at all. So the contention of the Board that it is entitled to go into all the reasons including those that were decided against it by the Courts is to my mind absolutely untenable.

It is urged by Mr. Rajamannar that a dissatisfied party may show cause why the notification proceedings should not be started, that three members of the Board are directed to consider the objections and decide the points and if the party is still dissatisfied with the decision of the three members, he can appeal to the full Board which will hear and decide the matter and that even then the party dissatisfied may go to the Local Government and satisfy it that it is not in the interests of the temple to notify it under the Act. What is urged is that where a statute creating a right in a particular body also provides a remedy for the persons affected by the exercise of the right by that body, it is not open to the dissatisfied party to resort to a Civil Court and that he is confined to the remedy which is prescribed under the Act. To this the plaintiff's advocate urges that where the statutory body is given jurisdiction to exercise a power if certain facts exist, the question whether those facts exist in a particular case so as to give jurisdiction to the statutory body to exercise the power given by that statute, or to put it in another way, the question whether the jurisdictional facts exist in a particular case or not, is always open to the Civil Courts to decide and that a party can go to the Civil Court and say that the facts which give rise to jurisdiction to the body do not exist in a particular case and that therefore the proceedings of that body are ultra vires of the powers conferred by the statute.

For the plaintiff, reliance is placed upon the decisions in (1905) A C 426,[2] (1885) 28 Ch D 486[3] and (1886) 32 Ch D 72[4] which deal with certain statutes empowering a particular body to acquire property for the purpose of providing public conveniences or for the purposes of widening a street. If the statutory body to which these rights are given attempts to acquire property, not for purposes for which it was authorized to acquire property, but for a purpose alien and foreign to it, then the Courts held that the statutory body had no jurisdiction to acquire the property and that the proceedings were ultra vires. Thus if the property was acquired for the purpose of utilizing only a very small portion for the road making and for selling the rest and making a profit out of it, it was held in (1885) 28 Ch D 486[3] that that body exceeded its jurisdiction and that it acted ultra vires of its powers. Then again where the right given is to acquire property for widening a street, it was held in (1886) 32 Ch D 72[4] that it did not include a power to acquire land for the purpose of altering the levels. But, where, as in the case in (1905) A C 426,[2] the power was given to acquire land for providing public conveniences and a property was acquired to provide public conveniences and to form a subway to reach them, it was held by the House of Lords that forming a subway to serve as approaches to the public conveniences is not alien to the purpose for which the body was authorised to acquire land. These cases are not of much use because they turn upon the wording of the statutes with which they were concerned. Where the purpose for which the acquisition is authorized is mentioned in the statute the case is an easy one. The Court has only to decide whether the purpose for which the acquisition was made in any given case comes within the purview of the object for which the acquisition was authorized by the Act. A statutory body cannot acquire the property of a private person unless authority is given to it by a statute. Where the purpose for which the acquisition is made is absolutely foreign to the purpose for which it is authorized to acquire property, then it is easy to say that the body acted ultra vires of its powers and that the exercise of the power in that case was absolutely foreign and alien to the scope of the Act.

---

[2] Westminster Corporation v. L & N W Ry., (1905) A C 426=74 L J Ch 629 = 93 L T 149 =54 W R 129 =3 L G R 1120=69 J P 425= 21 T L R 686.

[3] Gard v. Sewers Commissioners, (1885) 28 Ch D 486=54 L J Ch 698=52 L T 827.

[4] Lynch v. Sewers Commissioners, (1886) 32 Ch D 72=55 L J Ch 409=54 L T 699=50 J P 548.

The question however is not so easy in a case like this, where the purposes for which the proceedings under Chap. 6-A may be started, are not expressly specified in the statute. Here we have to deal with an entirely different set of facts. The Board is given the power to start notification proceedings under Chap. 6-A. There is no provision laying down the circumstances under which the notification proceedings may be started by the Board. In such a case it is difficult to say when exactly the Board may be said to act ultra vires of its powers or to act arbitrarily and capriciously and in fraud of the powers conferred upon it. It is said by Mr. Rajamannar, the learned advocate for the Board, that if the Board starts proceedings on the ground that it is not satisfied with the politics of the trustee or for some other reasons which are absolutely unconnected with the good administration of the temple, then the proceedings under Chap. 6-A would be ultra vires of the powers of the Board. But Mr. Rajamannar contends that if the proceedings started by the Board are stated to be for securing the better administration of the temple, the Court has no power to go into the sufficiency of the reasons which led the Board to start the proceedings under S. 65-A. He urges that the Legislature has not placed any restrictions on the power of the Board to start proceedings under Chap. 6-A and that what the Board is asked to do is to give reasons in the notice under S. 65-A (1) (a) and to go into the matter at two stages when objections are filed by a party. He urges that so long as the reasons which are stated by the Board in its notice are not absolutely foreign to the good administration of the temple and so long as action is taken in the professed interests of the temple, the Courts have no jurisdiction to enquire into the matter. He relies upon the decision of the House of Lords in (1905) A C 426,[2] where it is said at p. 427 that where the Legislature has given power to a particular body with a discretion as to how it is to be used, it is beyond the power of any Court to contest the discretion assuming that the thing done is a thing which the Legislature has authorized. He also relies upon the decision in (1926) 1 Ch 66,[5] which lays down that where power is given to a party it is for that party to act and that merely because its action does not appear to be right, it is not a ground for the Court to set it aside. Reliance is placed upon the observation of Warrington L. J., at page 90 in the above case that so long as the body does not act upon alien and irrelevant grounds and exercise its discretion on such grounds, the Civil Courts have no right to sit in judgment as regards the exercise of that discretion. Adopting this test to a case where, as here, in a suit to which the Board is a party, the Court after considering all the points urged by the Board in the best interests of the temple, decides against the Board and frames a scheme, let us see how the position stands. I have already expressed the view that having regard to the whole scheme of the Act in such cases the remedy is only by way of a suit under S. 65 and not by way of notification under S. 65-A at all.

Even otherwise, the statute does not specify the circumstances or conditions under which notification proceedings can be started. But it requires 'reasons' to be given for the action in a notice issued under S. 65-A (1). Provision is made for a trustee or other person interested to file objections and to satisfy the Board that it is not in the interests of the temple that it should be notified. So the reasons given by the Board should be reasonable. They ought not to be unreasonable and must be consistent with the scheme and purpose of the Act and must not be contrary to the well-established principles of jurisprudence, viz. (1) that a party to a suit is bound by the decision in that suit unless the same is varied or set aside by appeal, review or by a separate suit, (2) that a party to a suit is bound by the decision in the suit on all the points

---

5. Short v. Poole Corporation, (1926) 1 Ch 66 = 95 L J Ch 110=134 L T 110=90 J P 25= 24 L G R 14=70 S J 245=42 T L R 107.

which were raised and expressly decided in the suit. So the Board cannot put forward the very charges or points that were decided against it in a suit to which it was party. The Board cannot adopt a course which would render nugatory the provisions of S. 63 (4) giving a right of suit to a dissatisfied party. As I said before, the Board was a party to the scheme suit. The Board is as much a litigant as any other party. It is bound by the result of the litigation and to say that in such a case the decision can be set at naught by proceedings taken for the obvious purpose of altering that very decision of the Court is, to my mind, utterly inconceivable. It is an extraordinary contention that the Board urges in para. 7 of the written statement that merely because the management ordered by the Civil Court in a suit to which it is a party is in its view not in the best interests of the institution it can immediately start proceedings under Chapter 6-A without even giving that scheme a fair trial. Is it to be taken that the Legislature thought the Endowment Board alone can frame a good scheme and the Civil Courts cannot do so? Is it to be taken that the Board has the monopoly of wisdom in such cases? S. 63 (4) gives the Court a right to alter or modify a scheme framed by the Board under S. 63 (1). The Court may spend years in deciding a suit under S. 63 (4) and the case may go up in appeal to the highest Courts and be decided by those Courts and yet on the mere ground that the decision of the ultimate Court of appeal is not in the Board's view in the best interests of the temple, proceedings can be started at once under S. 65-A, if the Board's contention is right. That is not the purpose or the intendment of the Act. I do not think that the Legislature would give in S. 63 (4) a right to Civil Courts to modify or alter the scheme framed by the Board in a suit to which the Board is made a party, and straightway give power to the Board to nullify the decisions of the Civil Court inclusive of the highest tribunals, merely because the Board thinks that the decision of the Civil Courts is not conducive to the best interests of the institution, while that was the very question that was decided by the Court. The right of suit under S. 63 (4) would, in that event, be illusory. If the plea advanced in para. 11 that the procedure under S. 65-A is the only remedy to effectively safeguard the interests of a temple or its endowments, is accepted, why have Ss. 62, 63, 64 and 65 of the Act? Evidently the primary object, and perhaps the sole object, of these proceedings is to get round the decisions of the Civil Courts rather than to get a proper scheme for the temple.

The next argument of Mr. Rajamannar is that in this particular case the scheme that was framed was the one framed by the High Court in November 1930, that that scheme was given a fair trial for a long period of eight years, that in the working of it, various defects were found and that it is for that reason that notification proceedings were started by the Board. He urges that O. S. No. 1 of 1933 was filed by two worshippers who wanted the High Court scheme of 1930 to be modified in very minor and inconsequential matters and that in that suit the Board in its written statement said that in the interests of the institution a better scheme was necessary, that the Court refused to deal with matters which were not urged by the then plaintiffs, that the Court in fact dealt only with those matters which were not provided for in the High Court scheme. He therefore says that in O. S. No. 1 of 1933 nothing material was adjudicated upon, no suggestions for improvements of the High Court scheme were dealt with by the District Judge, and decided against the Board. He says that the Board is not going behind and is not flouting the decision of the District Judge. He invited me to go into that judgment and find out what the points are that are decided in that judgment and see if the Board in starting the notification proceedings is trying to get behind any point which was decided in the judgment. He says that the reasons for starting the proceedings under the new Chap. 6-A are all defects which were found in the working of the scheme of 1930.

Mr. Kuttikrishna Menon urges that it is not the case of the Board in the written statement that they gave the scheme of the High Court framed in November 1930 a fair trial, that defects were found in the working of that scheme and that that is the reason why the Board took the proceedings under the new chapter. He draws my attention to the fact that in the plaint it is specifically stated that nothing happened after the scheme was framed in November 1930 to justify any interference by the Board, that the Board is trying to get behind the scheme framed in 1930 for the very reasons which existed in 1930, that reasons 1, 3, 5 and 6 are the grounds which had been urged by it and decided against it that it had never cared to urge reasons 2, 4 and 7 for the reason that nobody ever thought there was any substance in them. He draws my attention to the fact that in para. 13 of the plaint it is definitely stated that at the hearing before three members of the Board, this argument that the grounds now urged were in existence in 1930 and that nothing happened between then and now justifying any action was expressly urged. In para. 13 it is further stated that at the hearing, the Commissioners conceded that nothing had transpired after the decree above mentioned and yet overruled the preliminary objection. The plaintiff's advocate says that in the written statement there is no allegation that the three members did not concede as alleged in para. 13 of the plaint or that they wrongly conceded it or that their concession is not binding on the Board. He also urged that in the written statement there is no averment or even an indication anywhere that subsequent to the High Court scheme, the Board discovered any defect in the working of that scheme to justify resort to Chap. 6-A. It is pointed out on the other hand that the Board expressly states in paragraph after paragraph that because the Board is convinced that the decision of the Civil Courts is wrong, it is taking proceedings under this chapter. My attention is particularly drawn to para. 7 of the written statement. It is said that this and the other paragraphs do not state that the scheme of the High Court was found wanting in the actual working of it and that for this reason, proceedings are being started. He says that the written statement is a direct challenge thrown out by the Board as to its supreme powers and that the Board invites a decision on its absolute right to do what it likes and to start proceedings immediately after a decision of a Civil Court though it is a party to the suit in which a scheme is framed by the Civil Court and that it can urge and consider the very reasons decided against it by the Civil Courts. The written statement was drafted presumably under expert legal advice by the defendant Board the members of which are all lawyers ; it cannot be said that the pleadings are loosely drafted. I am afraid that in this case there is ample justification for the contention of the plaintiff's advocate that the plea of the Board in almost every paragraph of the written statement is that it is entitled to have its view prevail over the judgment of the Civil Courts, and not that the High Court scheme was after a fair trial found defective.

I shall now proceed to deal with the reasons given by the Board in the notice, Ex. P-18: *Reason No. 6 :* One of the chief points in controversy is whether the appointment of the manager should be with the trustee or whether it should be with the Board. This question was one of the principal points of contest between the Board on the one side and the trustee on the other in O. S. Nos. 1 and 2 of 1929, District Court, South Malabar. The Board contended that having regard to the fact that the temple is famous all over India and attracts pilgrims in large numbers from the whole country and also having regard to various other facts, the right of appointing the manager should be with the Board. The trustees resisted this claim and the District Judge came to the conclusion that the power of appointment should be with the Board and the Zamorin should have the power to nominate the manager in the first instance. The Zamorin was to send up a nomination and if the Board did not approve of the nomination after ascertaining the views of defendant 2, the Zamorin was to nominate another person and the same procedure was to be gone through. If after three nominations the Board was still of the opinion that the nominations of the Zamorin were not proper, then the Board itself was to appoint the manager. Naturally the Zamorin was dissatisfied with this arrangement and he carried the matter in appeal to the High Court in A. S. Nos. 211 and 212 of 1930. Wallace, and Krishnan Pandalai, JJ., before whom the appeal came on for hearing, went elaborately into this question as to who should have the power of appointing the manager. While giving due weight to the reasoning of the District Judge, this Court thought that in the circumstances of this case, having regard to the fact that the trustees were men of very high standing and position, one being the Zamorin Raja of Calicut and the other a very prominent Nambudiri, the power of appointment of the manager should be with the trustees and that the Board should not have that power. In the scheme framed by the High Court, the power of appointing the manager was given to the trustees.

In refusing to give the Board the power of appointing the Manager, the High Court did not rest its decision on the view that such a course was illegal or not justified by the provisions of the Religious Endowments Act as it then stood, but on the special circumstances of this case. The scheme has been functioning for eight years and there is no suggestion in the notice given under S. 65-A (1) (a) that this provision of vesting the power of appointing the manager in the trustee had led to any unsatisfactory results. We have got a bald statement in the notice that in the interests of the administration of an institution of the importance of the Guruvayur Temple, it is necessary that the actual day to day management should be in the hands of persons appointed by the Board. This is, to say the least, an extraordinary contention, that a manager appointed by the trustee, however eminent the trustee may be and however unimpeachable his character and integrity might be, cannot look after the day to day management and it is only a person appointed by the Board in Madras that could efficiently discharge the duties of the day to day management. Further, in this case that is the very point that was urged and fought very strenuously both before the District Judge and before the High Court; and the High Court ultimately decided that for the reasons given by it, the trustee should have the power. There being no allegation or suggestion that the appointment by the trustees has not worked properly after 1930, I am of opinion that it is not open to the Board to go behind the express adjudication by the High Court in the appeal to which the Board was a party and to set at naught the decision of the High Court by arrogating to itself the power of appointing the manager under the indirect procedure of Chap. 6-A. I do not think that it was the intention of the Legislature to arm a subordinate authority like the Endowments Board with powers to flout the decisions of the highest Courts in the land merely by having resort to the procedure by notification. The Legislature only provided a cheaper and expeditious remedy in some cases, and it cannot possibly be that it was the intention of the Legislature to enable the Board to bring the administration of justice into contempt and ridicule which would be the result, if, after fighting for a particular power and after having lost it in the Civil Courts, the Board without any fresh facts may immediately resort to notification proceedings to get that power, merely because in its view the decision of the highest tribunal in the land is not in the best interests of the institution. I hold that, so far as this reason goes, it is a fraudulent exercise of the power given to it in trying to re-agitate a matter which was decided against it by the High Court and to substitute its own view as against the considered judgment of the High Court. I cannot conceive of a grosser abuse of the powers given in the new Chap. 6-A than this case.

Reason No. 1: The first reason given is that the scheme of administration under which this temple is managed fails to provide effective supervision or check over the action of the trustees, especially in the matter of the budget and the expenditure of the temple funds. The Board was a party to O. S. Nos. 211 and 212 of 1930 in the High Court. Various suggestions were put forward by it as regards the budget and the expenditure of temple funds. I find various safeguards provided in that decree and these safeguards were provided after hearing the Board and the other parties. It is not said in this reason No. 1 that the scheme as framed by the High Court has in its working failed to achieve the object of securing effective supervision or check over the actions of the trustee in the matter of the budget and expenditure. The notice reads as though that at the inception, the scheme as framed failed to provide for effective supervision or check over the action of the trustees in the matter of the budget and the expenditure of the temple funds. The remark that I made in respect of reason No. 6 applies equally to this reason.

Reason No. 5: The point covered by reason No. 5 was similarly considered by the Courts in O. S. Nos. 1 and 2 of 1929 and in A. S. Nos. 211 and 212 of 1930. My remarks as regards reason No. 6 also apply to this.

Reason No. 3: The District Court in O. S. No. 1 of 1933 has rectified this matter. It is not clear from reason No. 3 what there is to complain of after the judgment of the District Court in O. S. No. 1 of 1933.

Reason No. 4: Arrears spoken of may be the accumulations of several years. It is not possible to collect 100 per cent. of the rents every year. In most years there will be some arrears left. The ground is vague; it is not stated that it is the arrears which were allowed to accumulate during the few years past. It is impossible to meet such an allegation. It is not a ground for starting proceedings under Chap. 6-A unless it is stated that large arrears were allowed to accumulate during a period when they might and ought to have been collected. In that case alone it will point to a neglect of duty. The reason as framed must be a reason for the notification, i. e., for the drastic step of imposing serious restrictions on the trustee's powers. If you frame your reason in a very vague manner and do not give the necessary particulars on which the charge of neglect of duty is based, it is no reason at all.

Reason No. 2 : This was never put forward in the earlier litigations. What is said here is that the previous Zamorin Rajahs have taken loans from the temple funds and that succeeding trustees have failed to recover those amounts. In Ex. P-19 it was pointed out that a previous Zamorin took a loan from the Dewaswom funds and that the then Zamorin died without leaving any private property and that there are no assets from which it could be recovered. In Ex. P-19 the plaintiff further stated that in spite of the fact that there were no assets of the borrower still the Zamorin who immediately preceded him paid a sum of Rs. 15,000 to the trust. He says that there is now only a sum of Rs. 15,000 more to be paid and that though under no legal obligation he himself would pay in a few years by yearly payments. Mr. Kuttikrishna Menon urges, and I think rightly, that it is only if the money could be recovered and the trustee does not recover it, then alone it may amount to neglect of duty on the part of the trustee for which any action could be taken under the notification chapter. In this case, even after the objection statement Ex. P-19, there is no plea in the written statement that this was an amount which could be recovered and which the trustees have failed to recover and that it therefore amounts to neglect of duty on their part. It is not even suggested that the previous Zamorin borrowed the amounts in question for purposes binding on the Sthanom or on the succeeding Zamorin. There is no allegation that the person who borrowed the money left any assets from which the money could be recovered. In the absence of these two averments, I agree with Mr. Kuttikrishna Menon, that this is no reason at all. The reason to be mentioned in the notice under S. 65-A (1) are all reasons which must point to some neglect of duty or omission on the part of the trustee to do what he is bound to do, in which case alone, there will be a justification for resorting to this drastic step of notifying the temple. In the present case Mr. Kuttikrishna Menon urges that the Board was in possession of these facts all through and that because there is no substance in this reason, it was not put forward in the previous litigations. If really there was any sum which could be legally recovered and yet not recovered by the succeeding trustees it would have been put forward in the previous litigations as a ground for curtailing the powers of the Zamorin. It was open to the Board to point out and the Board would certainly point out that here was a Zamorin who did not care to collect the amounts which could be collected and that he was causing loss to the institution. No such plea was ever put forward. Hence, for the reasons which I have given in connexion with the other reasons, I hold that reason No. 2 is not available to the Board. As I said before, the reasons must give specific grounds upon which neglect of duty or omission can possibly be inferred on the part of the trustee.

Reason No. 7: This is merely a statement of what the Board thinks about the scheme as framed by the Civil Courts and not a statement that the scheme after being worked for a reasonable time has been found to be unsatisfactory. As I said before if this is what is intended, the Board must indicate in what particulars the scheme was found wanting. As it is, it is absolutely vague and indefinite. So I hold that 'reasons' given in Ex. P-18 are not available to the Board.

In the result the suit is decreed and it is declared, (1) that the proceedings under S. 65-A are not open to defendant 1 in this case and that a suit under S. 65 is the only remedy open to the first defendant Board; (2) that in any case, the proceedings started by its notice dated 19th December 1938 are ultra vires of the first defendant Board's powers and are a fraudulent exercise of the powers of the Board and are therefore illegal and invalid. I further grant an injunction restraining defendant 1 from proceeding with the enquiry under Chap. 6-A, Madras Act 2 of 1927. I also direct defendant 1 to pay the plaintiff's costs of this suit. Defendant 2 will bear his own costs.

C.R.K./G.N. *Suit decreed.*

A. I. R. 1940 Madras 257

LAKSHMANA RAO J.

In re Avidi Veerasami — Petitioner.

Criminal Revn. Case No. 646 and Petn. No. 614 of 1938, Decided on 9th December 1938, to revise judgment of Sub-divisional First Class Magistrate, Peddapur, in C. C. No. 25 of 1938.

Arms Act (1878), S. 19 (f) — Servant of licensee carrying gun to his master's house.

A servant of a gun licensee merely carrying the gun of his master to the house of the master under his orders is not guilty under S. 19 (f). [P 258 C 1]

V. Viyanna — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—The petitioner is the servant of a gun licensee and the Sub-Inspector found the gun of his master with him. The explanation is that he was merely carrying the gun to the house of the master under his orders and the conviction of the petitioner under S. 19 (f), Arms Act, cannot be sustained. It is therefore set aside and the fine if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 258

VENKATARAMANA RAO J.

Official Liquidator, Travancore National Bank Subsidiary Co. Ltd.
Applicant.

v.

Official Liquidators, Travancore National and Quilon Bank Ltd.
Respondents.

Appln. No. 437 of 1939, in O. P. No. 158 of 1938, Decided on 9th March 1939.

(a) Banker and Customer — Preferential claim — Subscribers of company purchasing chits depositing amount with Bank for payment to company—There is only assignment of money deposited in Bank in favour of company —There is no question of trust in favour of company so as to entitle it to rank as preferential creditor of Bank.

Where subscribers of a company purchasing chits from the Company deposit money with a Bank for payment to the Company of the instalments of chits as and when they fall due, the money deposited by subscribers with the Bank operates as a valid assignment in favour of the company in respect of and to the extent of the amounts due to the Company by the subscribers. The deposit with the Bank cannot be said to be trust money held in trust by the Bank for the Company and therefore the Company is not entitled to rank as a preferential creditor in respect of the same: *(1887) 34 Ch D 128 ; (1919) 2 Ch 104 ; (1886) 17 Q B D 442 ; (1905) A C 454 ; A I R 1914 Mad 281 and A I R 1918 Mad 172, Rel. on.* [P 263 C 1, 2; P 265 C 2]

(b) Transfer of Property Act (1882), S. 130 —Agreement between debtor and creditor that debts would be payable from particular fund with third person — Agreement amounts to assignment—Assignee is bound to refund surplus to assignor.

When there is an agreement between a debtor and a creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third party, the agreement will operate as an assignment of the debts or the money. But the assignee is under an obligation to refund to the assignor any surplus that may remain after discharge of liability : *(1902) 2 K B 190 and (1884) 12 Q B D 347, Rel. on.* [P 261 C 2 ; P 264 C 1]

(c) Transfer of Property Act (1882), S. 130 —Assignment of part of debt.

An assignment of a part of a debt is valid : *A I R 1928 Mad 1201, Foll.; A I R 1925 Mad 753, Not foll.* [P 265 C 1, 2]

(d) Transfer of Property Act (1882), S. 130 —Assignment of debt—Interest.

Where a debt is assigned, interest will go with it. [P 265 C 2]

S. Parthasarathi and V. K. Thiruvenkata-Chari — *for Applicant.*

C. Krishnaswami Iyer—*for Respondents.*

Order. — This is an application by the Official Liquidator of the Travancore National Bank Subsidiary Co., Ltd., hereinafter called the Company, for an order that the Official Liquidators of the Travancore National and Quilon Bank, hereinafter called the Bank, should be directed to admit the claim of the Company in respect of the amounts standing to the credit of the Chitty Savings Bank Accounts utilized for the purpose of paying the dues of its prized subscribers who are its debtors to the extent of the debt due by the respective subscribers to that Company as a preferential claim. The Subsidiary Company was formed mainly by the Travancore National Bank Ltd., as a private Limited Company having as its subscribers The Travancore National Bank, Ltd., which holds 4998 shares out of 5000 shares, the other two shares being held by one K. Ommen and K. M. Cheriyan, each holding one share. The object of the Company was among other things to conduct chits. The basis of the claim is that the amounts standing in the names of persons who have subscribed for the chits in the company in the Chitty Savings Bank Accounts of the Bank are trust moneys held in trust by the Bank for the Company and therefore the Company is entitled to rank as a preferential creditor of the Bank in respect of the same to the extent of the amounts due to the Company. To appreciate the contention it is necessary to state a few facts. The Company ran a series of chits according to certain rules which are found in a printed pamphlet marked as Ex. A in the case. The chits were divided into four classes, A, B, C and D each running for 25 months and the holder of a ticket in each class being bound to subscribe the instalments regularly for the twenty-five consecutive months. The chit amounts of each class of tickets will be separately put up for auction every month, excepting the 25th and the first instalment, will be auctioned, but on the day of the first instalment falling due, the second instalment will be auctioned in advance and similarly each subsequent instalment of the chit will be auctioned on the date of the instalments previous to it. At each auction the bid will begin at a fixed minimum discount and the subscriber who bids for the largest amount will be declared to be the successful bidder. The total amount of discounts of each class of tickets less expenses of management were divided pro rata for those particular classes of tickets both prized and non-prized. The share of discount divided thus due to a subscriber will be given credit to him when he pays the subscription for the instalment to which the auction relates. The net amount of each successful bid which is called the prize amount will be given to the respective successful bidder on his furnishing security to the satisfaction of the Company for payment of the future subscriptions. If he gives security, he is paid the prize amount one week after the date of the next instalment; but if he fails to give security, it is open to the Company to retain the amount and adjust it from time to time towards the subscription due to the Company from such bidder. If after adjustment any amount is due from the subscriber, the subscriber is liable to pay the amount with 12 per cent. interest per annum to the Company. But instead of retaining the said amount there was also a provision in and by which the amount payable for the future subscriptions is deposited in the Bank in such a manner that the instalments of subscription as and when they fall due may be paid to the Company. The rule which regulates it is R. 18 (b) which runs thus:

> Arrangements have been made with the Travancore National and Quilon Bank, Ltd., and its branches providing facilities to every chit subscriber of the company to open Chit Savings Bank Account with them from which Chit instalments will be adjusted as and when they fall due.

For the information of the intending subscribers certain rules were framed by the Bank which have been printed as part of the printed pamphlet, Ex. A, containing the rules issued by the Company in the matter of the chits. As a consideration of those rules will become important in defining the actual legal position of the company with reference to the amounts deposited by the subscribers in the said Savings Bank Accounts I reproduce herein the said rules:

> 1. Chit Savings Bank Account may be opened by any Chit Fund subscriber with an initial deposit of Rs. 5. A minimum balance of Rs. 5 shall always be maintained in every account.
>
> 2. Interest will be allowed at the rate of 3½ per cent. per annum on the daily balance of Rs. 5 or multiples thereof.
>
> 3. Accounts are balanced half-yearly, viz., 30th June and 31st December when the interest earned will be credited to the accounts.
>
> 4. Amounts deposited in the Chit Savings Bank Accounts shall not be available for withdrawal for purposes other than for payment of Chit instalments till the termination of the particular Chit in respect of which the account was opened.
>
> 5. The Chit Fund subscriptions due every month will be appropriated and adjusted from Chit Savings Bank Account as and when it falls due for payment if there be sufficient balance at credit in the accounts, and receipts forwarded to the respective subscribers.
>
> 6. At the termination of the Chit Fund the Chit Savings Bank Account may be treated as an ordinary Savings Bank Account and all the rules relating to the Ordinary Savings Bank Account shall be applicable to it.
>
> 7. Any person wishing to open an account should apply in the prescribed form which will be supplied free on application.

When the subscribers or the Company choose to adopt this method of payment, that is payment through the Travancore National Bank by depositing in the Chitty Savings Bank Account, the procedure adopted by the Subsidiary Company, and the subscriber appears to be as follows. The subscriber executes a receipt for the amount of the prize which he bid for, which is in the following form:

> Received from the Travancore National Bank Subsidiary Co., Ltd., the sum of Rs . . . . . due to me on account of the Chit Fund prized amount for my . . . . Ticket No. . . . . . in your Chit Fund No. . . . . which I prized on the . . . . . at the . . . . .

Then he executes two letters in favour of the Travancore National and Quilon Bank, (1) a letter requesting the Bank to open a Chitty Savings Bank Deposit Account with an undertaking to comply with the Bank's rules for the conduct of such account, Ex. B, and (2) a letter asking them to appropriate for the future instalments as they fall due the necessary amount from the said Deposit in the Chitty Savings Bank Account, Ex. C. The letter to the Bank asking them to open the account runs thus:

> **Chitty Savings Bank Deposit**
> Place :—
> Date :—
>
> To
>
> The Travancore National Bank, Ltd.
>
> Dear Sir,
>
> Having read through your revised rules of business you sent to me I now request you to open a

Chitty Savings Bank Deposit Account in my name in the books of the Bank, and I herewith tender Rs. . . . . for credit thereto as under.

Coin and currency notes ... Rs.
Cheques, Bills, etc. ... Rs.
Total ... Rs.

I agree to comply with the Bank's rules for the time being for the conduct of such accounts.

Be good enough to furnish me with a pass book for my use, also to note my signature as under.

Yours faithfully,

The letter authorizing the Bank to pay the Company the future instalments as they fall due runs thus:

To
The Travancore National and Quilon Bank, Ltd., Branch.

Dear Sirs,

Re : Prized Ticket in Chit No. . . . . .

I beg to inform you that I am holding . . . . . . No. . . . . in your Chit Fund No. . . . . which was prized at the auction conducted on the . . . for the . . . . instalment. I have acknowledged receipt of the bid amount for which I have given a separate receipt and I confirm my agreement that as security for the due payment of all the future subscriptions towards my above ticket . . . in Chit No . . . you will hold as much amount as would cover up the future liability of this in Chitty Savings Bank Account with you.

I also confirm my agreement with you that you will appropriate towards future instalments as they fall due the necessary amount from my deposit in your Chitty Savings Bank Account.

Yours faithfully,

The amount that will be deposited into the Bank will be the entire prize money or the amount of the future subscriptions which are payable for each ticket as prescribed by R. 1 (a) because it cannot at that moment be predicated what exactly would be the amount of discount which each subscriber will get by way of pro rata dividend as per R. 9. It is also provided that if through the default of the Company the chit should collapse the subscribers who have received prizes will be bound to pay their subscriptions only on the dates on which subscriptions would have fallen due if the chit had not collapsed. This is to show that the debt which has been incurred by a subscriber by reason of having received the prize amount will have to be paid by him in monthly instalments on the several dates on which the subscriptions would have fallen due. In the case of moneys which have been deposited in the Bank in the Chitty Savings Bank Account, the Bank will have to pay the instalments of subscription on the due dates on which the subscriptions would have been ordinarily payable. No oral evidence has been let in as to the nature of the arrangement entered into between a subscriber, the Company and the Bank at the time of the deposit of the prize money in the Chitty Savings Bank Account of the Bank. From the affidavits and from the documents aforesaid what I gather is this. The Bank which has subscribed almost the share capital of the Company was practically controlling the Company. If the subscriber is not able to give the security, the Company itself takes a receipt for the prize money alleged to have been paid to him, deposits the said amount into the Bank itself by getting a signature to a letter similar to Ex. B and also takes a letter purporting to be addressed to the Bank similar to Ex. C-1.

The Bank in pursuance of the letter addressed to them to open an account receives the money and opens a Chitty Savings Bank Account in the name of the subscriber and permits the letter similar to Ex. C-1 addressed to them to remain with the Company. The transactions which purport on paper to be done severally with the Company and the Bank were all done through one agency so that it may be said that every transaction has been done with the consent of both the Bank and the Company. This is plain on a consideration of Ex. C-1. As has already been stated, the form that was adopted for Ex. C-1 was the form that was in use in the Travancore National Bank with the change in the heading "Travancore National and Quilon Bank Ltd." The language of the document was not altered so as to signify that the letter was addressed to the Travancore National and Quilon Bank at the time of the deposit in the Chitty Savings Bank Account. In most parts the language of the letter is unintelligible with reference to the Travancore National and Quilon Bank. Para. 1 of the letter obviously cannot apply to the Travancore National and Quilon Bank except with regard to the words "in Chitty Savings Bank with you." The rest of the paragraphs obviously can only apply to the Company. It is only para. 3 that can properly be referable to the Bank. Para. 1 says that the subscriber is "holding in your chit fund" where the word 'your' can only refer to the Company.

In para. 2 it states "I have acknowledged receipt of the bid amount" which can only refer to the Company. The said paragraph proceeds to state: "I confirm my agreement that as security for the due payment of all the future subscriptions . . . ." The agreement is only with the Company. The last words, namely in the Chitty Savings Bank Account with you, might refer to the Bank, but having regard to the context and to the previous sentences in the said paragraph, it might also be referable to the Company. It will be seen that under the rules if the subscriber is unable to give security it is open to the Company to retain the prize amount which will be adjusted from time to time towards the subscriptions due as and when they fall due. What the company does is that instead of keeping it in its custody, it purports to deposit the same on behalf of the subscriber and with the consent of the subscriber in the Bank. The words "in the Chitty Savings Bank Account with you" connote that both the Subsidiary Company and the Bank were treated as one; though the Chitty Savings Bank Account is with the Bank, it is treated as if the account is with the Subsidiary Company. The last paragraph says: "I also confirm my agreement with you." It is a pertinent question to ask, was the agreement with the Bank or with the Company? It may mean both. The agreement with the Company is that according to R. 18 (b) in cases where the Chitty Savings Bank Account is opened, the chit instalments will be adjusted as and when they fall due from that account, that the amount deposited in the Chitty Savings Bank Account should not be withdrawn except for purposes of paying the chit instalments till the termination of the chit and that the chit fund subscriptions should be appropriated and adjusted towards the Chitty Savings Bank Account. The truth is, as I have stated, that the entire transaction is done by one single agency representing both the Bank and the Subsidiary Company. That seems to be also clear from the affidavit of the Official Liquidator of the Subsidiary Co. filed on 14th February 1939. In para. 9 of his affidavit he states thus:

> I also understand that in some cases where the prized subscriber failed to furnish security and also failed to make the arrangements mentioned above the Subsidiary Co. deposited the prize amount due to the subscriber into the hands of the Bank in a Chitty Savings Bank Account on the same terms and earmarked for the same purpose, namely payment to the Subsidiary Co. of the monthly subscriptions as and when they fell due and as regards adjustment of subscriptions the same practice was followed in such cases also.

It is not in some cases alone, but I think in every case where a subscriber is not able to give the security instead of retaining the amount as per R. 10 which they could very well have done, they deposited the amount in the Chitty Savings Bank Account and the arrangement, I inferred, was followed. Mr. Parthasarathy, who appeared for the Official Liquidator, stated that it was so. The question is what is the legal relationship that is constituted by the deposit in the Bank between the debtor and the Bank and the company? The transaction as evidenced by R. 186 of the Chit Fund Rules, the rules of the Chitty Savings Bank, Ex. B and Ex. C-1 operates as an equitable assignment of the money deposited in the Bank in favour of the Company. The agreement referred to in para. 2 of Ex. C-1 is that the prize amount should be retained as security for the due payment of the future instalments in the Chitty Savings Bank Account of the Bank. The intention is clear that the debt due in favour of the company should be discharged from and out of the money deposited in the Bank. When there is an agreement between a debtor and a creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third party, the agreement will operate as an equitable assignment of the debt or the money. In my opinion the agreement in para. 2 of Ex. C-1 would operate as an absolute assignment of the debt even in English law within the meaning of S. 25, cl. 6, Judicature Act. Much more so would it under S. 130, T. P. Act. Again, reading para. 3 of the letter with Ex. B and the rules relating to the Chitty Savings Bank Account, it is clear that the subscriber has authorised the Bank to pay the future instalments to the Company as and when they fall due from and out of the deposit in the Bank. This authorisation was communicated to the Bank because Ex. C-1 is kept with the Company and has been produced by the Company and it would operate as an assignment of the moneys in favour of the Company. This would be so even if paras. 1 and 2 of Ex. C-1 are eliminated as inapplicable to the Bank. There is enough authority both English and Indian for the view I am taking. The principle applicable is neatly expressed in Chitty's Book on Contracts at p. 281 thus:

> An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers.

In (1887) 34 Ch D 128[1] a debtor wrote to a creditor that he would hold at his disposal a sum of money due to the debtor from a third party for goods sold and delivered and it was held that the letter was an immediate equitable assignment though it was not communicated to the third party. Cotton L. J. at p. 134 observed as follows:

> When there is a contract for value between the owner of a chose in action and another person which shows that such person is to have benefit of the chose in action, that constitutes a good charge on the chose in action. The form of words is immaterial so long as they show an intention that be is to have such benefit . . . It is contended that the true construction of the letter is that the appellants (creditors) are to have no charge on the debt till the Company have received the money; but that when they have received it, they shall deal with it in a particular way; but I think the appellants had a good equitable assignment, and had a right to insist on the debt being paid to them and not to the Company.

In (1919) 2 Ch 104[2] the facts were as follows: A testator handed to his landlady Mrs. G. an envelope addressed to her describing it as a present to her. After having delivered that envelope, he again took it from her promising to keep it with him. After his death, on the envelope being opened it was found that it contained (1) a deposit receipt for £500 deposited with his Bank; (2) an order in writing signed by him directing the Bank to pay to Mrs. G. the sum of £500 then on deposit and (3) a letter addressed to Mrs. G.:

> You have been very kind to me and I desire to make some return by giving you the amount of £500 now on deposit at the ... Bank as per receipt enclosed.

There was no endorsement on the deposit receipt. Sarjant J. held that there was a valid and complete gift to Mrs. G. of the sum on deposit by way of assignment under the Judicature Act, 1873, S. 25, sub-s. 6, and that the omission to give notice to the Bank was immaterial. The learned Judge in that case followed among other cases the case in (1886) 17 Q B D 442.[3] In that case the executors and trustees under a will sent to one of the residuary legatees a statement of account showing a balance to be due to him on account of his share of the residuary estate. He sent this account to his daughter, the plaintiff, with the following direction on it in his handwriting:

> I hereby instruct the trustee in power to pay to my daughter Laura Harding, the balance shown in the above statement.

It was held that the letter was a valid assignment of the balance in the hands of the trustees in favour of the plaintiff. In (1905) A C 454,[4] one K and Co., were rubber merchants in Liverpool. Their business was financed by Brandts and also by another firm of Bankers. The arrangement was that the Bankers advanced money for goods purchased and by way of security the Bankers took delivery of the goods to themselves. But when K and Co. purported to sell the goods they got a delivery order from the Bankers who got an engagement from K and Co. that they would hold the goods and proceeds in trust on their behalf. In accordance with this arrangement K and Co. sold certain goods to Dunlop Rubber Co. on 30th December 1902. In connexion with this purchase Brandts had advanced a sum of £3430. The goods were delivered to the Dunlops. At the time of the delivery, K and Co. sent to Brandts two documents, (1) a letter by K and Co. to the Dunlops and (2) a letter intended to be signed by or on behalf of the Dunlops and to be returned by them direct to Brandts. The letter intended to be signed by the Dunlops was to the effect that they would remit the value of the goods purchased from K and Co. to Brandts. Brandts forwarded that letter to the Dunlops which was acknowledged by them. They sent it to Brandts. It was held that there was an equitable assignment of the money due from the Dunlops to K and Co. in favour of Brandts. In the Court of Appeal, which was reversed by the House of Lords, the learned Chief Justice took the view that the document did not on the face of it purport to be an assignment nor use the language of an assignment. In repelling that argument Lord Macnaghten made the following observations at p. 462:

> An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor. I think that the documents which passed between Brandts and the Company would of themselves, and apart

---

[1] Gorring v. Irwell India Rubber Works, (1887) 34 Ch D 128=56 L J Ch 85=55 L T 572=35 W R 86.

[2] In re Westerton; Public Trustee v. Gray, (1919) 2 Ch 104 = 88 L J Ch 392 = 122 L T 264=63 S J 410.

[3] Harding v. Harding, (1886) 17 Q B D 442=55 L J Q B 462=34 W R 775.

[4] William Brandt's Sons & Co. v. Dunlop Rubber Co., (1905) A C 454.

from Kramrisch and Co.'s undertaking and engagement given to Brandts, have constituted a good equitable assignment.

So far as Indian authority is concerned, it is enough to refer to 38 Mad 500[5] and 43 I C 385.[6] I have therefore no hesitation in holding that there has been a valid assignment of the money deposited in the Bank in favour of the Subsidiary Company. One may go so far to say that there has been a novation so as to result in an absolute release of the subscriber in respect of the future subscriptions payable to the Company and at least to the extent of the money deposited should the amount deposited not cover the total amount of the future subscriptions. In the view I have expressed that the transaction on behalf of the Bank and the Company was done by a single agency all the elements of novation are present. The three parties must be deemed to meet, that is, the debtor (subscriber), the creditor (the Company) and the third party (the Bank) and with the consent of all the three, the transaction was put through. The Bank contracts to pay the Company as and when the subscriptions fall due and the Company agrees to receive them as and when they fall due from the Bank and thus accept the liability of the Bank. As stated in Leake on Contracts, Edn. 8 at page 683 :

> The liability of a third party may be accepted in satisfaction of the debt of the original debtor, who is thereby discharged under a valid agreement of all the parties to that effect, which gives the creditor a remedy against the third party. Such an agreement before breach constitutes what is called 'novation'.

But the difficulty that arises in adopting this view is created by the language of Ex. C-1, where in para. 2 the term "security" is used. On this an argument may be founded that the assignment of the deposit money by the subscriber was only by way of security for the debt due to the Company. But in answer to this it may well be pointed out that the whole of paras. 1 and 2 in Ex. C-1 are out of place with reference to the Company. The language used therein is properly applicable to cases where the Bank was conducting the chit and retaining the money with itself in its Chitty Savings Bank Account. But taking the said paragraphs applicable to the Company, the substance of the transaction appears to be that the prize money is retained by the Company agreeing to deposit the same with the Bank and take the subscriptions from the Bank itself thus exonerating the subscriber from all liability to future subscription. It seems to me unnecessary to pursue the matter further and express a final opinion in this application as the question of liability of the subscriber to the Company will properly arise in the liquidation proceedings of the Company. I am however convinced that, whether there is a novation or not, there is an assignment in favour of the Company of the moneys deposited in the Bank by the subscriber and the right to realize it is vested in the Bank. Whether the assignment can be termed legal or equitable under the English law, it is an assignment within the meaning of S. 130, T. P. Act. Mr. Parthasarathy on behalf of the Official Liquidator of the Company frankly conceded that if I take that view the Company cannot sustain its claim for preferential payment and can only prove for the moneys due and payable under the account of each subscriber as an ordinary creditor of the Bank.

I shall now deal with some of the objections urged against this view. It is contended that the assignment is only of an unascertained amount and further a part of the debt and therefore invalid. The contention is based on the language of Ex. C-1 and R. 9 of the Chit Fund Rules regulating the payment of discount on each chit, which runs thus :

> When the proceedings of each auction are recorded in the chit minutes book the total amount of discounts of each classes of tickets less expenses of management are divided pro rata among the subscribers for those particular class of tickets, both prized and non-prized including the foreman (the company). The share of discount divided thus due to a subscriber will be given credit to him when he pays the subscription for the instalment to which the auction relates.

The contention is outlined thus : the amount is unascertained because what is collected from each subscriber is not the amount of subscription which has to be paid for the ticket according to R. 1 (a) but the said amount less the share of discount which each subscriber is entitled to get from and out of the discount got from the successful bidder in the month previous to that in which the instalment of subscription is collected and consequently it will vary with each month. For this reliance is placed on the words used in para. 2 of Ex. C-1 which are: "You will hold as much amount as would cover up the future liability of this" (subscription) and also on the words in para. 3 which are "the necessary amount from my deposit." But this contention ignores the actual facts of the case. What is retained by the Company is the entire prize money or so much of the amount due for the unexpired period of the chit according to the subscription payable for each ticket as per R. 1 (a) and it is that amount that is deposited in the Bank and accepted by the Bank. What is therefore assigned in favour of the Company is the entire amount deposited in the Bank which is a definite and ascertained sum. The extent of debt incurred to the Company by the subscriber is the total amount of future subscriptions payable in respect of the particular chit in respect whereof the prize was drawn and it is an ascertained amount. This is evident from the security bond taken in cases where successful bidders give security and draw the prize amount: *vide* Ex. D, the security bond executed in respect of a C class ticket by a subscriber, who drew the prize. According to R. 1 (a) the amount of the chit is Rs. 500 payable in 25 monthly instalments of Rs. 20 each. When the subscriber drew the chit, there yet remained 20 more instalments and the bond was taken for Rs. 400.

---

[5] Navajee v. Administrator General of Madras, (1914) 1 A I R Mad 281 = 22 I C 566 = 38 Mad 500.

[6] Rama Iyer v. Parthasarathi Chetti, (1918) 5 A I R Mad 172=43 I C 385.

It is urged that there is difficulty in accepting this view and it is argued that what the Company will be collecting and what the Bank will be paying will be less than the amount of subscriptions which are attributable to each ticket having regard to the fact that the share of discount divided among the subscribers will be given credit to every month and there will remain an excess, and the question is, is the Company to appropriate the balance? It seems to me, no such difficulty arises. If the assignment is by way of security, undoubtedly, the Company will have to pay the balance of the amount that will remain after payment of all the subscriptions. But it is again urged that the Company would not have collected the excess and that would have remained with the Bank and the question is asked who is to collect it? It is the duty of the Company to collect that amount and pay over to the subscriber. The Company is deemed to collect the entire subscription and appropriate only so much of the amount as is necessary for the payment of the instalment for the particular month for which the subscription is to be collected and retain the discount for and on behalf of the subscriber. Instead of doing so, the Company only collects the amount that is necessary for the payment of the instalment for the particular month and retains the balance with the Bank itself so that at the end of the period of the chit the Company will be bound to collect from the Bank the amounts retained by the Bank and pay them over to the subscribers. The share of discount that is payable under Rule 9 (a) is a payment which each subscriber is entitled to get as a matter of right. In fact, the arrangement is clear that the Company retains in its hands the entire amount of the prize money or so much as is necessary for the payment of future instalments of subscription and deposits it on behalf of the subscriber and therefore it is in a way under a trust to account for the surplus that may remain after the payment of all the subscriptions. Where there is an assignment by way of security, there is always a right of redemption implied : *vide* (1902) 2 K B 190.[7] It is either open to the debtor to pay at any time the debt and have the security released or after the debt is discharged there is an obligation on the part of the assignee to pay back whatever is due to the credit of the assignor. Where the assignment is not by way of security and it is an out and out assignment, even then the Company would be under an obligation to refund to the subscriber the amount which would be properly attributable to the share of discount which would be given credit to the subscriber every month. In (1884) 12 Q B D 347[8] a debtor was indebted to a creditor in the sum of £152-8-3. In order to have that debt liquidated, the debtor assigned to the creditor a debt which he was entitled to get from third persons under an arrangement that the creditor should collect the debts, and out of the same, pay himself the expenses attending the realizations, appropriate the balance towards his debt and then pay the balance, if any, to the debtor. Held that it was a valid assignment and the obligation rested on the creditor to pay over the surplus to the debtor. No doubt the obligation in this cass was express but it can be implied if the circumstances warrant.

The next contention as to the assignment being a part of the debt and therefore

---

[7] Hughes v. Pump House Hotel Co., (1902) 2 K B 190=71 L J K B 630 = 86 L T 794=50 W R 660=18 T L R 654.

[8] Burlinson v. Hall, (1884) 12 Q B D 347 = 53 L J Q B 222=50 L T 723 = 48 J P 216 = 32 W R 492.

invalid is based on the fact that in cases where the prize money exceeds the amount of future instalments of subscription, the assignment can only be part of the debt. The view I have taken is the assignment is of the whole debt in which case the assignee will be entitled to appropriate only the amount of the future instalments and in regard to the balance he will be accountable to the assignor. I may instance a case in point which is reported in (1927) 43 T L R 29.[9] The defendant in that case owed £285 to one *W* who owed money to a Bank in the sum of £100 or thereabouts. *W* assigned to the Bank the whole debt of £285 subject to the condition that the amount recoverable shall not at any time exceed £150. *Held* the assignment was a good legal assignment of the whole debt of £285 and not merely of a part of the debt. Wright J. in the course of the judgment is reported to have observed thus: He would hold, following (1921) 1 Ch 349,[10] that even if it was an assignment of only part of the debt, it would still be a good equitable assignment. But was it an assignment of only part of the debt? In his view it was not an assignment of part of the debt, but was an absolute assignment to the Bank of the whole debt, with a proviso that if the Bank should recover more than £150 from the debtor they must hold the balance in excess of £150 as trustees for Wilkinson. The fact that a creditor remained trustee of part of the debt did not make the assignment any the less absolute: (1891) 7 T L R 475 = 1 Q B 737.[11] The assignment therefore was a good legal assignment.

Even assuming it to be part of the debt, it would still be held to be valid according to the decision in 52 Mad 465,[12] by which I am bound. Mr. Vepa who urged this point brought to my notice a decision to the contrary reported in 1925 M W N 180,[13] but I am bound by the decision of the Division Bench and I therefore think it unnecessary to deal with that matter. After all, the objection as to the validity of assignment of part of the debt is based on the fact that the debtor would be subject to a multiplicity of actions if every part owner of the debt can enforce the part he owns by an action. But it is a mere question of procedure and there would be no objection to a part owner of the debt suing for a debt if he could make the other part owners of the debt parties to the suit and pray for recovery of the whole debt and the part to which he was owner being paid to him. So far as I am concerned, I must take it the assignment is valid in view of the Bench decision. Another argument was addressed based on the ground to whom is the interest payable on the deposit account to go. The answer is that when the debt is assigned, interest will go with it.

Besides the application with which I am now dealing on behalf of the company, other applications have been made by individual subscribers of the company for payment in full from and out of the money standing to the credit of the company in the Chitty Savings Bank Account of the moneys paid by them on the ground that the moneys deposited in the Bank were entrusted to the Bank for a specific purpose, that they continued to remain in the Bank for that specific purpose, that they were trust moneys and that they should therefore be directed to be paid to the company by the Bank. The company alleges that the Bank is a trustee for them in respect of the said amounts. The question therefore is, was a trust created either in favour of the subscriber or in favour of the company? I am not able to see on what basis the Bank is a trustee for the company. In the view I have taken that the transactions in and by which the money was deposited in the Bank operated as an assignment in favour of the company, no question of trust in favour of the subscriber arises at all. In the result, the claim of the Official Liquidator for preferential payment fails and he will only be entitled to rank as an ordinary creditor in respect of amounts standing to the credit of the prized subscribers' accounts in the Bank.

C.R.K./G.N. *Application dismissed.*

A. I. R. 1940 Madras 265

LAKSHMANA RAO J.

Mandavalli Satyanarayanamurthi

v.

Kotha Manikyala Rao.

Criminal Revn. Case No. 595 and Petn. No. 566 of 1938, Decided on 30th November 1938.

---

[9] Bank of Liverpool v. Holland, (1927) 43 T L R 29=32 Com Cas 56.

[10] In re Steel Wingh Co., (1921) 1 Ch 349 = 90 L J Ch 116 = (1920) B & C R 160 = 124 L T 664=65 S J 240.

[11] Comfort v. Betts, (1891) 1 Q B 737 = 60 L J Q B 656=64 L T 685=7 T L R 475=39 W R 595=55 J P 630.

[12] Rajah of Ramnad v. Subramaniam, (1928) 15 A I R Mad 1201=116 I C 827=52 Mad 465.

[13] Doraiswami v. Doraiswami, (1925) 12 A I R Mad 753=87 I C 332=48 M L J 432.

Penal Code (1860), S. 405—S. 405 applies to partners.

The provisions of S. 405 apply to the case of partners and the view of law that a partner cannot be convicted of criminal breach of trust under any circumstances is erroneous: *AIR 1932 Bom 57, Rel. on; AIR 1933 Cal 582, Not followed.* [P 266 C 1]

V. Subramaniam — *for Petitioner.*

P. Satyanarayana Rao—*for Respondent.*

Public Prosecutor — *for the Crown.*

Facts. — The petitioner and respondent were partners and the petitioner was the capitalist partner and the accused was the managing partner who managed the business, kept the cash book, maintained accounts and was in charge of the cash. Suspicions having arisen of the respondent having misappropriated partnership funds the accounts were examined and the complaint was filed in respect of several items. The trial Court framed a charge against the respondent in respect of three items. The defence of the respondent was that Ss. 403 to 409, I. P. C. are not intended to apply to partners and the decision in A I R 1933 Cal 582[1] was cited in support of it. As against it, the decision in A I R 1932 Bom 57[2] was cited. The trial Court relied on A I R 1933 Cal 582[1] and acquitted the accused under S. 258 (1), Criminal P. C.

Order. — The view of the Joint Magistrate that a partner cannot be convicted of criminal breach of trust under any circumstances is erroneous and the order of acquittal cannot be sustained. It is therefore set aside and there will be a retrial in accordance with law by such other Magistrate as the District Magistrate may direct.

C.R.K./G.N. *Order set aside.*

---

1. Bhupendra Nath v. Girdhari Lal, (1933) 20 AIR Cal 582 = 1933 Cr C 953=145 I C 416=34 Cr L J 958=60 Cal 1316=37 C W N 982.
2. Jagannath v. Emperor, (1932) 19 AIR Bom 57 =1932 Cr C 81=136 I C 493=33 Cr L J 317 =33 Bom L R 1518.

A. I. R. 1940 Madras 266

GENTLE J.

In re Travancore National Bank Subsidiary Co. Ltd. (In liquidation)
D. Sundaravaradan — Applicant.
v.
R. Narasimhachari, Official Liquidator — Respondent.

Applns. Nos. 8415 and 849 of 1939, and O. P. No. 163 of 1938, Decided on 11th August 1939.

(a) Companies Act (1913), S. 229 — Set-off —Debtor is entitled to claim set-off in respect of amount due to him from company — Fact that another person has stood surety in respect of his debt does not deprive him of that right.

The privileges and rights which are given in S. 46, Provincial Insolvency Act, which applies to proceedings under S. 229, Companies Act, are based upon equity and fair dealing. It is recognized that it would be very harsh if the Official Assignee or the Official Liquidator of a Company could demand in full money, due by a debtor and at the same time that person being a creditor for an equal or a larger sum of the company must be content with a dividend dependent on the distribution which can be made from the assets. [P 268 C 1]

A debtor who has a cross-claim which he can set off against the company does not lose that right because the company has obtained a safeguard by a surety assuring to the company the amount of the debt of the debtor to the company. There being moneys which can be set off, this right is not lost when a surety is obtained in respect of the debtor's debt to the company. [P 268 C 1, 2]

(b) Civil P. C. (1908), O. 8, R. 6 — Applicability — O. 8, R. 6 does not apply to matters arising in insolvency or liquidation.

Order 8, R 6 deals with the position of suits against joint debtors and the question of set-off before any insolvency arises. The provisions of the above rule are in no way referable to matters arising in insolvency or liquidation. [P 268 C 1]

(c) Companies Act (1913), S. 229 — Liability of principal debtor and surety to company joint and several — Surety himself creditor of company in separate dealing — Dealings between company and surety are 'mutual' as contemplated by S. 46, Provincial Insolvency Act — Surety can claim set-off.

Where a surety whose obligation is to pay to the company the debts of another person, himself has money owing to him by the company in a separate dealing or transaction, the moneys due to the surety on the one hand and from him to the company on the other are mutual dealings as contemplated by S 46, Provinicial Insolvency Act and he has the right to set off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and the surety is one which is joint and several: *(1806) 33 E R 131 ; (1805) 32 E R 996 ; (1875) 20 Eq 515 and (1925) 1 Ch D 825, Rel. on : A I R 1921 Bom 66 and A I R 1927 Lah 228, Not foll.* [P 268 C 2]

The Official Liquidator in person.

Order.—*(Application No. 8415 of 1939):* In this application the Official Liquidator seeks directions of the Court in regard to matters set out in prayers 2 and 3. Shortly the points are these: whether a debtor in respect of whose debt there is a surety is entitled to set off against the money owing by the debtor to the company moneys due to the debtor from the company and whether the surety is entitled to set off in respect of his obligation to the company moneys owing to him from the company. The origin of the transactions is a liability which arose in connexion with a chit fund scheme conducted by the company. Every contributory to a chit fund scheme agrees that he will each month for a specified period pay to the company an agreed amount; each month an auction is held and the successful bidder, being one of the subscribers, is entitled to receive from the company the total amount of all his subscriptions to the fund upon furnishing security by means of a surety and also agreeing to continue to pay each month the amount of his monthly subscription. When a debtor is placed in a position to receive from the company the total amount of his subscriptions the company requires the debtor and a surety or two sureties to enter into an obligation to the company, a draft form of which has been placed before me and it is on account of the obligations under this document that the matter arises in the present application. It has been contended on behalf of the liquidator that the obligation itself in regard both to the debtor and the surety first arises upon the execution of this security bond and on behalf of one of the debtors it has been on the other hand argued that the original contract between the debtor and the company subsisted throughout and continued after the execution of the security bond. Whatever the position may be, it is common ground and it is agreed that the obligations of the debtor and the surety are joint and several.

The claim to set-off arises in the following way: S. 229, Companies Act, provides that in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and other liabilities as are in force for the time being under the law of insolvency. Under that Section the provisions of S. 46, Provincial Insolvency Act, are applicable in the liquidation of a company. That Section provides that where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the accounts and no more shall be claimed or paid by either side respectively. The question is whether in respect of either the debtor or the surety in the matter before me, debts owing by the company to the debtor or surety are mutual dealings within the contemplation of S. 46 mentioned above. The provisions of S. 31, English Bankruptcy Act, although differently worded, it is conceded, do not have any different effect to those of S. 46, Provincial Insolvency Act.

This matter has been before two other High Courts in this country: In 45 Bom 1219,[1] it was held in circumstances more or less similar as in this case that no right to set off arose. A decision somewhat to the same effect is to be found in 8 Lah 105.[2] So long ago as 1806 in (1806) 12 Ves Jun 345=33 E R 131,[3] the following case is reported. At the time of the bankruptcy of two persons two others were indebted to them in a joint bond, one as principal and the other as surety, and the principal was a creditor on a separate account. Lord Erskine, the Lord Chancellor, made an order upon the petition presented that liberty to set off should be given. The principles laid down in that case have been referred to in modern textbooks. In 2 Halsbury (Hailsham Edition) 285, para. 377, in referring to (1806) 12 Ves Jun 345[3] and other cases the following appears:

> In the absence of agreement, express or implied, there is no set-off between joint and separate debts; but if one joint debtor is a surety for the other the principal debtor may set off against the joint debt a debt due to himself; and a person induced to become surety by the creditor's fraud may set off his claim in respect of the fraud against the debt due by the principal debtor.

The question of fraud does not arise. I have quoted that passage for reasons which will appear in a moment. In Rowlatt on Principal and Surety, Edn. 3, p. 140, the following appears:

> If a surety, being severally liable, has money in the hands of the creditor, who becomes bankrupt, he is entitled before the trustee sues the principal to apply it in satisfaction of the debt.

The trustee referred to is the trustee in bankruptcy whose position in England is analogous to that of the Official Assignee here. It is therefore to be noticed that so far as the textbooks are concerned the principle of set off is recognized when, at any rate, the debt is a joint and several debt. The question of set-off arose in (1805) 11 Ves Jun 24=32 E R 996.[4] In that case a lady had placed some money in the hands

---

1. Trimbak Gangadhar v. Ramachandra Trimbak, (1921) 8 A I R Bom 66=63 I C 906=45 Bom 1219=23 Bom L R 537.
2. Alliance Bank of Simla v. Mohan Lal, (1927) 14 A I R Lah 228=101 I C 762=8 Lah 105 =28 P L R 427.
3. Ex parte Hanson, (1806) 12 Ves Jun 345 = 33 E R 131.
4. Ex parte Stephens, (1805) 11 Ves Jun 24=32 E R 996=8 R R 75.

of a bankrupt firm for the purchase of stock. The bankrupts failed to make the purchase but by remitting what purported to be dividends upon the principal sum led the lady into the belief that her instructions had been carried out. Subsequently her brother desired to borrow moneys from the bankrupt firm and she became his surety for the amount advanced to her brother. There was a suit by the Trustee in Bankruptcy, after the firm had become bankrupt, against the brother alone for the amount advanced and in that suit the brother and the lady were permitted to petition, and successfully petitioned, for the amount of the debt due to the lady being the sum placed in the hands of the bankrupt to be set off or as much as was necessary against the claim by the trustee against the brother. This was to some extent on account of the fraud of the bankrupt. That case has been explained more fully in (1875) 20 Eq 515,[5] in which it has been decided that there is no rule that a debt due to joint creditors which has been contracted by fraud can be set off against a separate debt due from one of the joint creditors. Another case was cited to me, (1925) 1 Ch D 825,[6] the effect of which is that a joint debt cannot be set off against a claim by one of the joint debtors.

The privileges and rights which are given in S. 46, Provincial Insolvency Act, are based upon equity and fair dealing. It is recognized that it would be very harsh if the Official Assignee or the Official Liquidator of a company could demand in full, moneys due by a debtor and at the same time that person being a creditor, for an equal or a larger sum, of the company must be content with a dividend dependent on the distribution which can be made from the assets. I have been referred to the provision of O. 8, R. 6, Civil P. C., which deals with the position of suits against joint debtors and the question of set-off, before any insolvency arises. The provisions of the above rule are in no way referable to matters arising in insolvency or liquidation and in my view no help is obtained from that rule. Firstly I will consider the position of the debtor who wishes to set off. Is it to be said that a debtor who has a cross-claim which he can set off against the company loses that right because the company has obtained a safeguard by a surety assuring to the company the amount of the debt of the debtor to the company? That is the position which must arise if the contention on behalf of the Official Liquidator is sound. In my view that cannot be. There being moneys which can be set off, this right is not lost when a surety is obtained in respect of the debtor's debt to the company. The other position is that of the surety himself whose obligation is to pay to the company the debts of another person, the surety himself having money owning to him by the company in a separate dealing or transaction. In my view the moneys due to the surety on the one hand and from him to the company on the other are mutual dealings and he has the right to set-off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and surety is one which is joint and several as admittedly it is in the present case. Both the debtor and the surety who are under an obligation to pay moneys to the company but who themselves are creditors of the company may set off one debt against the other and the balance remaining due should be paid to or by the company as the case may be. I give directions to this effect in the application by the Official Liquidator. I respectfully beg to differ from the decisions in the Indian authorities which are cited above. The Official Liquidator is entitled to his costs, Rs. 5 out of the assets.

C.R.K./G.N. *Application allowed.*

A. I. R. 1940 Madras 268

LAKSHMANA RAO J.

Public Prosecutor — Appellant.

v.

Moturu Appalanarasayya—Respondent.

Criminal Appeal No. 103 of 1938, Decided on 9th August 1938, against acquittal of aforesaid respondent by Stationary Sub-Magistrate, Gudivada, in C. C. Nos. 184 and 185 of 1937.

Railways Act (1890), Ss. 122 and 132—Complaint by railway authorities under S. 132 is not necessary for conviction under S. 122.

Where an accused is found guilty of an offence under S. 122 he cannot be acquitted on the ground that the prosecution was not on the complaint of the railway authorities as required under S. 132: *A I R 1926 Mad 865, Rel. on.* [P 269 C 1]

Public Prosecutor in person.

A. Lakshmayya — *for Respondent.*

---

[5] Middleton v. Pollock; Ex parte Knight and Raymond, (1875) 20 Eq 515=44 L J Ch 618.

[6] In re Pennington & Owen, Ltd., (1925) 1 Ch D 825=95 L J Ch 93=(1926) B & C R 39=134 L T 66=69 S J 758=41 T L R 657.

Facts. — The accused were charged by the railway police for crossing the railway line in Gudivada Railway Station while proceeding from the first platform to the second platform in spite of warning from the railway police constable — an offence under S. 122, Railways Act. The accused while admitting having crossed the line under certain circumstances objected to the jurisdiction of the police to file a charge sheet without a written complaint from the station authorities as required by S. 132, Railways Act (offences cognizable by the railway police are enumerated in S. 131, Railways Act and S. 122 is not one among them). The Sub-Magistrate while finding the accused guilty of the offence under S. 122, Railways Act, acquitted the accused on the ground that the prosecution was not on the complaint of the railway authorities as required under S. 132 of the said Act. Against this order of acquittal the Public Prosecutor has appealed.

Judgment.—The view of the Stationary Magistrate that there was no proper complaint in this case is opposed to the decision in 49 Mad 525,[1] and on the evidence the respondent would unquestionably be guilty under S. 122, cl. (1), Railways Act. The order of acquittal is therefore set aside and the respondent is convicted under S. 122, cl. (1), Railways Act. The offence is technical and the respondent is sentenced to pay a fine of one rupee with simple imprisonment for one day in default.

C.R.K./G.N. *Order set aside.*

---

[1] Public Prosecutor v. Ratnavelu Chetty, (1926) 13 A I R Mad 865 = 96 I C 983 = 27 Cr L J 1031=49 Mad 525=52 M L J 210 (F B).

A. I. R. 1940 Madras 269

LEACH C. J. AND KUNHI RAMAN J.

Madras Southern Maharatta Ry. Co. Ltd. — Appellant.

v.

P. Ranga Rao — Respondent.

Appeal No. 73 of 1938, Decided on 17th August 1939, from decree of Gentle J. in C. S. No. 284 of 1935, D/- 14th September 1938.

Master and Servant—Madras and Southern Maharatta Ry. Co.—Rules regulating dismissal of servants, Rr. 5 and 7 — Dismissal based on conviction is not wrongful—Departmental enquiry not necessary—Company cannot be compelled to re-employ servant though conviction set aside at later date.

Where dismissal is based on a criminal conviction it must be taken to be based on the findings of the Court. The conviction follows the conclusions arrived at by the Court and when a dismissal is based on a conviction it follows that the conclusions of the Court are accepted. Therefore a departmental enquiry is not necessary according to the provisions of note 2 to R. 7 and the dismissal cannot be said to be wrongful, and if the company had the right to dismiss the servant when he was convicted, it could not be compelled to take him back into its employment when the conviction was set aside at some later date as the result of revision proceedings. [P 271 C 1, 2]

King and Partridge — *for Appellant.*

T. S. Srinivasan — *for Respondent.*

Leach C. J. — The appellant company appeals against a decree passed for the paymet of Rs. 2987-3-7 in a suit instituted on the original side of this Court. The respondent was in the employ of the company as a station master and claimed damages for wrongful dismissal. About the middle of 1931, while the respondent was holding the position of station master at Narasaraopet, it was discovered that the assistant goods clerk had misappropriated moneys collected by him in respect of freight charges. It is said that the misappropriations amounted to Rs. 15,000. The discovery was made as the result of an audit. On the defalcations being discovered, the company made a written complaint to the police. The result was that the respondent, the assistant goods clerk and another employee of the company were arrested. They were all charged with criminal breach of trust and conspiracy under the provisions of Ss. 408 and 120-B, I. P. C. On his arrest on 24th August 1931 the respondent was placed under suspension. On 3rd October 1932 the trial Magistrate convicted all the accused and sentenced the respondent and accused 3 to one year's rigorous imprisonment. The goods clerk was sentenced to two years' rigorous imprisonment. As the result of the conviction the company dismissed the respondent from its service by a letter dated 11th November 1932. The respondent appealed against his conviction to the Sessions Judge of Guntur, who by a judgment dated 21st November 1932 dismissed the appeal. The respondent then applied to this Court to set aside the conviction and sentence under its revisional powers. By an order dated 22nd November 1933 the petition was allowed and the conviction and sentence were set aside. On 17th July 1935 the respondent filed the suit out of which this appeal arises. In his plaint he claimed Rs. 6049-15-0 made up of the following amounts : (1) Rs. 1200 as damages for wrongful dismissal, (2) Rs. 100

as damages in lieu of one month's notice; (3) Rs. 300 being the amount of a security deposit made by the respondent which he said had been wrongfully withheld; (4) Rs. 2449-15-0 being the amount which it was said the company was bound to pay into the company's provident fund for the respondent's benefit; and (5) Rs. 2000 claimed as arrears of salary from 24th October 1932 to 23rd November 1935. Item 1 was abandoned by the respondent in the course of the trial. Items 3 and 5 were disallowed by the trial Judge (Gentle J.) and his decision has been accepted. Items 2 and 4 were decreed. The company contends that the respondent was not entitled in law to any sum and that the suit should have been dismissed. The appeal turns on the decision of the question whether the respondent was wrongfully dismissed. It is common ground that if the dismissal was not wrongful the company had the right of withholding its contribution from the provident fund and that the respondent had no right to notice. The respondent was employed by the company under an agreement in writing. The agreement was embodied in a letter which the respondent addressed to the agent of the company. Under it the respondent agreed to accept service with the company upon the terms and conditions set out in the letter. It is only necessary to refer to the third and the seventh conditions. The third condition reads as follows:

> That I hereby bind myself to obey and abide by all the instructions and regulations contained in the General Rules for Indian Railways, the subsidiary working rules and all regulations in force that affect my duties and work and by any further instructions that may, from time to time, be issued by any person duly placed in authority over me.

The seventh condition is this:

> That I clearly understand that the authority which appoints me has the power, for any reason that may to him appear sufficient, to dismiss me.

The appellant company has framed rules regulating the discharge and dismissal of its subordinate servants and the submission of appeals. The rules deal not only with dismissal but also with the discharge of the employees. It is not necessary to refer to the rules relating to discharge as this case is merely concerned with the appellant company's powers of dismissal. The relevant rules so far as this case is concerned are Rr. 5 and 7. R. 5 reads thus:

> Dismissal—An employee will be liable to be dismissed from the service in the following circumstances, namely (1) in consequence of his conviction by a Criminal Court, or (2) for serious misconduct, or (3) for neglect of duty resulting in, or likely to result in, loss to Government or to the railway administration, or danger to the lives of persons using the railway.

Rule 7 on which the respondent places great reliance is in these terms:

> Dismissal — Procedure — In all cases where an employee is charged with an offence of a nature, which if proved against him, is likely to lead to his dismissal, his District Officer shall order a departmental enquiry and if a prima facie case is established, shall forward the proceedings with a copy of the employee's service register to the head of his department for decision. At the enquiry a definite charge in writing shall be framed in respect of each offence and explained to the employee, and the evidence which he may adduce in his defence shall be recorded in his presence, provided that, for special reasons to be recorded, the evidence of any witness may be taken and recorded otherwise than in the presence of the employee. A finding with its grounds shall be recorded on each charge.

There are two notes appended to this rule. They read as follows:

> 1. An order of dismissal operates as a bar to re-employment in any capacity by this railway and shall not be issued unless the employee's guilt is established by clear and conclusive evidence. In other cases when there is circumstantial evidence as to his guilt, it shall be open to the competent authority to consider the question of discharging him.
>
> 2. The provisions of this rule do not apply when it is proposed to issue an order on the strength of facts or conclusions established at a judicial trial, or when the railway servant concerned has absconded with an accusation hanging over his head.

It is the respondent's case that he had been wrongfully dismissed because there was no inquiry held under this rule, and this contention was accepted by Gentle J. The learned Judge found as a fact that the respondent had failed to carry out his duties as station master, that he did not faithfully and diligently employ himself in the company's service according to the terms of the contract of employment; and that he was guilty of neglect of duty resulting in a loss to the company and such neglect of duty amounted to serious misconduct. The learned Judge was here referring to the duty cast upon the respondent as a station master to control his subordinates at the station and inspect their accounts. The learned Judge however considered that notwithstanding these facts the company should have held an inquiry before exercising its right of dismissal. In his opinion the company was not justified in dismissing the respondent because it had not been proved before him that the dismissal was based on the facts or the conclusions established at the trial before the Magistrate. The company says that the learned Judge here mis-interpreted R. 7 and that on a correct interpretation it was entitled to dismiss the respondent without an inquiry. As I have indicated, the respondent's dismissal took place shorty after his conviction. The letter of dismissal is in these terms :

> You are dismissed from the company's service from 24th August 1931 the date you are placed under suspension. Please note and acknowledge receipt of this letter.

There can be no doubt that the dismissal was based on the respondent's conviction. This the respondent accepted as being the case in the letter which his advocate wrote before suit and also accepted in his plaint. In the letter it was said :

> My client states that as the order of dismissal is based on conviction by the trial Court, it ought to have been cancelled on my client's acquittal and that if you did not want to entertain my client any longer in service, you ought to have given a month's notice under the rules.

Paragraph 8 of the plaint reads as follows :

> The plaintiff further submits that, as he was dismissed from service owing to the said conviction by the Sub-divisional Magistrate, Narasaraopet, he ought to have been re-instated on his acquittal.

Therefore it is clearly the respondent's case that he was dismissed because of the conviction, and that this was so is obvious from the course of events. The respondent was placed under suspension as soon as he was arrested and he remained under suspension until he was dismissed, which took place on his conviction. The learned advocate for the respondent contends that the dismissal by reason of the conviction was not sufficient to deprive the respondent of the right of an inquiry under R. 7 of the rules regulating dismissal. He says that under note 2 of that rule an inquiry can be dispensed with only if the dismissal is based expressly on the strength of facts or conclusions established at the trial. But for the conclusion of the learned trial Judge on this question I should not have regarded this argument as a substantial one. With great respect, if a dismissal is based on a criminal conviction it seems to me that it must be taken to be based on the findings of the Court. The conviction follows the conclusions arrived at by the Court and to base a dismissal on a conviction it follows, in my opinion, that the conclusions of the Court are accepted. The respondent having recognized that his dismissal was based on his conviction I hold that he has no case.

The fact that as the result of revision proceedings the conviction was set aside does not affect the position. If the company had the right to dismiss the respondent when he was convicted it could not be compelled to take him back into its employment when the conviction was set aside at some later date. In fact there was no argument to the contrary. In my judgment the respondent was rightly dismissed and he is not entitled to maintain this suit. I wish however to make it clear that I am not holding that the rules must be read into the respondent's agreement of service. It is not necessary for the purposes of this appeal to decide this question. I have assumed that the rules were embodied in the agreement. The result is that the appeal succeeds and the suit must be dismissed with costs both here and below.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 271

WADSWORTH J.

Crown Prosecutor — Appellant.

v.

T. Sellamuthu — Respondent.

Criminal Appeal No. 270 of 1938, Decided on 1st December 1938, against the acquittal of aforesaid respondent by Third Presidency Magistrate, Egmore, Madras, in C. C. No. 168 of 1938.

Penal Code (1860), S. 206—Property transferred by accused judgment-debtor immediately after giving undertaking to Court not to transfer same—Intention to cause injury to creditor is clear — The case falls within S. 206 — Fact that decree-holder can by other proceedings defeat transfer is immaterial.

The word "fraudulently" in the Penal Code ordinarily connotes firstly, an element of deceit or secrecy, and secondly an intention to cause injury. Intention to cause injury clearly exists in a case where the accused judgment-debtor gives an undertaking to the Court not to transfer certain property and immediately after transfers the same by sale deed in favour of his son with the knowledge that the son would be in a position to claim the property as his own. The object of the transfer is thus to injure the creditor and to prevent execution against the property. Therefore the case falls clearly under S 206 and it does not matter whether or not the creditor might by taking troublesome proceedings in Civil Courts circumvent the fraudulent transfer. [P 272 C 1, 2]

K. V. Ramaseshan — *for Appellant.*

K. Sanjiva Kamath — *for Respondent.*

Judgment. — This is an appeal against an acquittal on a charge under S. 206, I. P. C. The accused was defendant 1 in a small cause suit, his son being defendant 2. A decree was passed for Rs. 231 in favour of the plaintiff—P. W. 4 here—against the accused the suit being dismissed as against the son. In execution of the decree a cow belonging to the accused was attached. A claim petition was filed by the wife of the accused. The claim was allowed on 14th May 1936 on the undertaking given by the accused that he would not for three months thereafter alienate a piece of land owned by him. On 25th May 1936, the accused executed a registered sale deed in respect of the property covered by this undertaking in favour of his son the exonerated defendant. After various proceedings this Court filed a complaint under S. 476 (1), Criminal P. C., charging the accused with an offence under S. 206, I. P. C. The defence to the criminal complaint was, firstly, a denial of the undertaking, secondly, a plea that the motive was to satisfy the pressure of his son for the discharge of debts, and thirdly, various legal contentions with which I shall deal separately.

There can be no doubt as to the fact of the undertaking which is embodied in Court records exhibited. It seems to me most unlikely that the motive of the accused was to satisfy the pressure of his son based on alleged old debts which according to the recitals in the sale deed are made up of a series of small hand loans mostly made months prior to the date of the sale. The undertaking having been given only a few days before the sale, it is incredible that the fact of the undertaking would not have been present prominently in the mind of the accused when he carried out the sale. The son denies that he knew about this undertaking. At any rate he was a party to the litigation and as such he must have known about the decree. On these facts, I find it impossible to agree with the conclusion of the Magistrate that the transfer was not fraudulent. The Magistrate supports his conclusion not by any clear finding of fact that the transfer has not been proved to be fraudulent but by certain legal contentions.

It is no doubt correct that the word "fraudulently" in the Penal Code ordinarily connotes firstly, an element of deceit or secrecy and secondly, an intention to cause injury. In my opinion there can be no doubt about the latter element in this case. The accused having so recently given this undertaking must have known that the transfer in breach of the undertaking would have the effect of impeding the execution of the decree and he must have intended that it would have that effect. It is to my mind quite immaterial whether it would be possible for the decree-holder by taking other proceedings to defeat that attempt. If there was an intention to prevent this property being taken in execution of the decree and if that intention had as its motive the object of injuring the creditor, it does not matter whether the object was likely to be achieved or not. There remains the question whether there was the ingredient of deceit or secrecy in the act of the accused. It is argued that there could have been no secrecy because there was prompt registration. I do not agree with this contention as a statement of law. Although registration in theory implies publicity, in fact, it can be and frequently is carried out in such a way that the person adversely affected knows nothing about it. The proper way to regard this case is to look at the fact of the transfer along with the immediately preceding fact of the undertaking given to the Court and taking these two facts together with the other known circumstances to deduce therefrom the intention of the transferor. He knew that his creditor had been lulled into a sense of security by the undertaking given in Court. With this knowledge he almost immediately carried out the transfer in favour of his own son, one who was not likely to publish the fact of the transfer in such a way that it would go to the ears of the creditor. To my mind it is patent that the object of the transferor must have been to deceive his creditor and to injure him by preventing the attachment of this property in execution. His object was to deceive because firstly, he promised the creditor in open Court that he would not alienate and then almost immediately afterwards, he transferred to a member of his own family. His object was to injure and to prevent execution against this property because he knew that his son having been exonerated in the suit would be in a position to claim the property as his own. To my mind it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Court circumvent this plot.

I am therefore of opinion that the case falls clearly under S. 206, I. P. C., and that the acquittal of the accused is wrong. I convict him of the offence with which he is charged and sentence him to a fine of Rs. 25 or in default to two weeks' rigorous imprisonment.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 273

VARADACHARIAR AND ABDUR RAHMAN JJ.

A. R. L. S. V. L. Sevugan Chettiar and others — Appellants.

v.

Raja Srimathu Muthu Vijaya Raghunatha Doraisingam and others — Respondents.

Appeal No. 121 of 1934, Decided on 15th August 1938, against decree of Sub-Judge, Devakottah, in O. S. No. 101 of 1929.

(a) Madras Survey and Boundaries Act (8 of 1923), Ss. 13 and 14—Suit for modification of demarcation made by Survey Officer—Burden is on plaintiff to show that demarcation was wrong.

In a suit for modification of boundary line marked by survey authorities, the burden to prove that the demarcation by the Survey Officer was clearly wrong is on the plaintiff. The plaintiff having come to Court challenging the order of the survey officer must prove by satisfactory evidence, the location of the demarcation stone. Inability to prove it owing to lapse of time is no ground for upholding his contention on no reliable evidence. [P 275 C 2]

(b) Evidence — Court refusing documents produced by party as too late—Party opposing their production cannot ask Court to draw adverse inference from non-production.

Where the Court has refused to accept certain documents relied on by a party as having been produced too late, it is not open to the other party who has opposed the production of those documents to contend that an adverse inference ought to be drawn against the party from the non-production of these documents. [P 275 C 2; P 276 C 1]

(c) Evidence Act (1872), Ss. 35 and 74 — Book maintained in Collector's office containing copies of communications sent by Collector to subordinate officers — Registered copy produced from book is admissible.

Where according to the official practice a book is maintained in the Collector's office containing the copies of the communications sent by the Collector to various subordinate officers, the book of copies thus maintained is itself an official register within the meaning of S. 35 and a public document within the meaning of S. 74. A certified copy produced from out of such book is admissible: *A. S. No. 261 of 1925 ; 2 Mad 128 and A I R 1918 Mad 889, Rel. on.* [P 276 C 2]

(d) Evidence Act (1872), S. 90—Copy more than 30 years old and produced from proper custody containing statement that it is true copy and also signature of person signing original—Copy is admissible.

A copy purporting to be more than 30 years old and produced from proper custody might be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, and would be admissible in evidence when that very copy contains a statement that it is a true copy and contains the signature of the person who signed the original: *A I R 1935 P C 132 and A I R 1929 P C 115, Rel. on.* [P 277 C 1, 2]

(e) Grant—Construction—Terms not clear — Ancient enjoyment is good evidence of title.

Ancient enjoyment is good evidence of title even when there is a grant to construe, if the terms of the grant are not clear. [P 278 C 1]

(f) Evidence Act (1872), S. 11 — Statement not satisfying conditions laid down in S. 32 cannot be admitted merely because it may probabilize relevant fact.

Section 11 must be read subject to the other provisions of the Act and a statement not satisfying the conditions laid down in S. 32 cannot be admitted merely on the ground that, if admitted it may probabilize or improbabilize a fact in issue or a relevant fact. [P 278 C 1]

(g) Court-fees Act (1870), S. 7 (iv) (c) as amended in Madras—S. 7 (iv) (c) should not be applied to cases falling under S. 7 (v) *(Obiter)*.

Section 7 (iv) (c) should not be applied to cases falling under S. 7, cl. (v) : *A I R 1932 Mad 605, Rel. on.* [P 279 C 2]

K. Rajah Iyer and V. Ramaswami Iyer — *for Appellants.*

K. Kuttikrishna Menon — *for Respondents.*

Varadachariar J. — This appeal arises out of a suit instituted by the Zamindar of Sivaganga for obtaining a modification of the boundary line marked by the survey authorities between two villages in the zamindary, namely, Kallvayal and Iluppakudi. The plaint also contained a prayer for possession to the extent to which the defendants might be found to be in possession of portions of the plot marked "I" in the sketch attached to the plaint.

Kalluvayal is to the south-east of Iluppakudi and continues to be an Ayan village of the zamindary. Iluppakudi had long ago been granted in inam to a temple and the defendants are the trustees of that temple for the time being. The Sivaganga estate was in the possession of certain European lessees for a period of nearly 30 years up to 1918 and during that period, it appears from Exs. B and C, that the Ayan village of Kalluvayal had been leased by the European lessees to one C. V. S. T. Narayanan Chetti for a period of 19 years (Faslis 1299 to 1317) and to one A. R. L. N. Lakshmanan Chetti for the subsequent period of ten years (Faslis 1318 to 1327). For some years after the expiration of the lease in favour of the European lessees, the Court of Wards continued to remain in management of the Sivaganga estate; and during their management, steps were taken to have a survey of the zamindari made. In the course of that survey, the suit locality appears to have been surveyed during 1922-23. At the outset, the surveyors included the whole disputed locality of more than 400 acres within the limits of Kalluvayal village, marking the whole extent as "waste." On a land complaint made by the trustees, in accordance with the provisions of the Madras Survey and Boundaries Act, the Survey Officer passed the decision, Ex. N, modifying the original demarcation in a manner to which we shall presently refer. Against this decision, the parties appealed to the Appellate Survey Officer and the Appellate Survey Officer by his order, Ex. 7, made a further modification as a result whereof the southern portion of the disputed locality measuring about 177 acres was allotted to Kalluvayal, while the northern portion measuring about 233 acres was included within the limits of Iluppakkudi.

Under S. 13, Survey and Boundaries Act, 1923, this demarcation becomes conclusive subject to the result of a civil suit to be instituted within three years. The trustees of the temple did not institute any such suit but the zamindar instituted the present suit to have the Appellate Survey Officer's decision modified so far as it was against him. The learned Subordinate Judge has passed a decree substantially in the plaintiff's favour, excluding only a small portion in the north-west corner of the disputed area. Against this decision, the defendants have filed this appeal. It will be convenient to refer to the accompanying rough sketch (adapted from the Commissioner's plan, Ex. L), in stating the points in dispute between the parties and the decisions reached by the various authorities who have had to deal with this matter at different stages. The disputed area of about 410 acres is shown in the sketch by the diagram A-1, C, E, G-1, J, K, L, M, N, Q, S, T, V, W, X, Y, Z. The whole of this block was, in the first instance, included in Kalluvayal village. Under Ex. N, the block A, C, E, G, J, K, L, M, N, W, X, Y, Z, was assigned to Kalluvayal and the rest of the block to the west of the line N W was included in Illupakkudi. The Appellate Survey Officer cut the whole area into two by a straight line drawn from G-1 and H westward to Q and assigned the area to the north of this line to Illupakkudi and the area to the south to Kalluvayal. The area to the north of the line G-1, H, Q, is accordingly the subject-matter of the present suit. The learned Subordinate Judge has assigned the whole of this area to Kalluvayal except the triangular bit to the north of a line connecting V with S-1.

The dispute has to be determined mainly with reference to the description given in certain ancient documents of the boundaries of these two villages and of one or two adjoining villages. As usual in this class of cases, some oral evidence has been adduced on both sides to help to locate on the land some of the marks referred to in these boundary descriptions. The learned Subordinate Judge has rightly observed that the oral evidence on either side cannot be said to be satisfactory; and it can be of use only in so far as it can be related with some confidence to the documentary evidence in the case. Many of the witnesses examined on the plaintiff's side are the cultivators of Kalluvayal village while those examined on the defendants' side are cultivators of Iluppakudi. Each set of witnesses are naturally likely to support their landlord; their position in life and the extent of their knowledge are not such as to enable the Court to accept their statements with confidence. It appears from the evidence of even some of the plaintiff's witnesses that till recently some of them have been cultivating portions of the disputed locality under the Iluppakudi devasthanam and paying rent to the devasthanam but that latterly they have ceased to do so. Their tenure under the devasthanam is sought to be explained away on the ground that the devasthanam was in possession of Kalluvayal under the lease evidenced by Ex. C and it is argued that the cultivation of the disputed locality under the devasthanam does not lead to any inference that the disputed locality forms part of Iluppakkudi and not of Kalluvayal. We shall deal with this question in due course. But it is clear that even after the expiry of the lease under Ex. C, the cultivated portions in the disputed area, coloured green in the commissioner's plan Ex. L have continued to be cultivated under the devasthanam and that some of the ryots now coming as witnesses on the plaintiff's side have, for some reason, ceased to cultivate under the devasthanam. This circumstance has to be borne in mind in determining the weight due to the oral evidence given by the ryots examined on the plaintiff's side.

The principal documents bearing on the question of boundaries are Exs. A, 8 and D. Ex. 9 purports to be a certified copy of a document in the Collector's office corresponding to Ex. A which is produced from the zamindari records. We do not think it necessary to consider which is the better evidence as between these two documents; it is probably safer to adopt the course pursued by the lower Court and read the two documents together, especially as Ex. A is, in some places, not easy to read. Two other documents referred to in the lower Court's judgment in this connexion, namely Exs. B and C are not of much help because they do not give the boundary of Kalluvayal with any greater detail than Exs. A and 9. Two sets of documents, namely Exs. E and E-1 and M and M-1 have been strongly relied on by the plaintiff as helping to locate two of the spots referred to in the boundary account. On the other hand, the Devasthanam has relied on two documents Exs. 12 and 12-a, as going to show that portions of the land which will clearly fall outside the boundary limits of Iluppakkudi as demarcated by the lower Court, have long been in the enjoyment of the Devasthanam and have been cultivated by its ryots. All these material documents formed part of the evidence before the survey authorities as well; and yet it happened that the three tribunals who have had to deal with this question came to three different conclusions. This circumstance has been relied on by the learned counsel for the appellant as showing that the documentary evidence is at best inconclusive; and he accordingly pressed on us an argument as to the burden of proof in the case.

With reference to the terms of S. 13, Survey and Boundaries Act, it was contended that the plaintiff in a suit like the present could not succeed unless he established that the demarcation by the appellate survey officer was clearly wrong. The observations of their Lordships of the Judicial Committee in 13 M I A 57,[1] lend support to this contention (see also the observations in A I R 1930 P C 255[2] in respect of suits under O. 21, R. 63, Civil P. C., where similar language is used.) On the other hand, the learned counsel for the respondent called in aid the line of authorities which lay down that in boundary disputes, undue stress ought not to be laid upon the accident of one person rather than the other figuring as the plaintiff and that both parties must be regarded as plaintiffs. He also relied on the cases which lay down that an Appellate Court ought not to set aside the decision of the Court of first instance unless it is satisfied that it is clearly wrong and particularly in boundary cases it is not sufficient for an appellant merely to pick holes in the lower Court's judgment. In answer to the first of the above contentions of the respondent, the learned counsel for the appellant, referred to the observations in 27 C L J 599,[3] drawing a distinction between cases where the defendant is in possession and cases where the land in dispute is unoccupied or incapable of an effective occupation. We do not think it necessary to discuss the question of burden of proof at any length. It cannot be said that the lower Court fell into any error as regards the burden of proof, because in para. 38 of his judgment, the learned Subordinate Judge stated the position correctly when he observed that

> the plaintiff having come to Court challenging the order of the survey officer must prove by satisfactory evidence, the location of the Kottakarai stone. Inability to prove it owing to lapse of time is no ground for upholding his contention on no reliable evidence.

But though the proposition is stated correctly enough, we are obliged to say that the learned Judge has not properly applied it in the case or at any rate he has not clearly appreciated the grounds of decision given by the two survey officers and displaced those grounds effectively. In this view, we proceed to deal with the merits of the case, taking it that the burden of proof is on the plaintiff. (After stating the facts in the case, his Lordship proceeded.) It was argued on behalf of the respondents that the defendants could not seriously rely upon their alleged enjoyment because they had not produced their accounts showing the receipt of income by the temple from these lands. We are unable to appreciate this argument. Some of these accounts were filed before the first survey officer and marked as Exs. O and P series. They were for some reason not produced before the Subordinate Judge's Court in time; when an attempt was made to produce them they were rejected by the learned Judge as having been produced too late. We do not wish to say anything against the learned Judge's exercise of discretion in dealing with this attempt of the defendants to produce their documents. But the penalty for this conduct is in our opinion only to deprive the defendants of the benefit of the evidence afforded thereby. It does not however lie in the mouth of the plaintiff, who, as the learned Judge says, strongly opposed their production, to contend that an adverse inference ought to be drawn against the defendants from the non-production of these documents. It seems to us unnecessary to pursue this matter, because it is not the plaintiff's case that these lands have remained uncultivated or that the plaintiff's estate has received the income from these lands. At the outset of the survey, the plaintiff, oddly enough, got the whole extent of the disputed land registered as waste when admittedly considerable portions of it had been under cultivation for at least 50 years, if not more. As stated already, the first survey officer and the commissioner who inspected these lands referred to their having been under cultivation. Many of the plaintiff's witnesses also admit their cultivation and though they attempted to post-date the commencement of cultivation, it is clear from their admission that they must have come into cultivation at least 50 or 60 years before the date when they were giving their evidence. In these circumstances, the non-production of the defendants' accounts seems to us a matter of little consequence. The defendants wish to carry the matter further and rely upon Ex. 12 and Ex. 12-(a) to show that as early as 1841 and 1867 their ryots were cultivating some of the lands in question. The admissibility of these two documents has been challenged and it is best to deal with that question also in this connexion.

---

[1] Rajah Leelanand Singh v. Rajah Mohendra Narain Singh, (1869) 13 M I A 57=13 W R 7 =2 Sar 482=2 Suther 286 (PC).

[2] Mohammad Ali Mohammad Khan v. Mt. Bismillah Begum, (1930) 17 AIR P C 255 = 128 I C 647 (PC).

[3] Manindra Chandra v. Saradindu, (1919) 6 AIR Cal 672=45 IC 408=27 CLJ 599=23 OWN 593.

Exhibit 12 (whose translation in the printed record is wholly erroneous and misleading) purports to be a copy of an order issued by the Collector of Madura to the Amin of the Amaravathi taluk in Sivaganga in August 1841. It refers to a dispute raised by the people of Iluppakkudi to water being stored in the Kalluvayal Kanmoi beyond a certain limit, Iluppakkudi people alleging that if more water is stored it will submerge the lands in the Ulvoi which were being cultivated by them. It also refers to a complaint by the Kalluvayal people against the Iluppakkudi people in respect of the same matter, the Kalluvayal people insisting that they were entitled to retain water in the Kalluvayal Kanmoi as per mamool. The Collector then expressed his opinion that as per practice of the locality, persons who cultivate lands in the waterspread of a tank must content themselves with cultivating those lands only when there is no water in the tank and that they have no right to object to people of the other village retaining water in the tank, to the extent authorized by mamool. This document, if admissible in evidence, clearly establishes that Iluppakkudi and Kalluvayal could not have been under the enjoyment or management of one and the same person at that time and that there were disputes between the two sets of villagers arising out of the cultivation of lands in the waterspread of the Kalluvayal kanmoi by the Iluppakkudi ryots. The document was produced before the survey officer and treated by him as evidence, but as pointed out by the learned Subordinate Judge, he obviously did not understand its significance or import. Before the Subordinate Judge, objection was taken to its admissibility on the ground that it was only a copy of a copy and this objection was based upon the description contained in the document itself. It must be said that in overruling this objection, the learned Subordinate Judge has not stated his reasons very satisfactorily. The mere fact of the production before the survey officer will not remove the objection, if otherwise the objection was well founded. But we think that the objection must be overruled on other grounds.

The description of the document as a copy of a copy must be understood in the light of the context and with reference to the system of official correspondence prevailing in those days. The document itself shows that the copy was given from out of a book maintained in the Collector's office containing the copies of the communications sent by the Collector to various subordinate officers. It has been explained in several cases in this Court that that was the official practice in those days. Taking notice of that practice, it has been held in this Court that the book of copies thus maintained in the Collector's office is itself an official register within the meaning of S. 35 and a public document within the meaning of S. 74, Evidence Act. On this basis, the copy now produced is a certified copy of a document relevant under S. 35, Evidence Act, and is clearly admissible. (See the judgment in A. S. No. 261 of 1925 following the observations of the Privy Council in 2 Mad 128[4] at p. 136 and of this Court in 40 Mad 871.[5])

Exhibit 12-a is a copy of an order issued by Mr. Fischer in July 1867 to the Tahsildar of Kandadevi, one of the subdivisions of the Sivaganga estate. This document also has not been properly translated in the printed record. As stated in the opening paragraph of the document, Mr. Fischer was the manager of the Sivaganga estate at that time. The document refers to the petitions received in the head office and to the enquiries made by the manager in connexion with that dispute. There were two matters in dispute at the time, one relating to the alleged interference by the Iluppakkudi ryots with water flowing through a channel from the Pudu Kanmoi to the Kalluvayal Kanmoi and the other relating to the cultivation of lands in the Ulvoi of Kalluvayal Kanmoi by the Iluppakkudi ryots. As regards the channel, Mr. Fischer directed that as it was a mamool source of supplying to the Kalluvayal tank, it should not be permitted to be interfered with by the Iluppakkudi people. But as regards the cultivation of the Ulvoi lands, Mr. Fischer referred to the Collector's order of 1841 (Ex. 12) and upheld the claim of the Iluppakkudi people to cultivate them. He also directed that the Sivaganga estate should not collect any assessment from the Iluppakkudi people in respect of such cultivation. With reference to this document, an objection has been urged on the strength of the decision of the Judicial Committe in 57 All 494[6] to the effect that the presumption under S. 90, Evidence Act can be drawn only when the original is produced before the Court and not when only a copy is produced. Ex. 12-a is no doubt a copy but it not merely declares itself to be a true copy but contains the signature of Mr. Fischer to the copy. This circumstance, is, in our opinion, an important distinction to be borne in mind in this connexion. Their Lordships recognized that a copy purporting to be more than thirty years old and produced from proper custody might be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, when that very copy contains a statement that it is a true copy. The presumption as to the due execution of the original can, in a case like the present, be drawn from the circumstance that Mr. Fischer, who according to the tenor of the document, is the gentleman, who issued the order, also appears to have signed the copy. The learned counsel for the respondent does not wish it to be understood that he admitted Mr. Fischer's signature on the copy, but we have no difficulty in reading Mr. Fischer's signature on the document and under S. 90 we are certainly entitled to presume the genuineness of the signature on the copy. We may in this connexion refer to a similar case where their Lordships of the Privy Council admitted a copy in evidence : *see* 52 Mad 453[7] at p. 459. The relevant facts are more fully reported in the judgment of this Court in 46 Mad 92[8] at p. 95. It cannot of course be said that Mr. Fischer was a predecessor-in-title of the plaintiff so as to bind the plaintiff by his admission, but the document is clearly admissible on the principle explained by the Court of Appeal in (1899) 2 Ch 121,[9] namely that it evidences an assertion of right by the Iluppakkudi ryots to cultivate the lands in the Ulvoi of the Kalluvayal kanmoi without any liability to pay therefor to the zamindari. These two documents clearly establish that long before any question of a lease of Kalluvayal village to the Iluppakkudi devasthanam arose, the devasthanam through its ryots, had been cultivating some of the lands in the waterspread of Kalluvayal kanmoi and that the zamindari recognized the right of the Iluppakkuddi ryots to do so free of any liability to pay cist to the zamindari. We may also point out that if Ex. 12-a, is admissible in evidence, its contents clearly negative the explanation that the document may refer to the lands lying west of the line Z Y; because that document refers to the lands lying on both sides of the southernmost of the channels flowing from Pudu kanmoi to Kalluvayal kanmoi. It is clear from Ex. L as well as from the oral evidence that this description refers only to the channel which enters the Kalluvayal kanmoi between E and F. Even if for any reason it should be held that Ex. 12-a is not admissible in evidence, Ex. 12 itself is sufficient to establish the custom of the Iluppakkudi ryots to cultivate the Ulvoi lands of the Kalluvayal kanmoi.

---

[4] **Raja Venkata Rao v. The Court of Wards, (1878) 2 Mad 128=7 I A 38=4 Sar 81 (P C).**

[5] **Navaneetha Krishna Tevar v. Ramasami Pandia Thalavar, (1918) 5 A I R Mad 889=39 I C 263=40 Mad 871=33 M L J 277.**

Taking the whole body of evidence bearing upon this point, we have no doubt that lands in this locality comprised in the area shaded green in Ex. L have for a long time been cultivated by the Iluppakkudi ryots on the strength of an assertion that they constituted part of Iluppakkudi and that this enjoyment had nothing whatever to do with any lease of the Kalluvayal village itself in favour of the Devasthanam. This course of enjoyment is, in our opinion, strong evidence in favour of the title being in the Devasthanam, because it has always been recognized that ancient enjoyment is good evidence of title even when there is a grant to construe, if the terms of the grant are not clear. In this case, we do not even have the document of grant but merely a boundary description account and from what we have already stated, it is obvious that the boundary description is anything but clear and definite.

---

[6] Basant Singh v. Brij Raj Saran Singh, (1935) 22 A I R P C 132=156 I C 864=57 All 494=62 I A 180 (P C).

[7] Seethayya v. Subramanya Somayajulu, (1929) 16 A I R P C 115=117 I C 507=52 Mad 453 =56 I A 146 (P C).

[8] Subrahmanya Somayajulu v. Seethayya, (1923) 10 A I R Mad 1=70 I C 729=46 Mad 92 (FB).

[9] Blandy Jenkins v. Earl of Durravan, (1899) 2 Ch 121=68 L J Ch 589=81 L T 209.

We may here refer to one other set of documents relied on by the defendants which if admissible, will be very strong evidence in support of the defendants' case. Exs. 1, 1-a, 4, 5 and 6 are a group of documents relating to plots adjacent to the pond marked Neeranikuttai, just to the west of the point marked J-1 in Ex. L. The bearing of these documents on the present controversy is that in all of them the property dealt with is described as situate in Iluppakkudi. If they are admissible, they will cearly show that Iluppakkudi limits extended even further south of the line fixed by the appellate survey officer. The learned Subordinate Judge has rejected these documents as irrelevant. Mr. Rajah Ayyar has strongly contested this view of the lower Court. He maintained that they must be held to be admissible under Ss. 11 and 13, Evidence Act. The decisions referred to in para. 613 of Taylor on Evidence would support the view that they may be admissible even under cl. 4 of S. 32, Evidence Act, as statements relating to a matter of public or general interest, namely village boundaries. But in view of the observations of their Lordships of the Judicial Committee in 16 Pat 258[10] as to the scope of this clause, we do not feel ourselves at liberty to follow the English cases. Mr. Rajah Aiyar contended that the documents may fall under cl. 3 of S. 32. We are unable to accede to this contention. As regards S. 11, it seems to us that S. 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in S. 32 cannot be admitted merely on the ground that, if admitted, it may probabilize or improbabilize a fact in issue or a relevant fact.

As regards S. 13 we are of opinion that these documents will be admissible only as transactions, that is, in so far as they evidence an assertion or recognition or denial of the right claimed therein. The description that the plot dealt with is situate in a particular village does not seem to us part of what is made admissible under S. 13. The position might be different if the right to deal with the plot necessarily depended upon the existence of that plot within the village, in which case it may be said that the description as to the existence in a particular place is also part of the right asserted. It does not appear to us in this case that the transactions evidenced by Exs. 1, 1a, 4, 5 and 6 are so necessarily connected with the situation of the plots in question in Iluppakkudi village that this description also must be taken to be part of the right asserted. Cases like 5 C L J 55[11] are clearly distinguishable on the ground that the transaction itself involved the assertion which was held to be relevant in the particular case. We do not therefore see sufficient reason for differing from the learned Judge's view that this group of documents is not admissible in evidence. There can however be little doubt that the defendant must have felt justified by the existence of these documents, by the existence of the boundary stones fixed by Mr. Gompertz and by the course of their long enjoyment, in contending that the limits of Iluppakkudi village extended even south of the line HQ. But in view of the course that the proceedings have taken, it has now become unnecessary to deal with the area to the south of the line HQ. We must observe in this connexion that the learned Subordinate Judge has laid undue stress upon the omission of the defendants to file a suit within three years of the appellate survey award. We do not wish to go to the length of saying that their conduct is relevant. But in dealing with a question beset with so much uncertainty, we do not think that this omission deserves all the stress that the learned Judge has laid upon it, as suggesting an interference that their case as to the boundary line between the two villages cannot be true. On the other hand, the circumstance that nearly the whole cultivated area lies to the north of the line HQ might well explain why the defendants preferred to remain content with the survey officer's award.

---

[10] Kesho Prasad Singh v. Mt. Bhag Jogna Kuer, (1937) 24 A I R P C 69=167 I C 329=16 Pat 258=31 S L R 242 (P C).

[11] Dwarkanath Bakshi v. Mukundulal Chowdhury, (1907) 5 C L J 55.

Mr. Rajah Iyer laid some stress on the disparity between the area mentioned in Exs. B and C as the area of Kalluvayal village and the area now claimed. He pointed out that the disputed area alone is more than 400 acres and that this is now claimed in addition to the undisputed portion of Kalluvayal, whereas in Exs. B and C the total area of the village is given at a native measurement which on conversion will come only to an aggregate of 200 acres. Such a large disparity is no doubt striking; but it cannot be denied that the area in Exs. B and C was in all probability inserted on a kind of rough estimate. Further Exs. B and C refer only to the nanja and punja lands. We cannot assume that the extent there given comprises the whole area of the village. He next drew our attention to the fact that the demarcation made by the learned Subordinate Judge divides the Seethevi kanmoi in the north between the two villages, when the plaintiff never seems to have claimed any part of that Kanmoi as his own. We do not find any reference to this kanmoi in the course of the proceedings either before the lower Court or before the survey officers and we are, therefore, unable to say whether or not this demarcation is opposed to the plaintiff's case. Lastly, he repeated the arguments urged before the lower Court as to the effect of its demarcation upon the quarters said to be occupied by the Valayas and the Adi Dravidas of Iluppakkudi and the burial grounds used by them. We are not in a position to say that these considerations carry the defendants' case very far or that the learned Judge has lost sight of them. It is on the broader grounds already referred to that we are obliged to differ from the decision of the lower Court and hold that the judgment of the lower Court does not disclose proper grounds for setting aside the decision of the appellate survey officer, Ex. 7.

In the above view, it is unnecessary to deal with the questions of estoppel and prescription raised by issues 3 and 4. We may however add that if we had to deal with them, we would have had some difficulty in concurring in the learned Judge's treatment of them in paras. 51 and 52; because his judgment proceeds on the assumption that the Devasthanam came into possession of the lands in the disputed locality only under a lease from the zamindar.

It was brought to our notice that the plaintiff has not paid proper court-fee in the lower Court and we were asked to give the necessary direction under S. 10, Court-fees Act, but as we are allowing this appeal and dismissing the plaintiff's suit, there is no opportunity for us to give the kind of direction contemplated by S. 10, cl. 2, Court-fees Act. We may add that if we were in a position to do so, the inclination of our opinion would have been certainly in favour of the view that court-fee should have been paid under cl. (v) of S. 7, Court-fees Act and not under S. 7 (iv) (c) amended by the Madras Act. *See* the observations in 54 All 812[12] and 63 M L J 764[13] to the effect that S. 7 (iv) (c) should not be applied to cases falling under S. 7, cl. (v). In the result, the appeal is allowed and the suit dismissed with costs both here and in the Court below.

C.R.K./D.S. *Appeal allowed.*

---

[12] Kalu Ram v. Babu Lal, (1932) 19 AIR All 485 =139 I C 32=54 All 812=1932 A L J 684 (FB).

[13] Venkatasiva Rao v. Satyanarayanamurthi, (1932) 19 AIR Mad 605=139 I C 317=56 Mad 212=63 M L J 764.

A. I. R. 1940 Madras 279

PANDRANG ROW J.

In re Shanbagaperumal Naicker and others — Appellants.

Criminal Appeal No. 380 of 1938, Decided on 23rd January 1939, against order of Sessions Judge, Tinnevelly Division, in C. C. No. 17 of 1938.

Evidence — Evidence of witness rejected as against some accused cannot be accepted against other accused.

The procedure of rejecting the evidence of certain witnesses so far as certain accused are concerned and accepting it so far as others are concerned cannot be upheld. A witness whose evidence has to be rejected so far as certain accused are concerned cannot safely be accepted or acted upon in the case of other accused. [P 280 C 2]

K. Venkataraghavachariar and A. V. Avudainayagam — *for Appellants.*

Public Prosecutor — *for the Crown.*

Judgment. — This is an appeal from the judgment of the Sessions Judge of Tinnevelly dated 30th July 1938 convicting the appellants, 13 in number, of an offence punishable under S. 148, I. P. C., that is rioting armed with a deadly weapon. There were a number of other charges also against the appellants but they were acquitted of these charges and it is not necessary to go into them. With the exception of accused 2 and 4 of whom accused 2 was sentenced to rigorous imprisonment for two years and a fine of Rs. 100 and accused 4 to rigorous imprisonment for one year, the remaining accused were sentenced to undergo rigorous imprisonment for 12 months and to pay a fine of Rs. 75. The charge of rioting against them was that on 20th October 1937 they formed themselves into an unlawful assembly with the common object of preventing by force one Thoondikaruppa Nadar and his party from ploughing their lands and that in prosecution of the said common object committed rioting at Kallurani armed with deadly weapons namely sticks, vel sticks, hatchets and aruvals. There can be no doubt that there was a fight between two parties, namely the appellants' party and the Nadars' party on 20th October 1937 in the morning. There is equally no doubt that the parties themselves went to the place with the intention of fighting one another and several members of the general public appear also to have been aware of the impending fight and a fairly large party of spectators had gathered at the spot for the purpose of witnessing the fight. The dispute was about certain land which originally belonged to the 10th accused and which had been subsequently acquired in Court sale by Seeni Nadar whose sons are the deceased, Thoondikaruppa Nadar and P. Ws. 7 and 8. In the course of the fight two persons on the side of the Nadar's were killed and one on the side of the Naickers' 'party' that is, the appellants' party, and thereupon the fight came to an end. As I have mentioned already the charge of murder, culpable homicide, attempt to murder, and causing hurt have all resulted in acquittal and it is not necessary to go into the details which relate to those charges. The only conviction is under S. 148, I. P. C. and the question therefore is whether the prosecution has established first that there was rioting by all the appellants and whether they were all armed with deadly weapons at the time. So far as the latter portion of that case is concerned, there is no clear evidence to show that all the appellants were armed with deadly weapons.

The learned Sessions Judge in para. 17 of his judgment has given an analysis of the evidence in the case enclosing in brackets the witnesses and the exhibits which he considered to be defective and tainted with infirmity and which in his opinion were to be rejected on that account. He has given reasons for these conclusions and no attempt has been made on the side of the Crown to show that the analysis is wrong or that the learned Judge ought to have accepted any portion of the evidence which he has rejected. Unfortunately, the learned Sessions Judge when dealing with the evidence against certain of the accused has rejected the evidence of certain of the prosecution witnesses which however he has accepted so far as some other accused were concerned. This procedure of rejecting the evidence of certain witnesses, so far as certain accused are concerned and accepting it so far as others are concerned, cannot be upheld. A witness whose evidence has to be rejected so far as certain accused are concerned cannot safely be accepted or acted upon in the case of other accused. Adopting this principle the only oral evidence that is left which is not liable to rejection is that of P. Ws. 12 and 17. It is not necessary to devote much attention to the dying declarations referred to by the learned Judge because they have not been accepted as sufficient proof of the other charges. P. W. 12 was a witness whom the prosecution sought to treat as hostile, an attempt which was not permitted by the learned Judge. His evidence in his examination-in-chief itself does not show which of the appellants were armed with deadly weapons. He merely says as follows:

"All the accused and some other persons were among those persons. They were armed with sticks, aruvals and vel sticks." As to the actual infliction of hurt, etc, his account is that "some of the Naickers" beat Thoondikaruppa Nadar and "some Naickers and Kudumbans" beat the deceased Sodalaimuthu Nadar." In other words there is nothing in his evidence in chief to show that any particular appellant was armed with a deadly weapon. His evidence also clearly shows that the Nadar party had armed themselves even before the appellants arrived at the scene and that it was the Nadars who first threw stones the throwing of stones being the first event at the place of occurrence and the actual fighting began only after the throwing of stones. P. W. 17 who is a Nadar no doubt says that accused 2 had a hatchet, accused 3 to 6 and 9 had vel sticks and the others had stones and sticks. According to him the first injury that was inflicted was by the deceased Sodalaimuthu Nadar on the deceased Vetturswami Naicker. In other words it was one of the appellants' party that was killed before the appellants' party did anything serious to any member of the opposite party. In any case, so far as the actual fighting is concerned, nothing turns on it in view of the acquittal of the appellants of the other charges. The only question that remains is whether all the appellants have been shown to have taken part in the rioting and if so whether they were all armed with deadly weapons at the time. As regards the first point, I am of opinion that there is sufficient evidence to show that all the accused did take part in the rioting. The evidence of P. Ws. 12 and 17 as well as the dying declarations and the fact that four of the appellants had injuries on their persons establish their presence among the rioters beyond doubt.

The next question as to whether all or any of them were armed with deadly weapons cannot be answered so easily because the evidence is very vague. As I have mentioned already, the only reliable oral evidence on the point is that of P. W. 17, and he says only accused 2 to 6 and 9 had deadly weapons without any description of the stones and sticks which the other appellants are said to have had; it is impossible to say they constitute deadly weapons. It is however admitted by P. W 17 that he saw the whole fight from a distance of about 100 yards and it is not likely that he would have been in a position to notice carefully which appellants were armed with deadly weapons and which were not. I am of opinion that the possession of deadly weapons by any of the appellants has not been established satisfactorily. The conviction of the appellants must therefore be modified into one under S. 147, I. P. C. The appellants were apparently in custody for about 8 or 9 months before the trial in the Sessions Court was over. In these circumstances, I am of opinion that a sentence of six months' imprisonment is quite sufficient for the offence under S. 147, I. P. C. The sentences of the appellants are therefore reduced to rigorous imprisonment for six months. The fines, if paid, must be refunded to those who have paid them. The appellants must surrender to their bail and serve the remaining portions of their sentences.

C.R.K./D.S. *Sentences reduced.*

A. I. R. 1940 Madras 281

ABDUR RAHMAN J.

Krishnamachari — Appellant.

v.

Chengalraya Naidu — Respondent.

Second Appeal No. 171 of 1936, Decided on 2nd December 1938.

(a) Limitation Act (1908), Art. 182—Application for restitution is application for execution.

Applications for restitution are treated as applications for execution and are therefore governed by Art. 182 : *A I R 1917 Mad 185 ; A I R 1933 Rang 180 and A I R 1934 Pat 246 (F B), Rel. on.* [P 282 C 2]

(b) Limitation Act (1908), Art. 182 — Word "appeal" includes revision.

Word "appeal" occurring in Art. 182 has been held to include revisions : *A I R 1932 PC 165, Rel. on.* [P 282 C 2]

(c) Limitation Act (1908), Art. 182—Application for restitution of costs of objection by judgment-debtor — Time runs from date of appellate order in consequence of which restitution is sought — Fact that revision by judgment-debtor against order allowing decree-holder's application for amendment of decree is pending is of no avail.

In the case of an application by a judgment-debtor for restitution in consequence of an order of the Appellate Court allowing costs of the objection allowed by the lower Court, time begins to run from the date on which the appellate order becomes final. The fact that revision by the judgment-debtor is pending against the order of the lower Court allowing decree-holder's application for amendment of decree which does not affect the appellate order allowing costs at all cannot help the judgment-debtor as the revision is with respect to a collateral matter. [P 283 C 1]

(d) Limitation Act (1908), Art. 182—Application for execution returned for amendment cannot save limitation if not re-presented within reasonable time even if no time is fixed by Court.

Where an application for execution is returned for complying with certain requirements and is not re-presented within a reasonable time even if no time was fixed by the Court it can be of no avail to save limitation. [P 283 C 1]

(e) Limitation Act (1908), Art. 182 (5) — Petition for restitution returned, without any orders being passed, on ground that execution had been stayed by order which was in force—Petition though not physically in Court must be treated as pending — Subsequent application though time-barred must be treated as reminder to Court to take up prior application for decision.

Where an application for restitution consequent on the reversal of a decree is presented and returned by the Court to the applicant on the ground that an order granting interim stay has been passed and is in force, and no legal or proper orders are passed by the Court the application though not physically in Court must be yet treated to be pending and undisposed of in so far as no interruption was occasioned by any default or laches of applicant. There is no duty on a decree-holder to make an application to revive an execution petition and in the absence of any such duty a subsequent application by the decree-holder must be taken to be a kind of reminder to the Court to take up his prior application for execution or restitution which has not been disposed of and to decide it according to law: *AIR 1933 Mad 540, Rel. on.* [P 283 C 2]

(f) Limitation—Principle of laches or delay is based on equitable doctrine—It does not apply to questions of legal rights.

The principle of laches or delay is based on the equitable doctrine of English Courts and cannot be applied where the legal rights of a party to a proceeding come up before the Court for determination. It would be different where an equitable relief is sought. [P 284 C 1]

Therefore objection as to laches or delay cannot be allowed to prevail where a legal relief is sought and the only question is whether a right is barred by the statute of limitation. [P 284 C 2]

N. Suryanarayana — *for Appellant.*

K. Narasimha Aiyar — *for Respondent.*

Judgment. — The main question raised by the appellant in this appeal is whether an application for restitution made on 13th November 1925, in consequence of an order passed on appeal on 9th July 1924, and returned by the Court on the ground that an order of an interim injunction restraining the applicant from recovering the amount deposited by him for costs was still in force is still undecided and should therefore be ordered to be proceeded with. Two more applications for restitution were presented by the appellant in 1928 and in 1934. They will have to be incidentally considered but as the facts which are going to be stated will show, the decision of this appeal solely depends on the effect of the order passed on the application presented on 13th November 1925. A preliminary decree for sale instead of redemption of a usufructuary mortgage was passed by a mistake on 8th November 1922 and costs were ordered to be paid by all the defendants, who were five in number, to the plaintiff. The plaintiff (decree-holder) applied for the recovery of costs on 11th October 1923, but defendant 5 who is the appellant in the present appeal objected on the ground that the decree was preliminary in character and was therefore inexecutable. This objection was overruled by the execution Court. Defendant 5 preferred an appeal against this order in which he was successful and the order of the executing Court was reversed on 9th July 1924. In the meantime costs which had been awarded to the plaintiff had been recovered by him from defendant 5 who applied for restitution after his appeal had been accepted (C. M. P. No. 1257 of 1924.) An order for restitution was passed by the executing Court on 22nd January 1925. This was appealed against but it was confirmed by the Appellate Court. The plaintiff then applied on 11th November 1925, for an amendment of the preliminary decree and prayed that the decree for sale, which had been erroneously passed by the Court, be converted into a decree for redemption (C. M. P. No. 357 of 1925). On the same date he applied for a temporary injunction restraining defendant 5 from realizing the costs paid by him, from the plaintiff (C. M. P. No. 390 of 1925). An ex parte order was passed by the execution Court and an interim stay was ordered. The fifth defendant, apparently without any knowledge of this order, presented another application on 13th November 1925, asking for restitution but instead of keeping it on the file or adjourning it to a future date, a curious procedure was observed by the executing Court. The petition for restitution was returned on 18th November 1925 to the fifth defendant on the ground that the order granting interim stay had been passed and was in force. It is on the effect of this order that the decision of this appeal depends. The application for amendment made by the plaintiff was eventually allowed on 8th March 1926, and the interim stay was confirmed by another order on the same date. Defendant 5 made an application for revision against the order granting the plaintiff leave to amend but this was dismissed by the High Court on 28th April 1931. Before this revision was decided, defendant 5 had filed another petition for restitution and had attached the application dated 13th November 1925, along with this application. This was again returned to him for compliance with certain requirements and was not re-presented. On 28th April 1934, a fresh petition for restitution was filed by defendant 5 and I have to decide first whether this is within time.

Having been presented after about six years of the application made in 1928 it is apparently barred, but it has been contended that the limitation for this application started on the date on which the appellant's revision was ordered by the High Court to be dismissed. Applications for restitution have been treated in this Presidency as applications for execution and would therefore be governed by Art. 182, Limitation Act: *see* 40 Mad 780.[1] The same view has prevailed in Rangoon and Patna. 11 Rang 275[2] and 13 Pat 411.[3] It is true that the word 'appeal' occurring in Art. 182, Limitation Act, has been held to include revisions, 59 I A 283[4] and if the order, in

---

1. Somasundaram v. Chokkalinga Pillai, (1917) 4 A I R Mad 185=38 I C 806=40 Mad 780.
2. Muthukaruppan Chettiar v. Annamalai, (1933) 20 AIR Rang 180=149 IC 889=11 Rang 275.
3. Bhaunath Singh v. Kedar Nath Singh, (1934) 21 A I R Pat 246=148 I C 1180=13 Pat 411 =15 P L T 173 (F B).
4. Nagendra Nath Dey v. Suresh Chandra Dey, (1932) 19 A I R P C 165=137 I C 529=60 Cal 1=59 I A 283=63 M L J 329 (P C).

pursuance of which the application for restitution was made had been the subject of a revision in the High Court, limitation would have started from the date on which the final order was passed by this Court. This is however not the case. The first decree was held to be inexecutable by the Appellate Court in July 1924. This order was not appealed against and became final. The cause of action for making an application for refund thus accrued to the appellant on the date when the appeal was accepted in 1924. This was independent of the application made or order passed by the Court for amendment of the decree. If the order passed on appeal in July 1924, were final and could not be affected by the subsequent amendment, the pendency of a revision petition by the plaintiff against the order allowing the decree to be amended could not possibly help him. The revision was in respect of a collateral matter with which we are not at present concerned. The contention that the starting point of the period of limitation should be the date of the order passed by this Court in 1931 on revision has therefore no force.

The question then is, if the applications made by the defendant-appellant in 1925 or 1928 are of any help to him. The application made in 1928 could not be of much use as the present application was made six years later. Moreover, in view of the fact that it was returned for complying with certain requirements and was not re-presented within a reasonable time even if none was fixed by the Court, it can't be held to be of any avail to the appellant now.

This brings me to the main question whether the application of 13th November 1925, should still be deemed to be pending as no final orders required by Art. 182 (5), Limitation Act, were passed on that application. This would depend on the effect of the order passed by the Court returning the application to the defendant-appellant in consequence of the interim stay being then in force. This was clearly a wrong order and it is therefore contended that the application should still be deemed to be undisposed of and thus held to be pending. The learned counsel for the appellant has relied on a number of cases which lay down that in order to entitle a petitioner to treat an application as in continuation or one for revival of a previous application it should be found that the order dismissing the first application was wrong or that the first application was not properly disposed of: *see* 50 M L J 215,[5] 65 M L J 305,[6] 76 I C 126,[7] 63 Cal 57[8] and 87 I C 561.[9] The principle on which these cases were decided is beyond controversy; but they have been attempted to be distinguished by the learned counsel for the respondent on the ground that the orders passed on the applications were not only illegal but the applications were physically in Court. He contends that when the applications had been returned to the appellant either improperly in 1925 or when the application returned for compliance with certain requirements in 1928 was not re-presented by him within a reasonable time it must be considered to be *non est* in the eye of the law and cannot be taken advantage of by the appellant after the lapse of about nine years. The contention is undoubtedly plausible but is there any warrant in law for me to give effect to it when I find that the Court was not justified in returning the application to appellant on the ground that an interim order for stay had been passed by it two days before? The application should have been retained in Court and any legal order that the executing Court might have considered to be proper and which it was competent to give should have been passed thereon. As it is, no final order was passed on this application as required by Art. 182 (5), Limitation Act. In the absence of any legal or proper order, I am constrained to come to the conclusion that the application although not physically in Court must be yet treated to be pending and undisposed of. There is no duty cast on a decree-holder to make an application to revive an execution petition and the application of 1934 must be in the absence of any such duty, taken to be a kind of reminder to the Court to take up his application for execution or restitution which has not been disposed of and to decide it according to law. I am fortified in this conclusion by a decision given by my learned brother, Madhavan Nair J., and reported in 64 M L J 401.[10]

---

[5] Pattannayya v. Pattayya, (1926) 13 AIR Mad 453=92 I C 782=50 M L J 215.

[6] Appavoo Nainar v. Lakshmana Reddi, (1933) 20 AIR Mad 745=145 I C 397=65 M L J 305.

[7] Ayisa Umma v. P. K. Abdulla, (1924) 11 A I R Mad 178=76 I C 126.

[8] Krishnakaminee Debee v. Gireeshchandra Mondal, (1936) 23 AIR Cal 239=162 I C 654=63 Cal 57=39 C W N 1030.

[9] Madhusudhan Kowor v. Girindra Narayan Singha, (1925) 12 A I R Cal 1185=87 I C 561.

[10] Muhammad Abu Bakkar v. Ramakrishna Chettiar, (1933) 20 AIR Mad 540 = 144 I C 167 =64 M L J 401.

In the end it has been contended on behalf of the respondent that even if the application for restitution made in 1925 is considered to be pending up till now, the appellant should, nonetheless, be held to have been guilty of laches and delay and should therefore be held disentitled to make the application almost 10 years after the order was passed which entitles him to get restitution. Reliance has been placed in this connexion on two cases reported in 64 M L J 664[11] and 71 M L J 180.[12] It is hardly necessary for me to examine these cases in any detail as I find that this question was not being considered in either of them. The observations in the first case were made in summing up the effect of a decision by their Lordships of the Privy Council in 15 M L J 258,[13] in which it had been held that the first petition for execution was not finally disposed of and that the subsequent application was both in substance and in form made with the object of reviving and carrying through a pending execution which was suspended by no act or default of the decree-holder. The facts in the second case were entirely different. No petition for execution was pending or undisposed of in that case and it was found that the decree-holder could have applied for execution at any time after March 1924 and the delay from March 1924 to August 1932 was

on account of his own negligence or laches and not to any defect in the decree or to any circumstances connected with the decree which prevented him from putting in an application for execution.

I find, on the other hand, that in the present case, the petition for execution filed by the appellant has not been finally disposed of so far and the interruption was not occasioned by any default or laches of the appellant. The interim stay was obtained by the respondent and it was in consequence of this stay that the application for restitution was illegally returned to the appellant. Moreover, the objection as to laches or delay, based as it is on the equitable doctrine of English Courts cannot be allowed to prevail when the legal rights of a party to a proceeding come up before the Court for determination. It might have been different if the appellant were asking for an equitable relief. He is asking for a legal relief in this case and the only question is whether this is barred by the statute of limitation. There is thus no room in such cases for the application of any equitable defence such as suggested by the learned counsel for the respondent.

In the circumstances the application made by the appellant in 1925 must be held not to have been disposed of and the application made in 1934 may be regarded either in the nature of a reminder or as one for continuance thereof. The result is that this appeal must be accepted and the case sent back to the executing Court for disposal of the application made by the appellant in 1925. In the peculiar circumstances of the case, however I shall leave the parties to bear their own costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 284

LAKSHMANA RAO J.

In re Kalagarla Sanyasiraju—Petitioner.

Civil Revn. Case No. 587 and Petn. No. 558 of 1938, Decided on 25th November 1938, to revise judgment of Sub-Divisional Magistrate, Vizianagaram, D/- 12th April 1938.

Explosives Act (1884), S. 4—"Explosive" in S. 4 includes electric sparklets.

The definition of "explosive" in S. 4 is wide enough to include electric sparklets particularly since the removal of the exemption of "toy fireworks" in 1917. [P 284 C 2]

B. Jagannadha Das — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts.—The accused were charged under R. 138, cl. (6) of the Indian Explosives Rules, 1914, for having been found on 27th October 1936 at Vizianagaram in possession without license as required under R. 35, of fireworks, viz. Kakara Electric Sparklets and amorees. Of the several defences one was that these are "toy fireworks exempt under R. 35. The Stationery Sub-Magistrate, Vizianagaram, overruled the contention and convicted the accused.

Order.—The definition of "explosive" in S. 4, Explosives Act, is wide enough to include electric sparklets and the exemption of "toy fireworks" was removed by the amendment of the rules in 1917. The conviction is therefore correct but in view of the order of forfeiture, the fine is excessive. It is therefore reduced to Rs. 25 and the excess of fine if levied will be refunded. Otherwise this petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

---

[11] Tripura Sundaramma v. Abdul Khader, (1933) 20 AIR Mad 418=143 I C 1=56 Mad 490=64 M L J 664 (F B).

[12] Jagadisan Pillai v. Narayanan Chettiar, (1936) 23 AIR Mad 284=162 I C 376=59 Mad 759=71 M L J 180.

[13] Kamar-ud-din Ahmad v. Jawahir Lal, (1905) 27 All 334=32 I A 102=15 M L J 258=8 Sar 810 (P C).

* A. I. R. 1940 Madras 285

VARADACHARIAR AND
PANDRANG ROW JJ.

Dubash D. K. Ahmad Ibrahim Sahib — Appellant.

v.

A. K. R. M. K. Meyyappa Chettiar and others — Respondents.

Appeal No. 73 of 1934, Decided on 13th September 1938, against decree of Court of Sub-Judge, Ramnad at Madura, D/- 13th February 1932.

(a) Mahomedan Law— Guardian—Guardian carrying on business cannot impose liability on minor member of family.

Whether under the Mahomedan law or on general principles defining the relations between a ward and a guardian, a guardian as such has no power to carry on business on behalf of his ward especially if the business is one which may involve the minor's estate in speculation or loss. The principles governing a joint family business under the Hindu law would not apply to a business carried on in a Mahomedan family and he would not have the right of imposing any liability on the minor members of the family. From the fact that the minor member was held entitled to the benefit of the business, the business cannot be held to have been carried on on his behalf in the sense of holding him liable for the debts of the business : *A I R 1931 Mad 553 and A I R 1932 All 512, Rel. on.* [P 287 C 2]

Similarly, even if the minor had no independent means of his own, the mere fact of guardian's feeding him or supporting him out of the income of their business will not make him a partner in their business nor make him liable for its debts. [P 288 C 1]

(b) Contract—Undue influence—Proof.

When there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete: *(1911) A C 120, Rel. on.* [P 289 C 2]

*** (c) Trusts Act (1882), S. 89 — One party standing in fiduciary relation to another exercising undue influence over latter—Third person deriving benefit of such exercise with knowledge of such relation cannot retain benefit so received.**

If it is shown that two parties stood in such a situation as to give rise to confidence between them and the third party who derives the benefit was aware of the existence of this relation, the third party is not entitled to retain the benefit unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in loco parentis towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. If it is shown that the third party was aware of the existence of the confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence : *A I R 1928 Mad 6, Rel. on.* [P 289 C 2; P 290 C 1]

(d) Minor—Document impugned on ground of executant's minority—Onus to prove minority on date of execution is on executant.

Where a document is impugned by a person on the ground of his minority, the onus undoubtedly rests upon him to prove that he had not attained majority on the date of execution of that document. [P 290 C 2]

B. Sitarama Rao, B. Pocker and K. T. M. Ahmed Ibrahim — *for Appellant.*

T. R. Venkatarama Sastri and K. S. Sankara Iyer — *for Respondents.*

Varadachariar J.—This appeal arises out of a suit for the recovery of money due under a mortgage bond (Ex. A) executed in favour of the plaintiff by defendants 1 to 3 on 14th May 1923. Defendants 1 to 3 are the sons of one Khan Bahadur Dubash Khadir who died in November 1912. Defendant 4 was unnecessarily impleaded and his name was subsequently removed from the record. Defendant 5 is the Official Assignee of Rangoon in whom the estate of defendants 1 and 2 had vested during the pendency of the suit when they became insolvents in 1929. The mortgagees are certain Chettiars to each of whom defendants 1 and 2 had become indebted in the course of their business at Rangoon. It was stated that there was some inconvenience in executing separate mortgages in favour of each of them and that they accordingly agreed to take a single mortgage bond in their joint names for the aggregate amount due to them and for the cash advanced on the date of Ex. A. The document proceeds on the footing that defendant 3 was equally liable with defendants 1 and 2 for the amounts due to the mortgagees.

The mortgagors admitted execution of Ex. A but they raised various defences to the plaintiff's claim. It is unnecessary to refer to the defences pleaded by defendants 1 and 2 as they have acquiesced in the decree passed by the lower Court against them. Defendant 3 not merely adopted some of the defences raised by defendants 1 and 2 but raised two special pleas of his own which are covered by issues 1 and 4 framed in the case. These defences were to the effect that he was a minor when he signed Ex. A and that the document had been obtained from him by undue influence. The lower Court decided these issues against defendant 3 and passed a decree against him as well. Defendant 3 has accordingly preferred this appeal. In the appeal, we are concerned only with the questions raised by issues 1 and 4, as no other point was pressed before us on behalf of the appellant. As we have come to a more definite conclusion in favour of the appellant on issue 4 than on the first, we propose to deal with issue 4 at the outset. The plea of undue influence was thus set forth in paras. 3 and 4 of defendant 3's written statement :

> Defendant 3 was not interested in the partnership business of defendants 1 and 2 in Rangoon or the 'Lighterage Company' referred to in the plaint nor was he liable for any of the debts of the said partnership or company. . . .
>
> The prior debts mentioned in the deed had no connexion with this defendant and the cash recited to have been paid was not for his benefit. The document was written up in India without the previous consent of this defendant including him as one of its executants and was sent over to defendant 2 in Rangoon. This defendant was then a student in a school in Rangoon and residing with defendant 2. The latter and another Muthuraman Chettiar, one of the agents of the plaintiff, requested this defendant to sign the document and assured him that the document would not be enforced against his share in the immovable properties first and that he was joining in the execution only as surety. Defendant 2 also stated at the time that unless he joined in the execution of the document, defendant 1 and himself would become involved in a terrible financial crisis and would be ruined irretrievably. Defendant 3 had then no knowledge of his rights under the deed of settlement executed by his father nor was he aware of his exact age. Unable to resist the importunities of the brother, defendant 2 and the agent of the plaintiffs, defendant 3 executed the document jointly with his brother, defendant 2, in Rangoon.

It seems to have been contended in the lower Court, that these allegations, even if true, would not invalidate the document as against defendant 3, nor amount to a plea of undue influence. This contention was embodied in issue 5. The learned Judge rightly found on issue 5 in the appellant's favour. On issue 4, he held that defendant 2 was in a position to dominate the will of defendant 3 when they executed Ex. A but that the evidence was altogether insufficient for finding that defendant 2 used his position to gain an unfair advantage over him for himself or some other or in other words exercised his influence unduly: *see* para. 14 of his judgment. It is obvious that in coming to this conclusion the learned Judge was largely influenced by his view as to defendant 3's liability for the debts recited in the suit mortgage bond. The bond purports to be for a sum of Rs. 2,88,750 made up of Rs. 2,62,500 already due and Rs. 26,250 advanced at the time of the execution of Ex. A. It is clear from the plaint and the recitals in the document as well as the evidence of the plaintiff's witnesses that the pre-existing debt of Rs. 2,62,500 was due to the various creditors recited in Ex. A on account of loans borrowed from them by defendants 1 and 2 in connexion with the business carried on by them under the name of "D. K. Kasim & Sons" and "D. K. Kasim and Sons & Co." It also appears from Ex. A itself that the contemporaneous advance of Rs. 26,250 was also borrowed for the purposes of the business. The contention on behalf of defendant 3 was that he had no interest in this business nor any liability for debts incurred in connexion with the same. If the learned Judge had come to the conclusion that defendant 3 was not liable for any portion of this debt, his approach to the consideration of the question of undue influence would have been wholly different because it would be a case in which defendant 3 would have made himself and his properties liable as security for a large amount for which he was not liable at the time.

The question of defendant 3's liability for the pre-existing debt is discussed by the learned Subordinate Judge in para. 16 of his judgment; and relying apparently on the decision in 54 Mad 543,[1] he came to the conclusion that the two businesses above referred to had been carried on by defendants 1 and 2 as a "family trade" for the benefit not only of themselves but also of defendant 3 and that defendant 3 was accordingly liable for the debt. This conclusion seems to us erroneous and founded upon a misreading of the decision in 54 Mad 543.[1] As the question of the antecedent liability of defendant 3 for the debts recited in Ex. A has a material bearing upon the decision of the question raised by issue 4 we proceed to deal with that question.

The nature of the business carried on by defendants 1 and 2 and the question of defendant 3's interest in the same or liability for the debts incurred in that connexion have to be determined in the light of the following facts. Dubash Khadir had for many years carried on business in Rangoon both as a lighterman and as a dealer in coloured cloths (kylies) used by Mahomedans and Burmans. From humble beginnings he seems to have made large profits in that trade and acquired extensive immovable properties in the Madura district and elsewhere. He had married four wives and had children by three of them. In September 1912, i. e., about two months before his death, he executed three deeds of settlement, one in favour of the children by each of the wives, and Ex. 3-A is the settlement deed in favour of defendants 1 to 3 and their mother and sisters. Under that deed, he settled certain properties on the three sons to be enjoyed by each of them in equal shares. He imposed restrictions on their power of alienation and provided that after their death the property should be taken by the male children of these sons. As defendant 3 was then aged about seven, he appointed defendants 1 and 2 trustees, managers and guardians to look after his interest in the properties settled on him, to collect the income and, after incurring necessary expenses, deposit the balance in the Madras Bank or in the National Bank, so that the same might be handed over to him after he attained majority. By para. 10 of the said deed (which is not correctly translated on the record) he directed that each of the said three sons must be respectively responsible for the profit or loss arising out of any trade that may be carried on by him (by each son) and that neither the uterine brothers nor the sons of the other wives shall have any claim or concern in regard to such profit or loss.

---

[1] **Abdul Rahim v. Abdul Hakim, (1931) 18 A I R Mad 553=135 I C 357 = 61 M L J 139 = 54 Mad 543.**

It has been suggested on behalf of the plaintiffs that the business done by defendants 1 and 2 were merely a continuation of the business done by Dubash Khadir during his lifetime. Defendant 2 however states that there was a break in the business for about a year and that it was only towards the end of 1913 that he and defendant 1 began doing business in Rangoon, though it was on the same lines as the father's business. It does not seem to us very material whether the businesses were conducted without a break or there was a break as alleged by defendant 2. The parties are not governed by the Hindu law and the principles laid down in cases relating to a family business conducted by the manager on behalf of the joint family will not be applicable to them. Whether the business which defendants 1 and 2 did was the same as their father's or not, can make no difference in the determination of the question of the liability of defendant 3 for debts incurred in connexion with such business. The decision in 54 Mad 543[1] laid down that if the major members in a Mahomedan family made profits by carrying on a business utilizing therein the share of a minor member in the common assets it was open to the minor to claim a share in the profits thus made. In that very case, the learned Judges took care to point out that the principles governing a joint family business under the Hindu law would not apply to such a case and that the managers of such a business in a Mahomedan family would not have the right of imposing any liability on the minor members of the family.

The same principle was also laid down by a Division Bench of the Allahabad High Court in 54 All 916[2] The learned Subordinate Judge appears to have thought that because the minor member was held entitled to the benefit of the business, the business could be held to have been carried on, on his behalf even in the sense of holding him liable for the debts of the business. This ignores the limitation pointed out in the cases above referred to. Whether under the Mahomedan law or on general principles defining the relations between a ward and a guardian, a guardian as such has no power to carry on business on behalf of his ward, especially if the business is one which may involve the minor's estate in speculation or loss. The deed of settlement Ex. 3-A contained definite provisions as to the extent of the powers of defendants 1 and 2 in their management of defendant 3's estate and cl. 10 which has been set out above is inconsistent with the assumption that defendants 1 and 2 were authorized to carry on business on behalf of defendant 3. Even in the case of Hindus it has been held that except in the case of an ancestral business, which stands on a footing of its own, the guardian of a minor has no authority to carry on business on behalf of his ward or enter into partnership on his behalf: *see* 40 M L J 153.[3] The minor's option to claim a share in the profits made by his guardian by the use of his assets rests on the principle defining the liabilities of trustees, executors, executors *de son tort* and *de facto* guardians. But as pointed out by the Judicial Committee in 45 Cal 878,[4] it is one thing to say that such conduct on the part of the guardian will impose certain disabilities upon him and confer certain benefits on the ward but a very different thing to suggest that the ward will be bound by the transactions of the guardian or the liabilities sought to be imposed upon the estate. We are therefore unable to hold that in the ordinary course defendant 3 would have been liable to the plaintiffs for the debts whose repayment was sought to be secured by the execution of Ex. A.

---

[2] Shukrullah v. Mt. Zohra Bibi, (1932) 19 A I R All 512=143 I C 230=54 All 916=1932 A L J 1039.

[3] Venkatasuryanarayana v. Ramayya, (1921) 8 A I R Mad 98=62 I C 802=40 M L J 153.

[4] Imambandi v. Haji Mustaddi, (1918) 5 A I R P C 11=47 I C 513=45 Cal 878=45 I A 73 (P C).

From the evidence of P. W. 1 and P. W. 5 it is clear that all the pre-existing liability provided for in Ex. A had come into existence by 1921, i. e., at a time when even according to the plaintiff's case defendant 3 was a minor. No attempt has been made to bring the case under S. 247, Contract Act, so as to attract the provisions of S. 248 with reference to the erstwhile minor's duty to repudiate his liability within a reasonable time after attaining majority. The plaintiff's witnesses admit that their books will not show defendant 3 as one of the parties liable to them. The books of the business which are said to have been handed over to the Official Assignee on the insolvency of defendants 1 and 2 have not been placed before the Court with a view to prove that there is anything in them to indicate that defendant 3 had been admitted to the benefits of the partnership within the meaning of S. 247, even assuming that this Section would be applicable to the case. The respondent's learned counsel relied on the admissions of defendant 3 in the witness box that he was living with defendants 1 and 2 and that they were bearing the expenses of his food and clothing and paying his school fees. In this context there is a further statement to the following effect :

> I did not know when I was studying there whether or not I had a share in the business. It was with its assets that our expenses were being defrayed.

From these admissions, the learned counsel argues that defendant 3 must be held to have had an interest in the business. We do not think that that contention is well founded. Even if defendant 3 has no independent means of his own, the mere fact of defendants 1 and 2 feeding him or supporting him out of the income of their business will not make him a partner in their business nor make him liable for its debts. But in the present case the position was that defendants 1 and 2 were managers on behalf of defendant 3 of property of considerable value under the terms of Ex. 3-a. It has not been suggested that the income from those properties would not have been more than sufficient to meet the expenses of defendant 3. It would not make any difference in law whether in such circumstances defendants 1 and 2 maintained defendant 3 out of the income from his own properties or out of the moneys which they found convenient to draw from their business. He must be taken to have been maintained out of his own resources whatever might be the method adopted by defendants 1 and 2 in maintaining him.

The main contention of the learned counsel for the respondent in this connexion was that whatever might have been the position during defendant 3's minority, he must be taken to have become a partner in the business and liable for its debts by his own choice after he attained majority. If, as we have pointed out above, no basis had been laid for the application of S. 248, Contract Act, we see nothing in the evidence to support the above contention. Even according to the respondent's contention, defendant 3 would have attained majority only about the beginning of 1923. The mere fact that whether in ignorance or even wilfully defendant 2 or defendant 3 has on occasions stated that defendant 3 was interested in the business will not suffice to prove defendant 3's connexion with the business or his liability for its debts. (After discussing the facts, his Lordship proceeded.) Apart from the facts thus spoken to by the witnesses, the broad probabilities of the case are clearly in favour of the defendant's version. Defendants 1 and 2 were admittedly heavily indebted to the plaintiffs who were acting in concert in taking Ex. A. They had not been able to pay their dues for nearly two years, that is subsequent to 1921 and the defendants had set an inconvenient precedent by executing Ex. X, in favour of one creditor. It was therefore only natural that other creditors who were being put off for two years would have insisted on security being given and it is nothing strange that in spite of their knowledge of Ex. 3, they preferred to take defendant 3's share also as security for what it was worth, hoping that all might go well.

From the point of view of defendants 1 and 2, the position was that they were anxious to stave off disaster to their business and whatever might be the degree of pressure exercised by them on defendant 3 there can be little doubt that it was at their insistence, whether we call it pressure or importunity, that defendant 3 must have been induced to join in Ex. A and thereby make himself liable for a debt which was not in any degree binding upon him. He was a student at the time and could have had no information either as to his own assets or as to the nature or extent of the liability he was undertaking because he could have no knowledge as to the ability of defendants 1 and 2 by themselves to pay off the debts. If, as stated by him, he was told that his interest would be proceeded against only in the last resort, even then, he had no means of knowing what the chances of his being proceeded against were and if so to what extent, as that would depend upon the exact position of defendants 1 and 2 in the business. It is not pretended that he ever had the management of his own affairs or that he had at any time been away from the control of defendants 1 and 2. Even at the time of Ex. A he was admittedly living with defendant 2 and looked after by him. Assuming for the present purpose, that he had attained majority four months before the execution of Ex. A, it is impossible to assume that he had any knowledge of the complicated affairs of the business or was sufficiently prudent to know his own interest in the matter. The mere fact that he knew that the transaction was a mortgage of his share or at one stage he expressed hesitation or unwillingness to hypothecate his share does not amount to sufficient knowledge of the nature and effects of the transaction in the sense in which that expression is used in the relevant authorities. It has not been suggested that he had independent advice from any quarter or that he had even an opportunity of consulting anybody except defendant 2 before he executed Ex. A.

Such being the situation of the parties at the time when defendant 3 executed Ex. A, there can be very little doubt on the authorities that Ex. A cannot be held to be binding on defendant 3 or his interest in the properties. It is not necessary to refer to the authorities at any length; they have been collected in the notes to Hugenin and Basley in White and Tudor's Leading Cases. They have also been referred to at some length in 53 M L J 842[5] and 58 Mad 454.[6] It is not necessary in a case like the present that defendant 3 should prove by direct evidence that defendants 1 and 2 exercised undue influence on him. Defendants 2 and 3 who undoubtedly are competent to speak to this matter have given their version of what happened at the time and in our opinion that evidence corroborated by that of D. W. 2 is substantially true, except as to the portion relating to the assurance given by the Chetties. The exercise of undue influence might in the circumstances be fairly presumed, in view of the relationship of the parties and the nature of the transaction. Under Ex. A, defendant 3 has made himself and his property liable as security for a heavy debt for which he was not in law liable at all. That this transaction must have been entered into by him at the instance and for the benefit of defendants 1 and 2 who till recently had been his guardians and under whose influence he was admittedly living at the time can scarcely be doubted. It was contended by the learned counsel for the respondents that it is one thing to prove the existence of the relationship making undue influence possible but it is another thing to ask the Court to hold that undue influence has been exercised. But as observed by Lord Macnaghten in 1911 A C 120[7] at p. 137:

> It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete.

The same principle is clearly implied in cl. 3 of S. 16, Contract Act, which provides:

> Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie on the person in a position to dominate the will of the other.

It was next urged on behalf of the respondents that whatever might have happened as between defendants 2 and 3 the creditors should not be held to be affected by it as they were not parties to the exercise of any undue influence. This contention ignores the principle of S. 89, Trusts Act, and the cases illustrating the application of that principle to varying circumstances. As observed in 53 M L J 842[5] at p. 852, the result of the authorities is that if it is shown that two parties stood in such a situation as to give rise to confidence between them and the third party who derives the benefit was aware of the existence of this relation, the third party is not entitled to retain the benefit unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in *loco*

---

[5] Narayan Doss v. Bucharaj, (1928) 15 AIR Mad 6=106 I C 315=53 M L J 842.

[6] Rama Pattar and Bros. v. Manikkam, (1935) 22 AIR Mad 726=158 I C 485=58 Mad 454=69 MLJ 104.

[7] Bank of Montreal v. Stuart, (1911) A C 120=80 L J P C 75=103 L T 641=27 T L R 117.

parentis towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. If it is shown that the third party was aware of the existence of the confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence. Dealing with a case in which the creditor had notice of all the relevant facts, Lawrence, L. J., observed in (1934) 1 K B 380[8] at p. 417, that the creditor would be in no better position than the mother (the debtor in that case) would have been in, had the daughter assigned her reversion directly to her instead of to the respondents for her benefit. We have already pointed out that the present is not merely a case in which the plaintiffs had knowledge of the relation between defendent 3 and his elder brothers but the suggestion that defendant 3's interest should also be given as security is likely to have proceeded from the plaintiffs. P. W. 1 who represented the plaintiffs at the time that Ex. A was signed by defendant 3 must have been aware and must have informed the plaintiffs of what happened at the time that defendant 3 signed Ex. A. Reliance was placed by the learned counsel for the respondents on (1850) 12 Beav 589[9] as supporting his contention. That case has not been understood as laying down any different principle from that laid down in the other cases on the point; it must only be taken that the Master of the Rolls declined to draw the inference of undue influence from the circumstances disclosed by the evidence. In particular, he relied on the fact that the daughter had for a long time been expressing her intention to arrange for the discharge of the debt due by her father and that at the time when the transaction in question was entered into by her, there was no pressure by the creditors even on the father nor even a request to and much less anything in the nature of pressure or importunity on the daughter by the father or by the creditor.

We accordingly dissent from the conclusion of the learned Subordinate Judge on issue 4 and find on it in favour of defendant 3. The result is that defendant 3 and his interest in the mortgaged properties must be held not to be bound by Ex. A. We must however observe that this exoneration will apply only to the properties which defendant 3 obtained under the settlement deed, Ex. III-A. The mortgage deed Ex. A comprises not merely these properties but other properties subsequently acquired by defendants 1 and 2 including properties in Rangoon which must presumably have been acquired out of the profits of the business. Consistently with defendant 3's case that he had no connexion with the business he cannot claim any interest in the properties acquired by defendants 1 and 2 out of moneys derived from the business. There is no doubt a statement in the evidence of defendant 2 that the properties acquired subsequent to the date of Ex. III-A were acquired with the income of the villages and that those properties had been purchased by them for the benefit of themselves and defendant 3. This statement presumably refers to items 4, 6 and 7 of the mortgage deed. Admittedly, no reference has been made to defendant 3 in the sale deeds relating to these items, nor have any accounts been placed before the Court to establish beyond doubt that all or any of these items were acquired with funds which can be held to belong to defendant 3. We are, therefore, unable to act on this vague uncorroborated statement of defendant 2. Item 5 is unquestionably connected with the Rangoon business and defendant 3 cannot claim any share therein. Our decree will therefore exonerate defendant 3's interest only in items 1, 2 and 3 in the schedule to the mortgage deed.

It was lastly urged by the learned counsel for the respondents that this rescission of Ex. A so far as defendant 3 was concerned must be made conditional upon repayment of the sum of Rs. 26,250 advanced in cash on the date of Ex. A. We do not think that the circumstances of the case entitle the plaintiffs to invoke S. 64, Contract Act. As we have already observed, this cash amount was advanced to defendants 1 and 2 for the purpose of their business and it has not been shown that defendant 3 derived any benefit from the advance. We are not setting aside Ex. A in toto; the security stands so far as defendants 1 and 2 and their interests in the mortgaged properties are concerned.

Proceeding next to the question of minority raised by issue 1, we may observe at the outset that the onus undoubtedly rests upon defendant 3 to prove that he had not attained majority on the date of Ex. A. P. W. 1 who was the only witness on the plaintiff's side who had seen defendant 3 about the time of the execution of Ex. A states that when defendant 3 signed Ex. A, he was 19 or 20 years old. The other witnesses examined by the plaintiffs merely deny that there was any representation to them at the time of Ex. A that defendant 3 was a minor. Ex. III-A, which may be taken as fairly reliable so far as it goes, states that in September 1912 defendant 3 was aged seven. The learned counsel for the appellant asks us to read it as intended to state that defendant 3 was then in his seventh year and had only completed six. It is true that it is often the practice in this country to give a man's age not with reference to the completed year but with reference to the year that is actually running. But it is not possible definitely to state whether the father intended to state in Ex. 3-A the completed year or the year which the boy was running. On the other hand, even if it is to be taken that what was stated there was the completed year, it would not necessarily follow that defendant 3 must have attained majority prior to Ex. A; because if he had been born at any time between May and September 1906, it would be correct to describe him as seven years old in September 1912. The utmost that can be claimed is that if thus understood, the statement of age in Ex.3-A is inconsistent with defendant 3's case that he attained majority only in January 1924. The margin of difference being, in any view, very small, we have to see whether there are any materials with reference to which the date of his birth may be definitely fixed. We agree with the learned Judge that Ex. 9 series are of little value; and if the matter stood on the oral evidence alone on the defendant's side, it will not be safe to act upon that evidence, having regard to the fact that the two witnesses who have spoken to the date of defendant 3's birth, namely D. Ws. 3 and 4, can scarcely be regarded as disinterested. Strong reliance has accordingly been placed by the learned counsel for the appellant on Exs. 1, 2 and 4.

---

[8] Lancashire Loans Ltd. v. Black, (1934) 1 K B 380=103 L J K B 129=150 L T 304.

[9] Thornber v. Sheard, (1850) 12 Beav 589=85 R R 169.

Exhibit 4 is an extract from the birth register relating to the village where Dubash Khadir was living and it appears from the entry in it so far as it is now readable that the birth of a child to Dubash Khadir was reported on 22nd February 1906. As rightly pointed out by the learned Subordinate Judge, the relation of this entry to any particular child of Dubash Khadir can only be established by other evidence and for this purpose defendant 3 relies on Exs. 1 and 2, one a day book and the other a ledger said to have been kept by Dubash Khadir. In Ex. 1 there is an entry against date 19th February 1906 of a sum of Rs. 23-0-3 having been spent for sweetmeats purchased for distribution on the occasion of the naming of the male child born to Syed Ibrahim's mother. If Ex. 1 is genuine and reliable, there can be no doubt that this entry can relate only to defendant 3 because the mother's name is also there given, the child is referred to as a male child and the evidence establishes beyond doubt that defendant 3 was the last male child, indeed the last child born to this lady. Defendant 2 explains that it is the practice in his community to name a child on the 40th day after its birth and that he was accordingly of opinion that defendant 3 must have been born on 12th January 1906. He also explains that it is only about the time of the naming ceremony that the birth would have been reported and that is the reason why the birth register extract refers to this birth only in February 1906 and not in January. We do not see much justification for the criticizm of the learned Judge in para. 26 of his judgment that the 22nd February will not exactly be the 40th day if the birth was on 12th January. It seems to us immaterial whether it was the 12th January or the 11th or the 13th January; nor do we see any force in the criticizm that defendant 2's statement as to the custom of the naming ceremony taking place on the 40th day after birth or as to distribution of sweetmeats to children about that time is unreliable. This must be a matter of common knowledge in the community and though there was an interval of nearly six weeks between the date of defendant 2's examination and the date of the plaintiffs closing their case, nobody has come forward to deny that such a custom exists amongst Mahomedans. The question for determination is whether Ex. 1 is genuine and whether Ex. 4 relates to defendant 3 or to any other child of Dubash Khadir. (After discussing the facts, his Lordship proceeded.) This being the state of the evidence on the question of the minority of defendant 3 on the date of the execution of Ex. A, we are free to say that we should have felt much greater hesitation than the learned Subordinate Judge in recording a negative finding on the first issue. But, as we have found in favour of defendant 3 on the fourth issue, we do not think it necessary to record a definite finding on the first issue. In the result, the appeal is allowed and the decree of the lower Court modified to the extent above indicated. The appellant will be entitled to his costs here and in the Court below, to be paid by the plaintiffs-respondents. As the appeal has been filed in forma pauperis the court-fee payable on the memorandum of appeal will be paid by the plaintiffs-respondents.

C.R.K./D.S. *Decree modified.*

A. I. R. 1940 Madras 292

PANDRANG ROW J.

Sundarammal — Petitioner.

v.

Palaniandi Mudali — Respondent.

Criminal Revn. Case No. 656 and Petition No. 624 of 1938, Decided on 14th December 1938, to revise order of Sub-Divisional Magistrate, Ranipet, D/- 12th August 1938.

Criminal P. C. (1898), S. 488—Reasonable apprehension of physical ill-treatment is "just ground" for refusal by wife to live with husband —She cannot be deprived of maintenance by reason of that refusal — Second marriage of husband is relevant for considering bona fides of his offer to take back his first wife and to maintain her.

The fact that the wife really has reasonable apprehension of physical ill-treatment is a sufficient or "just" ground for her refusal to accept the offer of her husband to take her back and maintain her. In such a case the wife is not bound to return to her husband and live with him and she cannot be deprived of her right to maintenance by reason of such refusal. [P 292 C 2]

The fact of the husband marrying a second wife though not a just ground for the first wife's refusal to live with him, is still a factor to be taken into account in considering whether the offer of the husband to take her back is bona fide or not. [P 292 C 2]

K. Chandrasekharan for B. C. Seshachala Iyer — *for Petitioner.*

K. Venkataraghavachariar for Public Prosecutor — *for the Crown.*

V. Rajagopalachariar — *for Respondent.*

Order.—This is a petition arising out of an application for maintenance by a wife against her husband. The marriage is admitted and the maintenance is sought not only for the petitioner herself but also for her child aged about two years. The unfortunate feature of this case is that while this child was in the womb, the petitioner had an attack of small-pox which left her more or less a physical wreck and made her completely blind with the result that she is absolutely helpless and unable to earn anything by her own exertions, and indeed she requires assistance even for ordinary purposes. The learned Magistrate appears to have ignored altogether the claim of the child whose right to get maintenance is not and cannot be denied, because it is not pretended that the counter-petitioner ever gave anything for the maintenance of the child or that the child was living with him. So far as the child is concerned, it is obvious that the order of the Magistrate dismissing the petition entirely cannot be sustained.

As regards the petitioner herself, she did give as a reason for her refusal to accept the belated offer of the counter-petitioner to take her back that she was afraid of further ill-treatment. The learned Magistrate appears to have thought that this cannot be regarded as a valid ground for the refusal to accept the offer. He says: "To me this ground of her refusal appears as no valid ground." This is obviously wrong because the ground would be certainly sufficient ground or as the Section has it 'just ground' for the refusal. A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment. The learned Magistrate's final decision appears to have been vitiated by this wrong view of the law on the subject of what constitutes a just ground for a wife's refusal to live with her husband. No doubt in one place he says vaguely that he does not find any neglect on the part of the counter-petitioner, because the counter-petitioner's mother begged for her daughter's welfare, but that is not at all conclusive on the point. It may be that the actual begging was due either to actual want or to the belief in the efficacy of begging as a cure for the blindness. But there can be no doubt in this case that there was a neglect by the counter-petitioner to maintain the petitioner for some time past. The counter-petitioner has married a second wife; and though this is not a just ground for the first wife's refusal to live with him, that is a factor to be taken into account in considering whether the offer is really bona fide or not. On the whole, it seems to me as if the petitioner had established satisfactorily her claim to maintenance for herself and as regards the claim on behalf of the child, there is really no defence to it. In the circumstances therefore the order of the Magistrate dismissing the petition is set aside. I am of opinion that a maintenance of Rs. 6 a month to the petitioner and Rs. 2

a month for her child would be reasonable maintenance and there will be an order directing the counter-petitioner, the respondent in this Court, to pay maintenance allowance at these rates to the petitioner with effect from the date of the order of the Sub-divisional Magistrate, i. e. 12th August 1938.

C.R.K./G.N. *Order set aside.*

A. I. R. 1940 Madras 293

BURN AND STODART JJ.

In re Mahanti Sreeramulu — Accused.

Referred Trial No. 29 and Criminal Appeal No. 124 of 1939, Decided on 3rd April 1939, referred by Sess. Court, Vizagapatam Division, D/- 4th February 1939.

Criminal Trial — Murder—Accused stabbing deceased on vital part — Deceased dying as direct result of the injury—Accused is guilty of murder — Fact that expert medical attention would have saved deceased makes no difference.

Where an accused stabbed the deceased on a vital part of the body and deceased died as a direct result of that injury, and the injury is one which in the ordinary course will cause death, the accused is guilty of murder. That the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime. [P 294 C 1]

T. R. Thyagarajan — *for Accused.*

Public Prosecutor — *for the Crown.*

Stodart J.—The accused, a man of 26, has been convicted and sentenced to death for the murder of Gangayya, aged 20. The referred trial raises the question whether we should confirm the sentence of death. The appeal is by the accused praying that the conviction be set aside. It is certain that the deceased was stabbed in the abdomen in the night of 19th August when he was sleeping on the pial of the house in the occupation of one Atchayya. At his cries the other persons who were sleeping there and the deceased's relations came to his help. They carried him on a cot to the house of the Assistant Surgeon and from there to the local fund hospital where he died on the morning of 21st August at 8 o'clock. The post mortem examination disclosed the fact that the stab had penetrated the abdominal cavity and had pierced the intestines and that death was due to profuse internal hæmorrhage and acute peritonitis.

P. W. 7 the father of the deceased who went to the scene of crime at once on hearing what had happened to his son says that at 9 that night he had seen and talked to the deceased at that place and that the accused was there at the time. He says that the accused and the deceased used to sleep on the pial with 7 or 8 other men. P. W. 8 is one of the men who used to sleep on that pial. He says that on the night in question the accused lay down to sleep at 10 P. M. beside him and that when the hubbub arose on account of the stabbing of the deceased, the accused was not there. P. W. 11 is the watchman of a choultry and his house is next door to the choultry and about 20 yards from the scene of crime. He says that in the middle of the night he was awakened by a knocking at his door and went there and saw the accused. The accused fell down in front of his door. The accused told this witness that he had stabbed Gangayya and then had stabbed himself and at that time there were several knife wounds on the person of the accused. The witness told the accused to go and lie down at some place and not in front of his house and the accused went to the choultry nearby and lay down on the pial of the choultry. P. W. 12 is the wife of P. W. 11 and she gives evidence to the same effect. These two witnesses are corroborated by the Sub-Inspector of Police who says that P. W. 11 came to him at the police station and reported this incident. The Sub-Inspector is P. W. 13. He says that he went at once to the choultry and saw the accused lying there with wounds on his person and the knife lying near the steps of the choultry two yards away. That knife is M. O. 1.

The accused was committed for trial not only for the murder of Gangayya but also on a charge of attempting to commit suicide, but the learned Sessions Judge reserved the charge of the latter offence to a separate trial.

There is also evidence, which we have no reason to doubt, that the deceased himself stated that the accused was the man who stabbed him. He said so to his father P. W. 7 and he made a similar statement to the Magistrate who recorded his dying declaration in the morning, but learned counsel for the appellant very rightly stresses the fact that when P. W. 8 got to the side of the injured man, the latter told him that he did not see the person who stabbed him. It is clear in our opinion that the deceased did not see his assailant and his statements that the accused stabbed him were based on what people round him said. But quite apart from that, there is ample evidence to bring home the offence to the accused, namely the evidence of P. Ws. 11 and 12, which, as we have said, is corroborated by the statement made by P. W. 11 at the police station at the very earliest opportunity. The evidence of these two witnesses is also corroborated by the condition of the accused when the Sub-Inspector found him lying on the pial of the choultry immediately afterwards. In the Magistrate's Court, the appellant filed a written statement saying that on that night he was in a fit of madness and while he was lying asleep some unknown person inflicted the injuries on him. In the Sessions Court he said that this statement was correct and denied the truth of P. Ws. 11 and 12, but gave no reason why they should implicate him falsely.

Learned counsel for the appellant contends that at the best the offence committed by the appellant would amount to causing grievous hurt. His argument is based on the fact that P. W. 2, the Assistant Surgeon, stated in answer to a Court question that the deceased might have survived if a major operation had been performed at once. The witness also stated that he did not open the abdomen as that was a major operation for which he had not the necessary expert assistance and when he was asked why he did not call in some other qualified medical man which he could have done, he said that he was afraid that even so the deceased might possibly die under the operation and he would come to be blamed. The fact remains that the appellant stabbed the deceased on a vital part of the body and that the deceased died as a direct result of that injury. It is clear also that such an injury is one which in the ordinary course will cause death. There were 26 ounces of fluid blood in the peritoneal cavity and, as we have said, there was acute inflammation of the peritoneum. That the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime. We agree with the learned Sessions Judge that the accused was guilty of murder and also that the appropriate sentence is death. We confirm the conviction and the sentence passed on the appellant and reject his appeal.

We regret to have to place it on the record that the conduct of the Assistant Surgeon in this case calls for adverse comment. He saw the injured man at his house at 12-30 in the night and made a most perfunctory examination of him, applied some bandages to the wound and told his relations to take him to the hospital. P. W. 7 the father of the deceased says that the doctor was angry at being disturbed from his sleep, and hit him a blow with his fist. P. W. 5 the uncle of the deceased says that when they got to the hospital, there was no ward attendant there and nobody to do anything for the injured man and that they themselves laid him on a cot. The Assistant Surgeon in his evidence says that he did not think that the wound on Gangayya's abdomen was anything but merely superficial and therefore he thought there would be plenty of time to attend to him in the morning. He admits however that when he saw him in the morning he realized that the patient was in a very grave and dangerous situation and he sent for the Magistrate to take his dying declaration. It seems to us that this witness must have made a very perfunctory examination of the deceased when he was brought to his house shortly after receiving the fatal injury, and we think this is a matter which should be brought to the notice of the Surgeon-General.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 294

BURN AND STODART JJ.

In re Boya Latchmakka — Accused.

Referred Trial No. 21 and Criminal Appeal No. 92 of 1939, Decided on 14th March 1939, (referred by Sess. Court, Chittoor Division, D/- 12th January 1939.

Criminal Trial—Murder—Test whether child was born alive.

The fact that the lungs on suction floated in water is not an infallible test of live birth and a child may breathe while its head is in the vagina, either during a presentation of the head or of the breach. [P 295 C 1]

G. Balaparameswari — *for Accused.*

Public Prosecutor — *for the Crown.*

Stodart J. — The referred trial and the appeal relate to the case of one Latchmakka, a woman of 30, who has been sentenced to death for the murder of her new born infant. The appellant had left her husband two years ago and at the time of the crime, she was living in a house two doors from his. Her husband's mother, P. W. 3, is the only material witness in the case. P. W. 3 says that on the night of 8th December, the appellant whose condition had been apparent for some time called her saying she was in great pain. P. W. 3 advised that she should take some hot water and went on the following morning to the appellant's house and found the appellant sitting leaning against a wall and the newly delivered child lying on the ground dead. P. W. 3 then took the child out, buried it and having obtained assistance, she attended to the appellant and tidied up the house and went away. The learned Sessions Judge has found that the appellant throttled the child but we do not find sufficient proof in the case either that the child died of homicidal violence or that the appellant intentionally caused its death. The Assistant Surgeon, Madanapallee, who examined the body was of the opinion from the condition of the internal organs that death was due to asphyxia. He also found on the front of the neck a bruise 2½ inches long by one inch wide and on these data, he gave it as his opinion that asphyxia was probably due to throttling.

On the admitted facts, the appellant was alone without assistance when the child was born. The mark on the neck may have been caused by an accident at the time of birth or shortly after it. The evidence of P. W. 3 is that when she first saw the appellant, the appellant was in a very weak and helpless condition and it is very difficult to believe that she would have had the energy or the will to kill her child. Learned counsel for the appellant has also pointed out that there is no conclusive evidence that the child was born alive. His argument is certainly supported by eminent authority. P. W. 1 the Assistant Surgeon, bases his opinion that the child was born alive on the fact that the lungs on suction floated in water. But the learned authors of Edn. 9 of Taylor's Medical Jurisprudence point out that this is not an infallible test of live birth and that a child may breath while its head is in the vagina, either during a presentation of the head or of the breach. The learned authors say this is not very uncommon and must be set down as a possible occurrence. The appellant told P. W. 3, the mother-in-law, that the child had been born dead, and in our opinion, there is no sufficient reason why this statement should not be believed. The probabilities in fact are in favour of the appellant and we find it very difficult to understand the opinion of the learned Sessions Judge based on the facts which we have set out above that the appellant killed her child and that there were no extenuating circumstances. He has taken the very unusual course—unusual in cases like this—of sentencing the appellant to death though we find at the same time that he has addressed the Government recommending that the sentence be reduced to a term not exceeding five years' rigorous imprisonment. It is obvious, in our opinion that if the case of the appellant was one which the Judge thought should be dealt with under R. 260 of the Criminal Rules of Practice by reduction of a sentence, the sentence of death was quite inappropriate. In the result, we allow this appeal, set aside the conviction and sentence of the learned Sessions Judge and direct the appellant to be set at liberty.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 295

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Jonnalagadda Ramaswamy Chetty — Petitioner.

v.

T. K. Ramachandra Rao — Respondent.

Civil Misc. Petn. No. 2543 of 1939, Decided on 27th September 1939, for issuing a *writ of certiorari*.

(a) Madras Debt Conciliation Act (11 of 1936), Ss. 4, 14 and 17 — Debtor having only one creditor applying under S. 4—Creditor not agreeing to settlement of his debts — Application under S. 4 must be dismissed.

Where a debtor who has only one creditor makes an application under S. 4 (1) setting out the debts due to the creditor and the creditor does not agree to the settlement of his debts, the Board is bound under S. 17 to dismiss the application of the debtor under S. 4 (1). [P 296 C 1, 2]

(b) Madras Debt Conciliation Act (11 of 1936), S. 4 (1)—Scaling down debt of agriculturist.

The Debt Conciliation Board has no power to scale down the debt of a person on the ground of his being an agriculturist under the provisions of the Madras Agriculturists Relief Act. [P 296 C 1, 2]

Kasturi Seshagiri Rao for Ramanujam and Venkataseshayya—*for Petitioner.*

D. R. Krishna Rao — *for Respondent.*

Leach C. J. — The petitioner filed the application before us for the issue of a writ of certiorari against the Debt Conciliation Board of Dhone, Kurnool District, and for the quashing of an order of the Board dated 28th May 1939. A rule nisi was issued, and we have heard the arguments. It is clear that the rule must be made absolute. The facts are these. On 6th February 1939 the respondent, who claims to be an agriculturist filed an application purporting to be an application to the Debt Conciliation Board under S. 4 (1), Madras Debt Conciliation Act, 1936. In this petition the respondent set out three debts all of which were shown to be due to the petitioner. The respondent apparently had only one creditor. Having set out the debts payable to the petitioner the respondent's petition proceeded as follows :

> I hereby declare that I am an agriculturist and the debts shown above are liable to be scaled down under the provisions of the Madras Agriculturists' Relief Act 1938.

The Board entertained the petition and served notice on the petitioner in these proceedings. In due course the Board went into the question whether the respondent was in fact an agriculturist, and came to the conclusion that he was. The petitioner contended that as the debts were secured on house property they were excluded from the scaling down Sections of the Madras Agriculturists' Relief Act by virtue of S. 4 (d) of that Act. The Board decided against the petitioner and held that the respondent's debts should be scaled down under the provisions of the Madras Agriculturists' Relief Act. It is this order which the petitioner asks the Court to quash.

Although the petition which the respondent filed on 6th February 1939 purported to be a petition under S. 4, Madras Debt Conciliation Act, 1936, what he was in effect asking the Board to do was to scale down his debts under the provisions of the Madras Agriculturists' Relief Act which the Board had no power to do. But treating the respondent's application to the Board as an application under the Madras Debt Conciliation Act 1936, it is manifest from the provisions of that Act that the petition should have been dismissed. S. 4 provides that a debtor may make an application "for the settlement of his debts." S. 14 (1) says that if the creditors to whom more than 50 per cent. of the total amount of the debtor's debts is owing come to an amicable settlement with the debtor, such settlement shall be reduced to writing in the form of an agreement recording the amounts payable to such creditors and the manner in which, the assets from which, and the times at which they are to be paid. But if the creditors representing more than 50 per cent. of the applicant's debts do not agree the Board is bound under S. 17 of the Act to dismiss his application. As I have already pointed out, there is here only one creditor and he has not agreed to a settlement of his debts. There having been no settlement the proper and only course for the Board to follow was to dismiss the application filed by the respondent.

The respondent has entirely misconceived the object of the Madras Debt Conciliation Act and has misread its provisions. If he is an agriculturist and the debts which he owes to the petitioner are debts which do not fall within the provisions of S. 4 (d), Madras Agriculturists' Relief Act 1938, he is entitled to have the debts scaled down in accordance with the provisions of that Act, and if the petitioner asks a Court to enforce the payment of a larger sum than is allowed by the Act the Court will have no power to do so. The Board having acted without jurisdiction in passing the order of 28th May 1939 that order must be quashed, and there will be an order accordingly. The petitioner having succeeded is entitled to his costs which we fix at Rs. 50.

C.R.K./D.S. *Order quashed.*

A. I. R. 1940 Madras 296

WADSWORTH J.

Suryadevara Subbayya — Appellant.

v.

Vemulapalli Venkatasubbayya and another — Respondents.

Appeal No. 85 of 1939, Decided on 6th September 1939, against order of District Court, Kistna at Masulipatam, D/- 11th December 1936.

Transfer of Property Act (1882), S. 67-A — Mortgage deed providing for payment of sum due in certain instalments with default clause that in default of two consecutive instalments mortgagee could claim whole—Mortgagee electing to sue only on two instalments in arrears and obtaining decree without affecting his rights under balance of mortgage—Objection in execution that sale should not be subject to remaining balance rejected — Order held appealable and principle of S. 67-A could not apply.

A mortgage deed provided for the payment of the amount due in certain instalments, with a default clause that if two consecutive instalments were in arrears, the mortgagee could claim the whole. In fact the mortgagee elected to sue only on the two instalments which were in arrears and he got a mortgage decree for the payment of these amounts. The decree did not affect his rights under the balance of the mortgage. In execution the mortgagor objected that the sale could not be held subject to the remaining instalments of the mortgage debt in respect of which no suit had been filed. The objection was rejected :

Held that the order being on a dispute between the parties arising out of execution and affecting the substantial rights of the judgment-debtor was appealable. [P 297 C 1]

Held further that the objection should have been raised in the suit and could not be kept in reserve to be used in the process of execution. [P 297 C 1, 2]

Held also that the principle of S. 67-A could not be applied. [P 297 C 2]

P. Somasundaram and P. Suryanarayana — *for Appellant.*

T. Krishna Rao for B. Sitharama Rao — *for Respondents.*

Judgment.—This appeal arises out of an order in the execution of a mortgage decree. The mortgage instrument is not before me, but from the recital in the preliminary decree it would appear that it provided for the payment of the amount due in ten annual instalments, with a default clause that if two consecutive instalments were in arrears, the mortgagee could claim the whole. In fact the mortgagee elected to sue only on the two instalments which were in arrears and he got a mortgage decree for the payment of these amounts. He must therefore be taken to have waived his right to enforce the default clause. When the hypotheca was put up for sale an objection was raised which is not very clearly stated but appears to have directed to two points, firstly, that more of the property was sold than was necessary to realize the arrears, and secondly that the sale could not be held subject to the remaining instalments of the mortgage debt in respect of which no suit had been filed. In so far as the objection was made to the extent of the land covered by the sale proclamation, I doubt very much whether the order is appealable at all. In so far as it relates to the power of the mortgagee to sell the land subject to the balance of his mortgage rights, it must, I think, be held that this is an order on a dispute between the parties arising out of execution and affecting the substantial rights of the judgment-debtor and is therefore appealable.

The basis of the objection has been stated here somewhat differently from the way in which it appears to have been stated in the Courts below. It is contended that, on the analogy of S. 67-A, T. P. Act, which of course does not apply in terms to the present proceedings, the mortgagee is bound to sue on the whole of his mortgage and that he not having done so, the decree must be executed by the sale of the properties free of the balance of the mortgage. No authority has been quoted covering the contention raised. It seems to me clear that the objection is really not one to the manner of execution so much as to the decree which has been obtained. If the mortgagee was bound to sue on the whole of his mortgage, then the plea should have been raised in the suit and the mortgagee should have been given an opportunity of either paying court-fee on the whole of the claim and getting a decree thereon, or of abandoning so much of the mortgage claim as it was not worth his while to pursue. The defendant cannot keep such an objection in reserve to be used in the process of execution. The decree itself makes the property liable to be sold to realize the amount due in respect of the first two instalments and it does not affect the rights of the decree-holder under the balance of his mortgage.

Quite apart from the question of the time at which this objection should have been urged, I doubt very much whether the objection is sound in substance; for, the principle of S. 67 A, T. P. Act, could not be applied unless there were either two mortgages or, possibly, two separate portions of the same mortgage both of which were payable. The present instrument apparently provided that the mortgagee might treat the whole of his mortgage as payable on default in respect of the two first instalments. This is presumably an option given to the mortgagee and, if he chooses to waive the penalty and sue merely on those instalments which were due, the mortgagor has the benefit of a deferred liability to pay the balance of the mortage debt. He cannot, in my opinion, be heard to say that the mortgagee was bound to enforce a penalty against himself. Whichever way one looks at the case, the appeal has no substance and is dismissed with costs. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 297

PANDRANG ROW J.

In re V. K. Subramania Mudali and others — Petitioners.

Criminal Revn. Cases Nos. 813 and 814 and Petns. Nos. 772 and 773 of 1938, Decided on 27th January 1939, to revise orders of Second Class Magistrate, Arkonam, D/- 11th October 1938.

Madras Local Boards Act (14 of 1920), S. 227 (a) and S. 208 (2) and (3) — Offence under S. 208 (2) and (3) by person in his capacity as member or president of Panchyat Board — Previous sanction of Local Government is necessary before Court can take cognizance of offence.

In the case of a prosecution under S. 208 (2) and (3) where the acts or omissions alleged against a person are with respect to something intimately related to his position as a member or a president of the Panchayat Board, the sanction of the local Government is absolutely necessary as a pre-requisite of taking cognizance of the alleged offence by the Court. Therefore the prosecution of a member of a Panchayat Board, who continues to exercise the functions of temporary president even after the election of the president and fails to hand over a certain amount being the panchayat fund to the newly elected president, under S. 208 (2) and (3), without sanction of Local Government is illegal and the proceedings must be quashed. [P 298 C 1, 2]

V. T. Rangaswami Iyengar and K. Ramaswami Iyengar — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—This is a case in which the petitioner who was a member of the Panchayat Board of Kaveripakkam and who was appointed temporary president for the purpose of election was charged before the Sub-Magistrate of Arkonam for offences punishable under S. 208 (2) and (3), Local Boards Act, in that he continued to exercise the functions of temporary president even after the election of the president and for failure to hand over one pie being the panchayat fund to the newly elected president. It is extraordinary to find that such a complaint was entertained by the Magistrate without any sanction for the prosecution being given by the Local Government as required by law; even an application by the accused to the Magistrate to drop the proceedings in view of the absence of sanction of the Government was dismissed. The Magistrate's view is, in my opinion, wrong as this is a case in which the sanction of the Government was absolutely necessary as a pre-requisite of taking cognizance of the alleged offence. The acts or omissions alleged against the petitioner in this case were with reference to something intimately related to his position as a member of the Panchayat Board or as sometime temporary president of the Board. The Sub-Magistrate should not have taken cognizance of the alleged offences in the absence of Government sanction. The proceedings before him in C. C. No. 727 of 1938 are therefore quashed.

Cr. R. C. No. 814 of 1938:—This is in a way connected with Cr. R. C. No. 813 of 1938. In the present case, no less than seven persons were charged with offences punishable under Ss. 208 (2) and (3) and 210, Local Boards Act. The petitioners 1 to 4 who are accused 1 to 4 in the Court below are members of the Panchayat Board of Kaveripakkam and the acts which are alleged to constitute the offences are acts which were performed by them while purporting to act in discharge of their duties as members of the Board. As the nature of the acts themselves clearly show this so far as they are concerned, they are clearly protected by the provisions of S. 227 (a), Madras Local Boards Act. As there was no sanction of the Local Government for their prosecution, the Magistrate should not have taken cognizance of the offences so far as they are concerned. The proceedings so far as these persons, accused 1 to 4, before the Magistrate are concerned, are quashed.

As regards the remaining petitioners, i. e. accused 5 to 7 in the Court below are concerned, it has not been shown that they are entitled to any protection or that the prosecution against them requires the previous sanction of any authority. It cannot therefore be said that the Magistrate was wrong in dismissing their application to drop the proceedings so far as they were concerned, and there can be no interference so far as accused 5 to 7 in the Court below are concerned. It will be open to them to contend before the Magistrate that the abetment alleged against them is no offence at all, and indeed to put forward any other defence that may be available to them.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 298

PANDRANG ROW J.

In re Manikyam Kondayya and others — Appellants.

Criminal Appeal No. 336 of 1938, Decided on 26th January 1939, against judgment of Sess. Court, East Godawari Division at Rajahmundry, D/- 20th July 1938.

Criminal Tribes Act (1924), S. 23 (1) — S. 23 (1) relates to time of conviction and not to time of occurrence.

Section 23 (1) relates to the time of the conviction and not to the time of the occurrence which is the subject-matter of the case which ends in a conviction. Therefore, a person who was not a member of a criminal tribe at the time of his conviction though he was member at the time of the occurrence, is not liable to be convicted under S. 23 (1). [P 299 C 1]

B. Jagannadha Das — *for Appellants.*

Public Prosecutor — *for the Crown.*

Judgment. — The appellants have been convicted after a trial with the aid of assessors by the Sessions Judge of East Godavari on various charges and sentenced to undergo various terms of imprisonment which are to run concurrently. The charge against them was that they formed themselves into an unlawful assembly with the common object of causing hurt to the Village Munsif of Anur to which place the appellants belong and in prosecution of that common object, one of the accused, namely accused 1, caused grievous hurt to the

Village Munsif with a knife. The other accused were charged under the same Section, namely S. 326, Penal Code, under the provisions of S. 149, Penal Code. There was also a further charge against accused 1 under S. 23 (1), Criminal Tribes Act. There is some doubt as to whether this charge was justified or not as he was not a member of the criminal tribe at the time of his conviction, though he was a member at the time of the occurrence. The Section seems to relate to the time of conviction and not to the time of the occurrence which is the subject-matter of the case which ends in his conviction. The conviction of accused 1 under S. 23 (1), Criminal Tribes Act, will be set aside and the sentence thereunder also and he is acquitted of that offence. But this will not make any material difference because there are convictions of accused 1 under Ss. 148 and 326, Penal Code, and sentences of the same description under those Sections as the sentence under S. 23 (1), Criminal Tribes Act.

* * * *

The appeal is therefore dismissed under S. 423, Criminal P. C.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 299

VARADACHARIAR AND ABDUR RAHMAN JJ.

Sirdhar Vasanta Rao Ananda Rao Dhyber Killedar at Baroda — Appellant.

v.

Gopal Rao Sethu Rao Peshwai and others — Respondents.

Second Appeal No. 241 of 1934, Decided on 30th September 1938, against decree of the District Court of West Tanjore in A. S. No. 94 of 1931.

(a) Civil P. C. (1908), S. 100—Finding of fact not vitiated by error of law cannot be disturbed.

So far as the findings of fact recorded by the lower Appellate Court are not vitiated by any error of law it is not open to the second Appellate Court to displace them. [P 301 C 1]

(b) Contract Act (1872), S. 220—Principal and agent—Misconduct—Forfeiture of remuneration is result of misconduct and not of loss arising therefrom—Payment of damages caused by misconduct is in addition to forfeiture of remuneration.

The principle underlying S. 220 is that a principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. The payment of damages caused by the misconduct is in addition to the forfeiture of commission or remuneration and the forfeiture of commission is the result of misconduct and not of loss arising from the misconduct. Therefore it cannot be said that the agent's claim to remuneration will not be affected by his misconduct unless it is also shown that the principal has incurred loss thereby and that even if loss is caused, the agent is entitled to his full remuneration on making good the loss: *(1903) 2 K B 635, Rel. on.* [P 301 C 2]

(c) Principal and agent—Suit for accounts by principal—Agent cannot claim credit for time-barred items unless right to account subsists on date of suit.

In a suit for accounts between the principal and agent, the agent cannot be said to be in equity entitled to credit for all the items due to himself, though a suit by him for the recovery of any such item might be barred unless the right to account as between the parties is one that is subsisting on the date of suit. Where the suit is instituted in 1925 there is no subsisting right to account as between the parties in respect of the agency that related to the conduct of a suit in a Court that ended in 1906: *A I R 1916 Mad 720, Expl.* [P 303 C 2]

(d) Principal and Agent—Benami transaction — Agent using principal's name for benami transaction of his own—Onus is on agent to prove that money was his own and not of principal and that transaction was truly benami.

Where an agent mixes up his moneys with the moneys of his principal the onus clearly lies on the agent to prove that any particular transaction which is claimed by him to belong to himself really represented his money. Where the agent uses his principal's name for a benami transaction of his own it must be proved by the agent beyond all doubt that the money was his own and not the principal's and that the transaction was truly a benami one: *A I R 1925 Mad 1125, Rel. on.* [P 305 C 1]

S. T. Srinivasagopalachari — *for Appellant.*

A. V. Viswanatha Ayyar and K. S. Desikan — *for Respondents.*

Varadachariar J.—This second appeal arises out of a suit for accounts between principal and agent. The final decree of the trial Court directed the defendant to pay a substantial amount to the plaintiff as a result of the taking of the account. On appeal by the defendant, the lower Appellate Court set aside that decree and directed the plaintiff to pay the defendant a sum of Rs. 3780 odd and also pay the defendant's costs including the court-fee payable to Government on the memorandum of appeal to the lower Court. It is against this latter decree that the plaintiff has preferred this second appeal. The defendant was adjudged an insolvent during the pendency of the appeal in the lower Court and the Official Receiver has continued the proceedings as representing the defendant's estate.

According to the plaint, the claim for account arose out of an agency constituted in March 1911 by a power of attorney marked Ex. A. But in substance the agency goes back to an earlier date. During the plaintiff's minority, a bond for Rs. 90,000 had been executed in his favour by two persons, a lady named Jumna Bai and a minor named Sethuram. The plaintiff and his mother who was his guardian were residents of Baroda but the executants of the bond were residing in South India. When it became necessary to institute a suit to recover the money due under that bond, the defendant's father was constituted agent by the plaintiff's mother and put in charge of the litigation. The suit was instituted in 1904, but even while it was pending before the trial Court, the defendant's father died and the evidence shows that the defendant attended to the subsequent stages of the trial till judgment was delivered by the trial Court in January 1906. We have not got the power of attorney or any formal document under which the defendant was appointed agent during the pendency of the suit in the trial Court. The only documentary evidence we have relating to this period is Ex. 1, dated 6th July 1906 wherein reference is made to the services rendered by the defendant's father and by the defendant in connexion with the suit and it is stated that the plaintiff's mother had agreed to pay a sum of Rs. 1500 by way of remuneration for the conduct of the suit; a period of two years was fixed by that document for payment of the amount. As the parties anticipated further proceedings in the suit, both by way of a possible appeal by the other side and by way of necessary proceedings in execution of the trial Court's decree, a further agreement was come to between the defendant and the plaintiff's mother acting on the plaintiff's behalf; this is evidenced by Ex. 2 which bears the same date as Ex 1. The defendant presumably acted under this arrangement for the rest of the litigation but when the plaintiff attained majority in October 1910, it was apparently thought more regular to have a power of attorney executed by the plaintiff in the defendant's favour (see Ex. A). The plaintiff instituted this suit on the basis that the agency was constituted by this document, but in the circumstances it seems to us more reasonable to hold that the agency really began under Ex. 2 and that the plaintiff merely adopted it and continued it by the execution of Ex. A.

We shall refer to the provisions of Ex. 2 in detail in due course. It is sufficient at this stage to say that it required the defendant to attend to the conduct of the possible appeal in the High Court as also to the conduct of the proceedings in execution of the trial Court's decree. The High Court pronounced judgment on 29th July 1910 varying the decree of the lower Court to this extent, namely whereas the lower Court had passed a decree against both the executants of Ex. A, the High Court confirmed the decree as against Jumna Bai and dismissed the suit as against Sethuram. The result was that an appeal was taken to the Privy Council by Jumna Bai and an appeal was also taken to the Privy Council by the plaintiff against so much of the High Court's decree as dismissed the suit as against Sethuram. The Privy Council delivered judgment in March 1916 confirming the decree of the High Court. In the meanwhile, proceedings were being taken in the mofussil in execution of the Appellate Court's decree as the High Court declined to grant stay of execution. In the course of the execution proceedings, a sum of about Rs. 26,000 was realised by the defendant upto 1918. In 1918, some villages belonging to the judgment-debtor were purchased in court auction in execution of the decree, on behalf of the plaintiff himself and the defendant was asked to take possession thereof and manage them as agent. To facilitate this management a fresh power of attorney Ex. B was executed in his favour by the plaintiff on 6th May 1918; the defendant continued the management or mismanagement till some time in 1922, though the correspondence of the later part of this period shows a growing estrangement between the principal and the agent. In August 1922 the defendant tendered his resignation by Ex. C and it was accepted by the principal subject to certain reservations. (*Vide* Ex. C-1.) Even after this resignation, the defendant did not render an account to the plaintiff, notwithstanding the issue of a lawyer's notice Ex. D. This suit was accordingly filed on 31st July 1925.

The plaint made several allegations of negligence, misconduct and misappropriation against the defendant and ask for an account being taken of the moneys which came into his hands from 1911 to 1918 as also of his management of the villages between 1918 and 1922. The defendant pleaded in bar to the suit that he was not accountable to the plaintiff but only to his mother and that in fact he had rendered account to his mother. The issues relating to these pleas were tried in the first instance and they were decided against the defendant both by the trial Court and by the the lower Appellate Court. The other issues in the case were thereafter tried and accounts were also taken by a commissioner and as a result the Courts below came to pass the final decree referred to supra. Though the parties are at issue on a number of points, it will be sufficient for the purpose of this second appeal to refer to a few main heads of dispute. The matter comes before this Court in second appeal; and so far as the findings of fact recorded by the lower Appellate Court are not vitiated by any error of law, it is not open to this Court to displace them. As we have come to the conclusion that the lower Appellate Court has fallen into serious errors of law in dealing with the principal questions arising in the case and has also failed to view some of them from the correct standpoint, we are obliged to deal with the questions raised before us with comparatively little help or hindrance from the judgment of the lower Appellate Court.

For convenience of discussion, the Courts below have rightly divided the case into two main heads, namely (1) the receipts and disbursements prior to 1918 which mainly related to the conduct of proceedings in Court whether in the appeal or in execution and (2) receipts and disbursements subsequent to 1918 which mainly relate to the management of the villages purchased in execution. Under both heads, one of the main points in dispute between the parties relates to the remuneration claimed by the defendant, and indeed this is a substantial figure. It will therefore be convenient to deal with it at the outset. We may premise this part of the discussion by stating that it has been found by both the Courts that prior to 1918, the defendant had come into possession of a sum of Rs. 30,840-13-9; there is accordingly no dispute about the receipt side so far as this part of the case is concerned. The dispute relates only to the items in respect of which the defendant claims credit. Before dealing with the details making up the claim for remuneration it will be convenient to deal with one larger question raised by issue 7 in the case, namely whether the defendant has forfeited his right to remuneration by reason of misconduct in the discharge of his duty. This contention of the plaintiff covers the conduct of the defendant prior to 1918, as well as his conduct subsequent to 1918, but it may be dealt with here once for all.

There can be little doubt as to the legal principle applicable. We must express our dissent from the view of the lower Court that the agent's claim to remuneration will not be affected by his misconduct unless it is also shown that the principal has incurred loss thereby. We must also observe that the learned Judge was in error in thinking that even where loss had been caused to the principal, it was sufficient if the agent was directed to make good the loss, and once he does it, he will be entitled to his full remuneration. These views of the learned Judge wholly ignore tho provisions of S. 220, Contract Act; the illustrations to that Section make it clear that the payment of damages caused by the misconduct is in addition to the forfeiture of commission or remuneration, and the forfeiture of commission is the result of misconduct and not of loss arising from the misconduct. The principle underlying the rule is that "a principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission" (Per Lord Alverstone C. J. in (1903) 2 K B 635[1] at p. 638.) Reference may also usefully be made to the following passage in Story's Laws of Agency in para. 331:

> It is a condition precedent to the title of the commissions, that the contemplated services should be fully and faithfully performed. If therefore the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskilfulness, in the business of his agency, he will not only become liable to his principal for any damages, which he may sustain thereby, but he will also forfeit all his commissions. Slight negligence, or slight omissions of duty, will not indeed, ordinarily, be visited with such serious consequences; although if any loss has occurred thereby to the principal, it will be followed by a proportionate diminution of the commissions.

Judged by the above test, we regret to say that the conduct of the agent in this case has certainly not been faithful. So far as the work prior to 1918 is concerned, the agent's part in the proceedings to be taken in the Court must in the very nature of things have been small, because the matter was in the stage of appeal or execution and was in the hands of lawyers. The more important part of his duty during this period therefore was the proper disbursement of the moneys that came into his hands and duly accounting for them. The letters which have been exhibited out of the correspondence that passed between the agent on the one hand and the plaintiff or his mother on the other, between 1911 and 1918 are sufficient to show how the defendant kept them almost wholly in the dark as to what was happening here. Nonetheless, they heard with some relief that a small amount had been realized in execution; they congratulated him upon it and asked him to invest the realizations duly and they were being assured by the defendant that it was being so done. It now however turns out that it is not possible to know how the agent had invested them, on what terms or with what results. Such little evidence as we have clearly suggests that a portion of these moneys seems to have been utilized by him for his own purposes. In the witness box, he admits that he was carrying on some money-lending business of his own which he claims to have been doing with his own moneys. He however states that he has never kept any account for this business and adds that he mixed up his funds with the principal's funds and invested them in one account in some local fund in Tanjore. Even the pass book or other voucher relating to that investment has not been made available. Having kept the principal in the dark as to the expenditure incurred by him, he pleaded when it came to the suit, that he had rendered account either to the mother or to the mother and the plaintiff together and that he had handed over all the papers to them. This has been found to be a false plea. All that happened is that he sent a miserable sheet of paper to the plaintiff which conveyed comparatively little information and was accordingly returned by the plaintiff to the defendant. The defendant has now produced Ex. X as that paper. At the time when the preliminary judgment was passed, the defendant was directed to file a statement of account, and he accordingly filed one. It is to this statement of account that the plaintiff filed objections as per directions of the Court.

---

[1] Andrews v. Ramsay & Co., (1903) 2 K B 635= 72 L J K B 865=89 L T 450=52 W R 126= 19 T L R 620.

It appears that there are very considerable differences between Ex. X and the account now filed by the defendant in Court. The answers of the defendant from the witness-box when these differences were brought to his notice are painful reading. We do not go into this matter in greater detail because both the Courts have concurrently found that many items of disbursements entered either in Ex. X or in the account now submitted are false. Coming to the period of management of the villages, subsequent to 1918, the defendant's management has certainly been indifferent and unbusinesslike. The report of the commissioner as to the state of the accounts throws sufficient light on the mismanagement. It is perhaps too much to say that there is as much of proved dishonesty during this period as during the period prior to 1918; but that there has been a lapse from honesty at least in some matters may safely be said. We do not feel that the lapse during the whole period from 1911 to 1922 can be said to be "slight" within the meaning of the rule stated by Story. But, for reasons which we shall presently advert to, we do not propose to go to the length of denying all remuneration to the defendant on the ground of misconduct.

The claim for remuneration in respect of the period prior to 1918, has been considered by the Courts below under four heads, (1) for the conduct of the trial of the suit on the Rs. 90,000 bond, (2) for the conduct of the appeal in the High Court, (3) for the conduct of the proceedings before the Privy Council, and (4) for the conduct of the execution proceedings. The remuneration claimed for the management of the villages stands on a slightly different footing, because the percentage allowed to the defendant under Ex. B covers not merely his remuneration proper but also the expenses of management. For both purposes, Ex. B allows him 15 per cent. of the collections. Under the first head, the defendant claimed Rs. 1500 on the basis of Ex. 1. Under the second head, he claimed Rs. 3000 on the basis of Ex. 2. As regards the third head, there was admittedly no specific agreement between the parties and the Courts below have allowed some reasonable remuneration to the defendant. As regards the fourth head, he claimed Rs. 5000 on the basis of Ex. 2. The trial Court refused to act upon Exs. 1 and 2 on the ground that they were not binding on the plaintiff, as they had been entered into during his minority and it was of the opinion that in some respects the remuneration was excessive and that the mother was not shown to have had independent advice in agreeing to its terms. The learned District Judge was however of the opinion that there was no justification for declining to act upon Exs. 1 and 2. We think that the plaintiff after he attained majority or at any rate after 1917 must have been clearly aware of Ex. 2 and have acted on the basis thereof. We do not find sufficient reason for dissenting from this view of the learned District Judge. We therefore propose to deal with this part of the case on the footing that Ex. 2 is binding on the plaintiff. Even as regards Ex. 1, there is no sufficient reason for thinking that the remuneration provided is excessive.

There is however one insuperable difficulty in the defendant's way, so far as his claim under Ex. 1 is concerned. The services to which that part of the claim related had been completed as early as 1906 and in the ordinary course, a claim to recover remuneration therefor would have become barred at the end of three years therefrom. Ex. 1 however takes a period of two years from its date for payment and it may be possible to start limitation from the expiry of the two years, treating the case as one falling under Art. 115, Limitation Act, on the ground of a special agreement. Even so the claim would be obviously barred on the date of the institution of the suit not to speak of the date of the written statement. The lower Courts have however allowed this claim of the defendant, on the ground that the suit being one for account, the defendant was in equity entitled to credit for all the items due to himself, though a suit by him for the recovery of any such item might be barred. And this conclusion was based upon the observations of this Court in 39 Mad 365[2] at p. 375. It seems to us that the Courts below have proceeded upon a misconception of that case. There can be no doubt in this case that the agency in respect of which the plaintiff has instituted this suit is wholly different from the agency to which Ex. 1 relates. As pointed out by Mr. Rustomji in the notes to Art. 56, Limitation Act, the real question is not whether the work is continuous but whether the contract is continuous.

So far as the trial of the suit was concerned, the contract was in the first instance with the defendant's father and the stipulation for remuneration under Ex. 1 covers not merely the services of the defendant but also the services of his father. It is true that the proceedings in the High Court are in a sense the same matter as proceedings in the trial Court; but the contracts undoubtedly are different. It is conceivable that anybody might have been entrusted with the charge of the conduct of the appeal and it was a mere accident that the defendant himself was thought of for the purpose. Even apart from this consideration, the fact that two independent documents Exs. 1 and 2 came to be executed on the same day is significant; and the terms of Ex. 1 are only consistent with the hypothesis that it was regarded by the parties as an independent bargain in respect of which the relation between them after the date of Ex. 1 was only that of debtor and creditor. The sum of Rs. 1500 was as from that date regarded as a debt recoverable from the plaintiff's estate, though on account of absence of funds a period of two years was provided for payment. The observations in 39 Mad 365[2] at p. 375, must be understood in the light of the further observation at p. 376 that in that case the right to account as between the parties was one that was subsisting on the date of suit. Here, there was in 1925 no subsisting right to account as between the parties in respect of the agency that related to the conduct of the suit in the trial Court which ended in 1906. We must accordingly hold that the defendant is not in this suit entitled to claim credit for the sum of Rs. 1000 or Rs. 1500 allowed in his favour by the lower Courts on the basis of Ex. 1.

Exhibit 2 provides for remuneration both in respect of the conduct of the appeal in the High Court and in respect of the conduct of the execution proceedings. For the first it fixed Rs. 3000 as remuneration payable in the event of success, and Rs. 1000 as payable in the event of non-success. We have already stated that what happened in this case was that the plaintiff lost as against one of the executants of the bond and succeeded as against the other. There has been some argument whether this is to be regarded as success or non-success, within the meaning of the provision in Ex. 2. We prefer to proceed on the view taken by the District Judge that for all practical purposes, it must be taken that the plaintiff was successful in the High Court. On this footing, the defendant would have been entitled to claim Rs. 3000 as his remuneration, for this part of his work. But there are two difficulties in his way; one is the view that we have already expressed as to his misconduct; the other arises from the frame of the suit. As we have stated already, the plaint claims relief only in respect of the agency that is alleged to have commenced in 1911 while the services of the defendant in connexion with the appeal in the High Court came to an end with the decision of the High Court in July 1910. It is accordingly contended on behalf of the plaintiff that any claim for remuneration for work done in the High Court is outside the scope of this suit. And the same line of argument as to limitation has been urged as was done with reference to Ex. 1. We do not however think that this part of the claim stands on the same footing as Ex. 1. Though the plaint claims account only in respect of the period subsequent to 1911, the account certainly relates to the receipts and disbursements in connexion with the execution proceedings.

---

[2] Chidambaram Mudaliar v. Krishnasami Pillai, (1916) 3 A I R Mad 720=28 I C 221=39 Mad 365=28 M L J 285.

As to this part of the arrangement under Ex. 2, we have already expressed the view that Ex. A is not an independent contract by itself but is only in furtherance of Ex. 2. Ex. 2, though it provides for two pieces of work, namely the High Court appeal and the execution proceedings in the Courts below, must be taken to be a single contract; and in this view neither the plea of limitation available in respect of the claim under Ex. 1 nor the plea that the High Court appeal must be treated as an independent contract will be available to the plaintiff. But the plaintiff seems to us right in his contention that if the defendant's claim for remuneration in respect of the High Court appeal is to be entertained in this suit, the defendant must also be called upon to account for all receipts and disbursements that passed through his hands between the date of Ex. 2 and the date of Ex. A. If we were attempting to work out a complete account between the parties, we should have given the parties an opportunity to go into those accounts also. But, here again, for reasons which will presently appear, we do not think it necessary or worth while to prolong these proceedings by directing any such further account. As regards the remuneration for the conduct of the execution proceedings, it has been contended with some justification that the provision for Rs. 5000 is excessive, but as we have held that Ex. 2 is binding on the plaintiff, we do not base any conclusion upon this argument. It only remains to point out that the trial Court attempted to fix the defendant's remuneration on a *quantum meruit* basis, as it had held that the plaintiff was not bound by Exs. 1 and 2. The learned District Judge awarded to the defendant full remuneration as per terms of Exs. 1 and 2 as he had held that they were binding upon the plaintiff. In the view we have above indicated the claim based on Ex. 1 must be disallowed as being barred, but the defendant would be entitled to claim on the basis of Ex. 2 except for our view on the question of misconduct and his claim will also be subject to his accounting in respect of the moneys that came into his hands between 1906 and 1911.

We however find that the plaintiff did not file an appeal to the District Court against the Sub-Court's decree objecting to the amount awarded by the learned Subordinate Judge to the defendant under the head of remuneration. We do not wish to be understood as saying that his omission to appeal wholly ties our hands in a suit of this kind, but we may take it as some indication that he was prepared to acquiesce in the Subordinate Judge's decree and that he did not regard the remuneration awarded as excessive. We have also been informed that the plaintiff does not stand to gain very much even if we should give him a decree for a larger amount than was awarded by the Subordinate Judge because the defendant had become insolvent. In view of these considerations, we have thought it unnecessary either to direct a further enquiry in respect of the period between 1906 and 1911 or to deny all remuneration to the defendant. We set aside the lower Appellate Court's decision on the above points and restore that of the Subordinate Judge. It is unnecessary to deal with the remuneration claimed in respect of the conduct of the Privy Council appeal because both the Courts have agreed on that matter and there has been no argument before us in respect of that head.

As regards the claim for remuneration in respect of the management of the villages subsequent to 1918, we are unable to see any justification for the learned District Judge having enhanced the amount awarded by the trial Court. If anything, there was considerable justification for reducing the amount, and on at least two points, the learned District Judge is obviously in error, namely, (i) when he thought that by reason of the payment of damages, the defendant was placed in a position to claim his full remuneration, and (ii) when he thought that the defendant was entitled to claim 15 per cent. on the Rs. 17,000 and odd found by the commissioner, though according to the defendant only Rs. 13,000 had been collected. Here again, as the plaintiff had not taken exception to the sum of Rupees 2003-9-1, awarded by the trial Court under this head, we confirm the trial Court's decision on that point.

The next important item pressed in the appeal relates to the money due under the decree in O. S. No. 412 of 1916 on the file of the District Munsif's Court, Tanjore. Here again, it is impossible to approve of the way in which the question has been dealt with by the learned District Judge. Admittedly, that suit was instituted on a promissory note obtained in the plaintiff's name. The decree also stood in the plaintiff's name and the defendant asked that the decree should be transferred to him. We need not go the length of saying that the defendant had no right to use his principal's name for a benami transaction of his own. But the least that should be insisted on in a case of this kind is that it should be proved beyond all doubt that the money was the agent's money and not the principal's and that the transaction was truly a benami one. Where an agent mixes up his moneys and the moneys of his principal, the onus clearly lies on the agent to prove that any particular transaction which is claimed by him to belong to himself really represented his money: *see* 48 Mad 597.[3]

The learned District Judge reverses the rule and attempts to consider whether the plaintiff had shown that the promissory note to which O. S. No. 412 of 1936 related was taken for an advance of the plaintiff's moneys. Even apart from the special rule arising out of the defendant's agency, the onus must have been laid on the defendant who pleaded that it was a benami transaction. The defendant admits from the witness-box that he has no evidence to prove that the money lent under that promissory note was his. This was sufficient to support the decree of the learned Subordinate Judge and it passes our comprehension how the learned District Judge reached a different conclusion. We may also observe that independently of the attempted calculations as to the possible amount of interest that might have been received by the defendant out of the investments of the plaintiff's moneys prior to the date of this loan, the defendant on his own admission had about Rs. 24,000 of the plaintiff's money before this date out of which he has accounted only for about Rs. 12,000 or Rs. 13,000. We must express our dissent from the special pleading in the lower Appellate Court's judgment on this part of the case as to possible claims for interest which the defendant might have against the plaintiff even in respect of his remuneration. The learned District Judge ignored the distinction between the agent's claim for remuneration which, in the absence of a special contract, becomes payable only on the completion of his duty and the principal's moneys in the agent's hands which the agent has been specifically directed to invest. It does not appear to us necessary to say more against this part of the lower Appellate Court's judgment. This decision must be set aside and the direction of the trial Court restored.

The third main item for consideration relates to certain Government promissory notes which the defendant purchased for being deposited as security in connexion with the plaintiff's appeal to the Privy Council against so much of the High Court's decree as dismissed his suit against Sethuram. The evidence of the defendant on this part of the case is extremely unsatisfactory. The accounts of the Madras Vakil produced by the defendant (Ex. 13) do not make any reference to this purchase. The defendant's story that he paid money for this purpose into the vakil's hands cannot be accepted. In all probability the defendant must have been in Madras and made arrangements presumably with the vakil's help for the purchase of the Government promissory notes. At a late stage of the enquiry it was found that the papers purchased represented 3 per cent. issue of 1896-97. The learned District Judge has given credit to the defendant in this connexion for the face value of the notes and he finds fault with the plaintiff for not having made available evidence as to what the actual costs must have been. This is only another instance of misapplied onus. Whatever may be the difficulty in fixing the exact figure, we may fairly take judicial notice of the fact that it could not have been the face value of the paper. The defendant would have been entitled to credit only for the money actually spent in the purchase of the promissory notes. It appears from the accounts that the interest on these promissory notes had been collected only to a small extent, namely Rs. 175 in September 1913. The papers seem to have come back into the defendant's possession in 1916 and it is his case that he sold them in 1920. He adds that at the time of the sale there remained about three years' interest unrealized. We are not satisfied that this has been proved beyond doubt. If it was true, it necessarily implies that the defendant must have drawn other sums for interest between 1912 and 1917. Whether drawn or not, the plaintiff was in any event entitled to credit for all the interest realized on the promissory notes. We do not think it worthwhile criticizing at length the learned Judge's arguments for holding that the defendant is not accountable to the plaintiff for this item. He merely falls back on the arguments which we have already noticed, that this might well be set off against the defendant's claim for interest on his remuneration. Here again, we refrain from directing a further account because we do not propose to do anything more than restore the trial Court's decree.

---

[3] Tulasamma v. Venkatasubbiaha, (1925) 12 A I R Mad 1125=91 I C 120=48 Mad 597=49 M L J 220.

For the same reason we do not propose to deal at length with some of the minor items referred to in the Appellate Court's judgment and rejected by the Appellate Court merely on the ground that they had not been made the subject of a cross-appeal by the plaintiff to the lower Appellate Court. Seeing that the suit is one for accounts, the mere omission to file a cross-appeal would not be a fatal objection. We may also point out that in any event the plaintiff would have been entitled to maintain the decree of the trial Court by claiming credit for items not allowed by the lower Court at least as against the other items on which the Appellate Court was inclined to vary the directions of the lower Court. There is one observation of the learned District Judge which we do not wish to allow to pass unnoticed. The evidence establishes that in respect of certain proceedings in Courts conducted by the defendant on the plaintiff's behalf a sum of Rs. 750 was recovered from the other side as vakil's fee. It appears that only a smaller amount was in fact paid on the plaintiff's behalf to the vakils who conducted these proceedings. The learned Judge nevertheless thinks that the defendant was entitled to retain the balance for himself. He is neither the vakil nor the party. Whatever he got, he got for his principal and if part of it was not really disbursed, it must go to the credit of the principal and cannot on any pretext be retained by the agent.

We accordingly set aside the decree of the lower Appellate Court and restore the decree of the trial Court. The plaintiff will be entitled to his costs in all the Courts, to be paid from out of the defendant's estate in the hands of the Official Receiver. The direction in the lower Appellate Court's decree that the plaintiff should pay the court-fee payable to Government on the memorandum of appeal in that Court will be set aside and there will be a direction to the Official Receiver to pay the court-fee payable on that memorandum of appeal to the Government, from the estate in his hands. The memorandum of objections is dismissed with costs to be paid out of the estate.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 306

PANDRANG ROW J.

In re Kovvada Sanyasi Naidu and others Petitioners.

Criminal Revision Case No. 702 and Petition No. 668 of 1938, Decided on 26th January 1939, to revise order of Sub-Divisional Magistrate, Vizianagaram, D/- 1st June 1938.

Penal Code (1860), S. 430—Accused closing sluice after same had been opened by Amin of Estate for irrigating land not entitled to water from tank — In absence of proof that opening of sluice was according to custom its closure by accused with object of protecting their own land from suffering from want of water cannot be termed "mischief" — Dispute is of civil nature.

It is not every interference with the distribution of water but only that interference which cannot be justified by the assertion of a bona fide right that constitutes mischief. [P 307 C 2]

Where the middle sluice of a tank is opened by the Amin of the Estate not for the purpose of supplying water to the lands registered as wet under the tank but with the intention of supplying water to land which is not entitled to be irrigated from the tank, in the absence of proof that the opening of the sluice was according to custom, its closure by the accused with the object of protecting their own land from suffering from want of water cannot be said to be with the intention of causing wrongful loss or wrongful gain and therefore their act in closing the sluice cannot be termed as mischief as defined in the Penal Code. The dispute between the parties is of a civil nature and the remedy lies in the Civil Court. [P 307 C 2]

B. Jagannadha Das — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—The petitioners, twelve in number, were convicted of the offence of mischief punishable under S. 430, Penal Code, and sentenced each to pay a fine of Rs. 20 by the Stationary Sub-Magistrate of Vizianagaram. That judgment was confirmed on appeal by the Sub-divisional Magistrate of Vizianagaram. The act alleged against the petitioners is the closing of the middle sluice of the tank known as the Baddi Tank in Gumadam village on 17th September 1937 after the same had been opened by the Amin of the Vizianagaram estate for the purpose of irrigating the lands of one Sheik Hussain of Pedda Majjipalam, registered under that tank as wet lands. The actual closing of the sluice after it had been opened for the above purpose has been established beyond doubt and it is not seriously contended before me that the petitioners were not responsible for closing the sluice in question. The only point that has been urged before me is that the act does not constitute the offence of mischief as there was no criminal intention in the closure of the sluice and that the closure was in the exercise of a bona fide right for the purpose of protecting the petitioners' own fields from suffering for want of water, the opening of it being according to the petitioners, calculated to benefit certain banjar lands of one Achyutaramaraju which were not entitled to receive water from the tank. Sheik Hussain has no doubt, registered wet lands to which he is entitled to get water from the tank, but the contention of the petitioners has always been that the opening of the sluice on this particular occasion was really not to supply water to the registered wet lands of Sheik Hussain, P. W. 6, but really to supply water to the banjar lands of Achyutaramaraju which had recently been brought under cultivation from the tank to which they were not really entitled. This particular defence does not appear to have received the attention which it deserved at the hands of either of the Courts below.

It may be that the Amin of the estate is entitled on behalf of the estate to distribute water according to custom. Whether on this particular occasion the opening of the sluice was in accordance with the custom is a point which has not been decided by the Courts below. In particular the contention of the petitioners that the opening of the sluice by the Amin on this particular occasion was not in accordance with the custom has not been definitely negatived. There seems to be some substance in the contention on behalf of the petitioners that the irrigation of P. W. 6's wet lands was not being effected by the opening of the middle sluice but through the surplus weir and the objection that was taken to the opening of the sluice was that P. W. 6's wet lands should not get water from the middle sluice but that they should get water according to mamul only from the surplus weir; the contention was that the opening of the middle sluice was unnecessary for this purpose but was resorted to only with the object of providing water for the banjar lands which had been recently brought into cultivation and which were not entitled to get water.

This contention does not appear to be a mere pretence. It appears to be a bona fide contention on the part of the petitioners; and unless it can be said that the opening of the middle sluice was according to custom, it cannot be said that the closing of it was with the intention of causing any wrongful loss or wrongful gain. It is clear that the closure was animated by the object of protecting the lands of the petitioners themselves which had been jeopardized by the opening of the middle sluice. In these circumstances, it can hardly be said that the act of closing the middle sluice was "mischief" as defined in the Penal Code. As in many other cases the Courts below have failed to realize the importance of deciding whether any unlawful or dishonest intention has been established. It is not every interference with the distribution of water that constitutes mischief under the Penal Code. It is only interference which cannot be justified by the assertion of a bona fide right that would constitute mischief. Whereas in this case there was a bona fide contention on the part of the petitioners that the opening of the sluice was contrary to mamul and would lead to serious diminution of water supply to their own registered wet lands, it is impossible to say that the closure of the sluice was with the intention of causing any wrongful loss or wrongful gain. The closure was obviously brought about in the bona fide belief that otherwise their fields would suffer from want of water and that they would lose their crop. An act like this which is done as it were to protect their own property and in the reasonable belief that no unlawful harm or damage was going to be caused cannot be regarded as an act constituting a criminal offence. The dispute between the parties was really one of a civil nature which ought to have been taken to the Civil Court by the parties concerned.

The fact that the Amin interfered and exercised his own authority in the matter of the distribution of water which was reasonably regarded as an interference with existing rights will not change the aspect of the case into a criminal one. The Courts below ought to have paid regard to this aspect of the case and declined to take notice of what was really and essentially a civil dispute. The convictions of the petitioners and the sentences imposed upon them are accordingly set aside and they are acquitted. The fines if paid by them should be refunded.

C.R.K./G.N. *Application allowed.*

A. I. R. 1940 Madras 308

VARADACHARIAR AND
PANDRANG ROW JJ.

Pentapati Venkataramana and others — Appellants.

v.

Pentapati Varahalu and others — Respondents.

Appeal No. 44 of 1933, Decided on 22nd September 1938, against decree of Sub-Judge, Vizagapatam, in O. S. No. 3 of 1928.

(a) Partnership — Dissolution — Minor — Manager of joint Hindu family who was member of partnership on dissolution entering into arrangement prejudicial to his family — Minor is entitled to sue not merely manager but persons in possession of his share of assets.

Where the managing member of a joint Hindu family on a dissolution of partnership of which he is a partner enters into an arrangement prejudicial to the interests of his family, the junior coparceners in that family are not without a remedy and it is open to them to take steps to protect the interests of their family and for the realization of what represents the share of their managing member in the assets of the dissolved partnership. On the analogy of the right of beneficiaries in similar circumstances, they can maintain a suit not merely against their manager but also against persons who are in possession of their share of the assets : *(1887) 12 A C 167 ; (1874) 8 Ch A 597 ; (1887) 56 L T 471 ; A I R 1924 Mad 909 and A I R 1938 Mad 388, Rel. on ; A I R 1918 Mad 37 (F B), Disting.* [P 310 C 2]

(b) Parties—Transposition—Suit by minor for share of his family assets in partnership after dissolution against partners and his brothers one of whom was manager of family and partner in firm—Suit virtually conducted by defendant brothers on behalf of minor plaintiff—Defendant brothers held could be transposed as plaintiffs.

The suit by minor member of a joint Hindu family after dissolution of partnership against the partners and his brothers one of whom was manager of the family and partner in the firm, for the share of his family assets, was virtually conducted by the defendant brothers of the minor plaintiff :

Held that the defendant brothers of the minor plaintiff were entitled to be transposed as plaintiffs on the principle followed in English practice that the cestui que trust is permitted to insist upon his being allowed to use the name of the trustee when suing a debtor to the trust estate. [P 311 C 1]

(c) Income-tax Act (1922), Ss. 54 and 26-A —One of partners obtaining certified copy of order of assessment containing statements by other partner — Court is not precluded from admitting same in evidence when statements are otherwise relevant.

A Court is not precluded by S. 54 from admitting in evidence a certified copy of an order of assessment which has been given to one of the partners by the income-tax authorities and which contains certain statements by other partners when those statements are otherwise relevant under the provisions of the Evidence Act. The provisions of S. 26-A indicate that it was not the policy of the Legislature to preclude from the cognizance of the Court an information regarding the aforesaid statements contained in the order of assessment : *A I R 1938 Rang 276, Disting.; A I R 1925 Rang 84, Expl.; A I R 1932 Bom 291, Discussed but not foll.* [P 313 C 1]

(d) Evidence Act (1872), S. 76—S. 76 is only enabling Section — It is not exhaustive — Nor does it declare grant of copies illegal in any particular case.

Section 76 is only an enabling Section as regards the issue of certified copies. It cannot be read as an exhaustive provision, much less as a provision declaring the grant of copies illegal in any particular case. Therefore, the issue of a certified copy of an order of assessment to the assessee cannot be said to be illegal. [P 312 C 2; P 313 C 1]

(e) Income-tax Act (1922), S. 54 — Word 'disclosure' — Meaning of — Statement by one partner on behalf of partnership — Grant of copies of that statement to other partners is not illegal.

The use of the word 'disclosure' in cl. 2 of S. 54 implies that the disclosure must be to a stranger and not to the party who made the statement. Where one partner makes a statement on behalf of the partnership, it is not reasonable to hold that the grant of copies of that statement to other members of the partnership is illegal. [P 313 C 1]

(f) Practice—Relief.

Where the plaint asks for a much wider relief, it does not deprive plaintiffs of the right to the more limited relief, namely the amount admittedly due : *24 M L J 561, Rel. on.* [P 311 C 1]

B. Sitarama Rao, M. Appalachari and N. Vasudeva Rao — *for Appellants.*

G. Lakshmanna, G. Chandrasekhara Sastry, K. Kameswara Rao, C. Krishnachandra Mouleswar, V. R. Venugopalan and R. Rangachari — *for Respondents.*

Varadachariar J. — This appeal arises out of a suit for the taking of the accounts of certain dissolved partnerships. The parties belong to the Vysia community and are members of one family though belonging to different branches which had become divided many years ago. Defendants 1, 2 and 3 are the oldest members in the group and they are the sons of one Chinna Venkanna. Defendants 4 to 23 are the descendants of defendants 1 to 3. Chinna Venkanna had a second cousin Venkanna who had two sons Appayya and Venkanna. The plaintiff and defendants 24 and 25 are the sons of Appayya. Defendant 28 is a grandson of Venkanna, the brother of Appayya. Defendants 26, 27 and 29 are respectively the sons of defendants 24, 25 and

28. These families had admittedly been carrying on trade in Vizianagaram; for the purposes of the present suit, it is necessary to deal with three businesses which are referred to in the record as Kottu No. 1, Kottu No. 2 and Kottu No. 3. Kottu Nos. 1 and 3 seem to have been carried on in the market and Kottu No. 2 in the house. Kottu Nos. 2 and 3 were carried on in the name of defendant 1 while Kottu No. 1 was carried on in the name of defendant 2. It is admitted that in Kottu No. 1 defendants 1, 2 and 3 had an 8 annas share as representing their family, defendants 24 and 25 had a 4-annas share as representing their joint family including the plaintiff, and defendant 28 had the remaining 4-annas share. It is also admitted that in Kottu No. 2, the family of defendants 1 to 3 had a 12-annas share, the family of defendants 24 and 25 had a 3-annas share and defendant 28 had a 1-anna share. As regards Kottu No. 3, plaintiff and defendants 24 and 25 contend that their branch was entitled to a 3-annas share in this also as in Kottu No. 2; but defendants 1 to 23 maintain that this kottu was their exclusive concern and that the branch of plaintiff and defendants 24 and 25 or the branch of defendant 28 had no interest in it.

It is common ground that in the course of 1926, the parties deemed it best to dissolve the partnership in respect of Kottu No. 2 and that they agreed to its dissolution as from 28th June 1926 (see Ex. 10); but as the books of the business were at that time in the possession of the income-tax authorities, the settlement of accounts was postponed. It is also not disputed that on 2nd July 1927 the document (Ex. 4) was executed by defendants 1 to 3, 24, 25 and 28 purporting to be a settlement of accounts relating to Kottu No. 2. Kottu No. 1 was agreed to be dissolved as from 20th June 1927 and on 2nd July 1927 the arrangement evidenced by Ex. 5 was entered into in respect of this kottu. Lastly, it is admitted that there was no settlement of accounts in respect of Kottu No. 3 nor any attempt made to settle its accounts whatever the reason might be. The evidence makes it clear that though defendants 24, 25 and 28 signed Exs. 4 and 5, they did not receive the moneys payable to them in pursuance thereof and that they were not prepared to abide by them; but, instead of directly impeaching them, they put forward the plaintiff, who was a minor at the time, to send the notice (Ex. 39) dated 17th August 1927, which does not in terms refer to the settlements under Exs. 4 and 5 and attack them but merely suggests that defendants 1 to 3 had been putting off coming to a settlement and concocting false accounts in the meanwhile. Ex. 39 attempted to make out that not merely Kottu Nos. 1 to 3 but certain other businesses also including in particular a concern referred to as Ramalingeswaraswami Oil Press were the joint family concerns of the parties. This was replied to by Ex. 85 which denied the existence of any joint family business as alleged in Ex. 39 and admitting the existence of a partnership, so far as defendants 24, 25 and 28 were concerned, in Kottu Nos. 1 and 2, pleaded that the accounts of these concerns had been settled and that the amount payable to these three defendants as per those settlements had been deposited with one Dhara Veerabhadraswami (D. W. 8 in the case). About this item, attempts were made to ascertain whether defendants 24, 25 and 28 were prepared to draw the money which was said to have been deposited with D. W. 8, and as they were not willing to do so, D. W. 8 purported to report that fact to defendant 1 and to return the amount to him. The present suit was instituted on 7th January 1928 by the plaintiff who is the younger brother of defendants 24 and 25 and who happened to be a minor even on the date of the suit.

The plaint alleged that the businesses above referred to as Kottu Nos. 1, 2 and 3 were family businesses, that in Kottu No. 1 the plaintiff's branch was entitled to a four annas share and that in Kottu Nos. 2 and 3 that branch was entitled to a three annas share and that defendant 1 as the eldest member of the family had been managing the three kottus and was in possession of all the accounts, cash balances and other assets relating to them. As regards the Ramalingeswaraswami Oil Press, the plaint mentioned that it was worked with capital borrowed from the assets of Kottus Nos. 1 and 2; the plaint accordingly claimed that in respect of Kottus Nos. 1 to 3, the plaintiff's branch was entitled to its share of the assets on the taking of accounts and that in respect of the oil press, it was entitled to a corresponding share in the interest payable on the capital borrowed therefor from Kottus Nos. 1 and 2. In paras. 5 to 8 of the plaint, reference was made to the settlement of accounts evidenced by Exs. 4 and 5 and various allegations were made against them. In para. 9

it was stated that defendants 1 to 3 had not paid even the amount admitted by them to be due to the plaintiff's branch. In the result the plaint prayed for the taking of the accounts of the three kottus and payment to the plaintiff's branch of a large sum of money which it was suggested would be due to that branch as representing its share. A decree was asked for in favour of the plaintiff or in favour of the plaintiff and defendants 24 to 27. Defendants 24 to 27 supported the plaintiff and it is stated by the learned Subordinate Judge that the suit was in fact conducted before him by defendants 24 and 28 on behalf of the plaintiff. Defendants 28 and 29 supported the plaintiff except for one point of difference, namely that in the 28th defendant's written statement Kottu No. 3 was stated to be an exclusive concern of defendants 1 to 23 and only interest was claimed in respect of advances taken for its working from Kottus Nos. 1 and 2. The contesting defendants were defendants 1 to 23. They objected to the maintainability of the suit as brought. They contended that the settlements evidenced by Ex. 4 and 5 were in the nature of awards and were binding till set aside. They also contended that the settlements were fair and reasonable and binding upon the plaintiff. On these contentions various issues were raised of which it is sufficient to refer at this stage to issues 3, 4, 5, 9 and 11. The issues relating to the existence of a joint family business and those arising out of the contention that there was an award rest upon a misapprehension and need not be noticed. There was nothing like a formal reference and an award and there was no question of a joint family business as between all the parties but only of business carried on in partnership by certain persons who were members of certain joint families.

The learned Subordinate Judge dismissed the suit both on the ground that as framed the suit was not maintainable and also on the ground that the plaintiff was bound by the settlements evidenced by Exs. 4 and 5. He also found against the plea that these settlements were brought about by fraud, coercion and undue influence. As regards Kottu No. 3, he held that defendants 24, 25 and 28 had no interest in it. He also recorded a finding of estoppel which has not been seriously supported before us. Against this decree of dismissal, the plaintiff and defendants 24 to 27 have preferred this appeal. Dealing first with the question of the maintainability of the suit, we may observe that we are unable to concur in the view of the lower Court that the suit as framed is not maintainable. It has not been disputed that the plaintiff is a member of a joint Hindu family with defendants 24 and 25 and that as between them the interest of defendants 24 and 25 in the partnerships now in question was held as joint family property. It is true that according to the decision of the Full Bench in 41 Mad 454[1] a person in the position of the plaintiff cannot maintain a suit for the dissolution of a partnership in which the managing member of his family was a partner; but that judgment does not deal with the rights of such a person and the remedies open to him after a dissolution of the partnership has taken place. This aspect of the matter has been dealt with in 47 M L J 554[2] and (1938) 1 M L J 106.[3] Both these decisions recognize that where on a dissolution the managing member partner has entered into an arrangement prejudicial to the interests of his family, the junior coparceners in that family are not without a remedy and that it is open to them to take steps to protect the interests of their family and for the realization of what represents the share of their managing member in the assets of the dissolved partnership. When the managing member has placed himself in an embarrassing position in respect of the assertion or protection of the rights of his family, the junior members are not without a remedy. On the analogy of the right of beneficiaries in similar circumstances, they can maintain a suit not merely against their manager but also against persons who are in possession of their share of the assets, (1887) 12 A C 167[4] and (1887) 56 L T 471[5] at p. 474; *see also* (1874) 8 Ch A 597.[6] The allegations in the plaint undoubtedly question the binding character of the settlements entered into by defendants 24 and 25 under Exs. 4 and 5. The plaint also complains that defendants 24 and 25 were not entitled to ignore the share of the family in Kottu No. 3. The

---

1. Gangayya v. Venkataramiah, (1918) 5 A I R Mad 37=43 I C 9 = 41 Mad 454 = 34 M L J 271 (F B).
2. Soopi v. Abdulla, (1924) 11 A I R Mad 909 = 82 I C 198=47 M L J 554.
3. Sambasiva Iyer v. Natesa Iyer, (1938) 25 A I R Mad 388=176 I C 821=(1938) 1 M L J 106.
4. Beningfield v. Baxter, (1887) 12 A C 167 = 56 L J P C 13=56 L T 127.
5. Meldrum v. Scorer, (1887) 56 L T 471.
6. Sharpe v. San Paule Railway Co., (1874) 8 Ch A 597=29 L T 9.

suit certainly therefore falls within the class of cases where the plaintiff as a beneficiary will be entitled to maintain the suit not merely against defendants 24 and 25 but also against persons in possession of the assets in which the plaintiff's family is entitled to a share.

We may in this connexion mention that a petition has been filed in this Court praying that defendants 24 to 27 may be transposed as plaintiffs. A similar request seems to have been orally made in the Court below. As we have already mentioned, the Subordinate Judge states in terms that the suit was conducted on behalf of the plaintiff by defendant 24 and he makes defendants 24 to 29 liable for costs on the very ground that they were substantially the plaintiffs in the case. The plaint asks for a decree jointly in favour of the plaintiff and defendants 24 to 27. In the English practice, the cestui que trust is permitted to insist upon his being allowed to use the name of the trustee when suing a debtor to the trust estate, in circumstances like the present. When defendants 24 to 27 are themselves willing to be transposed as plaintiffs, it will merely be carrying out the principle above recognized to allow them to continue the suit. We accordingly order the transposition prayed for. Another petition filed in this Court may also be conveniently dealt with here. As we have said already, para. 9 of the plaint refers to the fact that even the amounts admittedly due as per Exs. 4 and 5 have not been paid and this is not disputed. In dealing with the general issue—issue 16—the learned Judge observed that as defendant 24 was not a plaintiff, no decree could be given in his favour even for the admitted amount; and, as regards the plaintiff, he stated that no decree could be given to him because he was not a partner. We do not think that this is a satisfactory way of dealing with the matter. We have already observed that though the plaintiff was not a partner, he was entitled to maintain the suit. It is true that in the plaint he asked for a much wider relief and also attacked Exs. 4 and 5; but that will not deprive him of the right to the more limited relief, namely the amount admittedly due under Exs. 4 and 5: 24 M L J 561.[7] As a precaution, the appellants have filed an application here for amendment of the plaint by inserting a specific prayer to the effect that a decree may be passed in favour of the plaintiff and defendants 24 to 27 for the amount due at least as per the settlements Exs. 4 and 5. As we are of opinion that this relief could be granted even without the amendment, we see no harm in allowing the amendment to be made.

Proceeding now to the merits, we may first dispose of the case as regards Kottu No. 3. If it was the exclusive concern of defendants 1 to 3 as found by the learned Subordinate Judge, no further question will arise in respect of it in this suit. But if as the plaintiff maintains, it stood on the same footing as Kottu No. 2, the plaintiff for himself and as representing the other members of his branch would be entitled to a three-sixteenths share in the assets of that concern on the taking of accounts; because, it is the common case, as we have already pointed out, that the accounts of this kottu were not taken into consideration at all at the time of Exs. 4 and 5. It is proved by the admission of D. W. 18 and by the entries found in several pages in Ex. A series, the account books of Kottu No. 3, that during a period of more than a year defendant 24 had off and on written several pages in these accounts. The explanation given by D. W. 18 in respect of this circumstance is obviously absurd, namely that defendant 24 was there to train one of the witnesses' sons in the business because the witness's son referred to has long ago had his training in business.

The evidence of D. Ws. 2 and 3, whose reliability we see no reason to doubt, proves that for quite a long time defendant 24 had been working in Kottu No. 3 and the evidence of D. W. 2 is supported by the entries in the account book (Ex. 1) produced by him showing that moneys payable by the witness in respect of transactions between him and Kottu No. 3 has on many occasions been paid to defendant 24. No reason has been suggested why if defendant 24 had no interest in this concern, he should have been taking so much active part in its conduct. But all doubt on the matter is set at rest by the admission made in Ex. 69 by defendant 1 in whose name this business stood. It is a statement on oath made by him before the Income-tax Officer in October 1926. It deals with the various concerns in which the parties were interested and the accuracy of the statements there made in respect of Kottu No. 1 and Kottu No. 2, has not been disputed. Dealing with Kottu No. 3 he said that it was a branch of the house (inti) shop, i. e., No. 2. He added

---

[7] Bramanna Sastrulu v. Venkatasubba Rao, (1913) 24 M L J 561=19 I C 848.

"the shares of the partners are the same as those of the main shop, i. e. the house shop (Kottu No. 2)." In a previous paragraph he had stated who the partners in Kottu No. 2 were and what their respective shares were. If this statement is admissible in evidence, there can be no doubt that it clearly proves the truth of the plaintiff's case.

It was contended on behalf of the contesting defendants that the statement Ex. 69 was not admissible in evidence, and this contention was accepted by the lower Court. We are unable to accede to this contention. The objection is based on S. 54, Income-tax Act of 1922. There can be no doubt that this provision is stricter and wider in scope than the corresponding provision in the Act of 1886 and decisions like those in 26 Cal 281[8] and 32 Mad 62[9] may not be good under this Section. But the question for decision in the present case is not whether the Court can compel any public servant to produce before it any document of the kind mentioned in S. 54, but whether the Court is precluded from admitting in evidence a certified copy which has been given to one of the partners by the income-tax authorities, even when such a statement is otherwise relevant under the provisions of the Evidence Act. Cl. (1) of S. 54 first declares that all particulars contained in certain documents 'shall be treated as confidential' and it then proceeds to direct that no Court shall insist on their production by a public officer. Cl. (2) enacts a penalty in respect of the disclosure of such particulars by any public servant. It has been maintained before us that the declaration in the earlier part of cl. (1) has a wider effect than the direction in the latter part of the clause and prevents the admissibility of the copy in evidence even though it is available before the Court without any summons to a public officer. Reliance has been placed in this connexion upon two decisions of the Rangoon High Court reported in 2 Rang 391[10] and 1938 R L R 243.[11] The actual decision in the latter case has little bearing on the question now before us, because the aid of the Court was there sought to obtain the information; only, instead of asking the Court to send a summons to the income-tax authorities the defendant attempted to circumvent the prohibition in S. 54 by requesting the Court to compel the plaintiff to obtain and produce certified copies of the return made by the plaintiff and of a statement made by the plaintiff's agent before the Income-tax Officer.

In 2 Rang 391,[10] a certified copy of an income-tax return made by the plaintiff had been obtained by the defendant and was produced by him, the learned Judge held it was to be inadmissible, on the ground that the Evidence Act did not make admissible copies which have been unlawfully issued and certified. We do not wish to be understood as accepting the reasoning in this judgment; it is unnecessary for the purpose of this case to express a definite opinion on the point then before the learned Judge. That case had to be dealt with under clause (f) of S. 65, Evidence Act, which is restricted to cases in which the original is a document of which certified copy is permitted by that Act or by any other law to be given in evidence; because the copy there produced was of an income-tax return which cannot itself be said to be a "public" document : *see* 34 Bom L R 236.[12] In the case before us, the original was itself a "public document" because it was a statement recorded by the Income-tax Officer; we have only got to see whether what is produced before us is secondary evidence. A certified copy is certainly secondary evidence of a "public" document. S. 76, Evidence Act, to which reference has been made in 2 Rang 391[10] and in 34 Bom L R 236[12] is, in our opinion, only an enabling Section as regards the issue of certified copies. We are not, as at present advised, prepared to read it as an exhaustive provision, much less as a provision declaring the grant of copies illegal in any particular case.

In 34 Bom L R 236[12] the learned Judges were apparently inclined to think that S. 54, Income-tax Act did not preclude 'proper' secondary evidence being given of the contents of documents of the kind referred to in that Section but they held that the 'certified' copies were not admissible. Assuming that this view could be maintained as regards copies of the return, we are with all respect, unable to agree that a cetified copy even of the order of assessment, granted to the assessee, will be inadmissible. In holding that even the assessee is not entitled to obtain a certified copy of the assessment, the learned Judges seem to have lost sight of the fact that in the rules made under the Income-tax Act, there is an express provision for a copy of the order being granted to the assessee. (*See* R. 99). There is however, no express provision either enabling or prohibiting the grant of copies of sworn statements even to the assessee.

---

[8] Jadobram Dey v. Bulloram Dey, (1899) 26 Cal 281.

[9] Venkatachala Chettiar v. Sampathu Chettiar, (1909) 32 Mad 62=1 I C 705=19 M L J 263.

[10] Anwar Ali v. Tafozal Ahmed, (1925) 12 A I R Rang 84=84 I C 487=2 Rang 391.

[11] Ma Hla Mra Khine v. Ma Hla Kra Pru, (1938) 25 A I R Rang 276=177 I C 379=1938 R L R 243.

[12] Devidutt v. Shriram, (1932) 19 A I R Bom 291 =137 I C 381=56 Bom 324=34 Bom L R 236.

In the present case, Ex. 69 appears to have been obtained by one of the assessees because assessment was imposed upon all the members of the firm, though the statement was made by only one of them, namely defendant 1. Even assuming that the strict view taken in 2 Rang 391[10] is correct, it is difficult to see anything illegal in the grant of copies of such documents to the assessee himself. The use of the word "disclosure" in cl. (2) of S. 54, Income-tax Act implies that the disclosure must be to a stranger and not to the party who made the statement. Where one partner makes a statement on behalf of the partnership, we do not think it reasonable to hold that the grant of copies of that statement to other members of the partnership is illegal. It is not clear whether the declaration of the confidential character of such statements under S. 54 was intended to have a wider scope than the enactment in the latter part of the provision. But even so, it will be meaningless to talk of a statement as confidential in respect of the very person who made the statement. If one is to have regard to the general policy of the Legislature in matters of this kind, we may point out that in the penultimate proviso to S. 54, Income-tax Act an exemption has been made in respect of documents etc., relating to a procedure under S. 26-A of the Act. That Section relates to proceedings taken for the registration of partnerships for the purpose of the Act and the proviso to S. 54 distinctly contemplates that an Income-tax Officer may even be compelled to produce documents which will show the precise relationship between partners. Though Ex. 69 was not made in proceedings under S. 26-A of the Act, the above provision is some indication that it was not the policy of the Legislature to preclude from the cognisance of the Court information of the kind now sought to be obtained from Ex. 69. We accordingly hold that Ex. 69 is admissible in evidence and that it establishes the truth of the plaintiff's claim that the plaintiff's branch was entitled to a three-sixteenths share in Kottu No. 3.

By way of leading to a contrary inference, reliance was placed by the learned counsel for the respondents upon the conduct of defendant 24 at the time when the accounts relating to Kottu No. 2 were settled. * * * * As regards Kottu No. 2, the story put forward by defendant 24 is unfortunately far from truth. * * * We accordingly hold that there is no reason to disturb the settlement under Ex. 4 so far as Kottu No. 2 was concerned.

Before proceeding to deal with Kottu No. 1, we may dispose of one other claim made on behalf of the appellants. The accounts show that large sums have been advanced from the admitted partnership concern to the Ramalingeswaraswami Oil Press. On the basis of these entries, it was contended for the appellants that in taking the accounts of the partnership, the contesting defendants as owners of the oil press should be debited with a reasonable rate of interest. The case was put as one in which a partner had made profits by the use of partnership money and reliance was placed in this connexion on (1878) 8 Ch D 345[13] and 15 C L J 204.[14] We do not think that this is really a case of a partner making profits by the use of partnership money. The account books treat the transaction only as one of loan by the partnership to the press and the plaint itself proceeds on the footing that this was a case of money lent. Under the law as it stood at the time that these transactions were entered into, there was nothing to prevent a partner carrying on another business with the knowledge or consent of his co-partners : (*see* S. 259, Contract Act) ; and if with such knowledge the partners agree to one partner drawing moneys from the partnership for the benefit of such separate business and the moneys so drawn are shown in the partnership books as moneys lent to that business, there is no justification for claiming the profits of that business for the benefit of the partnership. On the basis of the relationship being one of creditor and debtor, the claim for interest can be substantiated only if it could be based either on contract or on the course of business. In the present case, the account books do not show that interest was at any time charged or paid; and as for agreement, defendant 24 candidly admitted that there was no arrangement that interest should be charged or paid. This claim must therefore fail.

---

[13] Dean v. Macdowell, (1878) 8 Ch D 345 = 47 L J Ch 537=38 L T 862=26 W R 486.

[14] Gokul v. Sasimukki, (1912) 15 C L J 204=13 I C 23 = 16 C W N 299.

It remains to deal with the plaintiff's claim in respect of Kottu No. 1. The settlement relating to it is evidenced by Ex. 5. As we have negatived the suggestion of collusion, undue influence, etc. in connexion with these settlements, the binding character of the settlement as against the plaintiff has to be determined in the light of a few undisputed facts. The accounts relating to this kottu are not before the Court. But D. W. 18 has produced Ex. 21 as being a copy made from a statement prepared by defendant 24 from the accounts then available of Kottu No. 1 preparatory to the settlement under Ex. 5. The answers of defendant 24 as regards Ex. 21 are very evasive, and we think that there is no reason to reject the story of defendant 1 in respect of Ex. 21. According to this document, Kottu No. 1 had the following assets at the time of the settlement, about Rs. 55,000 of outstandings which were considered good, about Rs. 10,000 of outstandings which were considered bad and stock on hand valued at Rs. 13,000. As against this, a sum of about Rs. 17,000 odd is shown as liabilities. We may roughly take it that excluding the bad debts, the net assets of the concern at the time it was closed were about Rs. 51,000. Ex. 5 refers to some mill shares, bull, cart, etc. connected with the shop. Ex. 21 does not refer to them and the evidence does not enable us to say what the value of these items was. The arrangement under Ex. 5 was that defendants 2 and 3 should take over the half share of the branches of defendants 24 and 28 in this kottu for a sum of Rs. 18,000.

The point for consideration is, whether this is a prudent and beneficial arrangement binding upon the plaintiff or an arrangement which sacrifices the interests of the joint family. It is important, in this connexion, to bear in mind that in respect of what we have taken as the net assets, there is no suggestion that any part of them could not be, or has not been, realised. As we have already stated, items amounting to Rs. 10,000 enumerated in detail in Ex. 21 have been excluded as bad debts. Defendant 3 who has given evidence as D. W. 19 has referred in general terms to the difficulty in collecting these assets but he has not stated that he was unable to collect any of them. It is true that some time after he had taken over Kottu No. 3 under this arrangement, there was a fire in the kottu and considerable loss was caused to him thereby, but that cannot affect the question of the value of the assets at the date of the settlement. It appears from Ex. 88-a, the partition list entered into between defendants 1 to 3 almost contemporaneously with the settlement, that for the purpose of that division, Kottu No. 1 was taken at the valuation of Rs. 50,000. We must, in these circumstances, hold that there was no justification for defendant 24 agreeing to accept a sum of Rs. 9000 as representing the fourth share of his branch any assets which were clearly worth more than Rs. 50,000. The principle applicable to this class of cases is stated in 48 M L J 155[15] and 51 Mad 484.[16] This is not a case in which it can be stated that the settlement is binding on defendants 23 and 25 but not binding on the plaintiff. It must be held to be not binding on the plaintiff and on defendants 24 to 27. But there is no reason in the circumstances to direct any fresh taking of accounts in respect of Kottu No. 1; because there is nothing to suggest that Ex. 21 does not correctly represent the state of the assets and liabilities of that concern. In view of the admitted fact of the fire in the kottu it is not easy to say which party is speaking the truth as to the existence or destruction of the material account books. It seems to us sufficient to direct that in addition to the amount provided for in Ex. 5, defendants 1 to 3 should make good to the plaintiff's branch the sum of Rs. 3500 which that branch would have obtained if the net assets as per Ex. 21 had been properly divided.

The learned Subordinate Judge has declined to give to plaintiff and defendants 24 to 27 a decree even for the amounts due as per the terms of Exs. 4 and 5. We have already indicated that he was not justified in so doing. The result is that the plaintiff for himself and for defendants 24 to 27, who have now been transposed as co-plaintiffs, will be entitled to recover the amounts due to their branch as per the terms of Exs. 4 and 5 and the additional amount of Rs. 3500 we have referred to above. They will also be entitled to whatever may be found to be payable in respect of the three-sixteenths share of this branch on the taking of accounts relating to Kottu No. 3. So far as the amounts payable under Exs. 4 and 5 are concerned, the amounts were tendered but not accepted by defendant 24. There is accordingly no justification for allowing any interest in respect of those amounts; but in respect of the additional amount of Rs. 3500 allowed by us, the plaintiff will be entitled to interest at 6 per cent. from date of plaint till date of payment. The amounts due under Exs. 4 and 5 will carry interest at 6 per cent. from the date of the lower Court's decree.

---

[15] Gopalaswami Iyer v. Kalyana Rangappa, (1925) 12 A I R Mad 348=85 I C 433=48 M L J 155.

[16] Dasaratharama Reddi v. Narasa Reddi, (1928) 15 A I R Mad 601 = 109 I C 329 = 55 M L J 109=51 Mad 484.

* * * *

The plaintiff has succeeded in part and failed as to the remainder; neither party has spoken the whole truth. In the circumstances of the case, we direct the parties to bear their respective costs both here and in the Court below.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 315

PANDRANG ROW J.

on difference between

VARADACHARIAR AND HORWILL JJ.

Sadachi Ammal — Appellant.

v.

Rajathi Ammal and others — Respondents.

Appeals Nos. 115 and 201 of 1933, Decided on 4th May 1938, from decree of Sub-Judge, Madura, in O. S. No. 23 of 1931.

(a) Will—Proof of—Execution of will under suspicious circumstances — Propounders must prove not merely that testator signed will but also that he knew and approved of contents of will—Existence of very material differences between two wills executed within short interval is suspicious circumstance—Burden lying on party substantially benefited by change is proportionately heavier and he must make frank and full disclosure of all material circumstances.

It is well established that whenever a will is prepared and executed under circumstances which raise the suspicion of the Court, it lies on the propounders not merely to prove the execution of the will, in the sense that it was signed by the testator, but also to adduce evidence which removes such suspicion and to satisfy the Court that the testator knew and approved of the contents of the will. The existence of very material differences between two wills said to have been executed within a short interval is undoubtedly a circumstance calling for explanation, and which may legitimately be taken into account by the Court in determining whether the later will represents the conscious and voluntary act of the testator. And if the circumstances attending the execution of the second will suggest that the party substantially benefited by the change must have had some share in bringing it about, the burden lying on him is proportionately heavier and the least that the Court is entitled to expect from him, if he desires to sustain the will, is that there should be a frank and full disclosure of all material circumstances: *A I R 1930 P C 24, Rel. on.* [P 316 C 2; P 317 C 1]

(b) Will — Proof of — Registration during testator's lifetime — Testamentary capacity — Facts of execution and testamentary capacity are distinct — Significance of registration and effect of sub-registrar's evidence must be appraised with due regard to physical and mental condition of testator at time of execution—Mere fact that testater could say that it was his will or could answer simple questions is not enough to show that he had sound disposing mind.

Though the importance of the registration of a will during the lifetime of the testator cannot be under-estimated, still in assessing the significance of that fact, there is a well-marked distinction between cases in which the subsequent dispute relates to the fact of execution and cases in which the question relates to the "testamentary capacity" of the executant. [P 318 C 2]

The scope of the enquiry by the officer who registers a will during the testator's lifetime does not always comprise all the ingredients which the Court considers material when called upon to determine a question of testamentary capacity : *A I R 1930 P C 24; A I R 1925 Cal 739 and A I R 1932 Cal 574, Rel. on.* [P 318 C 2]

An enquiry as to the "capacity" of the executant is provided for only if the executant appears to the registering officer to be a minor, an idiot or a lunatic. But the mere fact that the testator could say that it was his will or could answer some simple questions put to him does not show that he had a sound disposing mind at the time : *A I R 1925 Cal 739 and (1858) 1 F & F 578, Rel. on.* [P 319 C 2]

Though registration is a solemn act so far as it goes, its significance and effect of the evidence of the sub-registrar have to be appraised with due regard to the physical and mental condition of the testator at the time. It cannot therefore be said that the registration endorsements 'completely' prove that the document was read over to the executant and understood by him: *A I R 1926 Nag 482, Not approved.* [P 318 C 2; P 319 C 1]

(c) Will—Proof of—Registration is not proof of testamentary capacity.

Where from the evidence of the Sub-Registrar himself, it was clear that at the time of the registration the testator was so weak as to require assistance in order to sit on his cot and also in lying down after the signatures were affixed in token of registration and that the testator died within about 40 hours after the registration having suffered from a serious illess for at least two months: *Held* that under the circumstances, it was impossible to regard the registration as being equivalent to proof of capacity for making a will. [P 328 C 1, 2]

(d) Will—Proof of—Suspicion—Fact that only one out of six attestors was examined and writer of will was not called intensifies suspicion.

Where a will was executed under suspicious circumstances, failure to examine five out of six attesting witnesses and the writer of the will makes the suspicion surrounding the will much stronger than it otherwise would be. [P 328 C 2; P 329 C 1]

K. Rajah Iyer, V. Ramaswami Iyer and K. V. Sesha Iyengar — *for Appellant.*

T. R. Venkatarama Sastri and N. Rajagopala Iyengar — *for Respondents.*

ORDER OF REFERENCE

Varadachariar J. — These appeals arise out of the same suit and raise the same question for decision. The appellants are some of the legatees under a will (marked Ex. I) said to have been executed by one Sanjeevi Sundaram Pillai on 2nd September 1930; and the point for decision is whether the said will was executed by the deceased in a sound disposing state of mind (issue 1). Ex. I was registered at the residence of the deceased at 10 A. M. on 3rd September 1930 and the testator died after midnight of 4th September, i. e., early (2 A. M.) on 5th morning. The suit was instituted by the widow on 23rd February 1931, for a declaration that Ex. 1 was invalid and void and did not affect her rights under the Hindu law and under a prior will (Ex. B), dated 7th August 1930. As there were disputes about possession, the plaint also prayed for reliefs by way of injunction and delivery of possession (if necessary). The defendants may be divided into four groups. Defendant 1 who receives the largest benefit under Ex. I, valued at Rs. 12,100 was the divided brother of the deceased. Defendant 2 who is given about Rs. 4000 worth of property was his sister and the wife of defendant 3. Defendants 4 to 9 are bandhus of the deceased, to whom property worth Rs. 3000 in all, is bequeathed in three shares. Defendants 3 and 10 are not beneficiaries but have been impleaded as having taken a prominent part in bringing about the will. Defendant 4 asserted an independent title to the estate; he was therefore exonerated from this suit and may accordingly be left out of account. Defendants 3 and 10 denied that they took any improper part in connexion with the will. They contended that they had been unnecessarily impleaded in the suit. As defendant 10 was one of the attestors to the will, he added that the will was freely and openly executed by the deceased when in a sound state of mind and with full knowledge of its contents. The legatee defendants (other than the fourth) supported the will.

The learned Subordinate Judge came to the conclusion, that though Ex. I had been signed by the deceased, the defendants had not proved that it was voluntarily executed by him in a sound disposing state of mind and that they had not cleared up the suspicious circumstances surrounding the execution of the second will so soon after the first will and altering its provisions in a material manner. He accordingly passed a decree substantially in terms of the prayer in the plaint. Defendant 1 has not chosen to appeal against the decree and has been impleaded as a respondent. Defendant 2 has filed A. S. No. 115 and defendants 5 to 9 have preferred A. S. No. 201. It is well established that whenever a will is prepared and executed under circumstances which raise the suspicion of the Court, it lies on the propounders not merely to prove the execution of the will, in the sense that it was signed by the testator, but also to adduce evidence which removes such suspicion and to satisfy the Court that the testator knew and approved of the contents of the will: *see* (1894) L R P 151,[1] 8 Pat 382[2] and 8 Rang 179.[3] In applying this rule, the question has sometimes been raised, what is the kind of suspicion contemplated by this rule? It is sufficient, for the purposes of this case, to refer to the facts of the cases last cited, as indicating some of the grounds of suspicion, because similar grounds also exist here. It seems to me that the existence of very material differences between two wills said to have been executed within a short interval is undoubtedly a circumstance calling for explanation. I do not deny that it is open to a testator to vary his dispositions as he pleases and if the Court is satisfied that the later document represents his voluntary act, it is not for the Court to substitute its view of reasonableness in place of the testator's view. It may also be conceded that it may not always be possible for a third party to offer an adequate explanation for the reasons or motives which led a testator to change his mind. Making allowance for these considerations, it nevertheless seems to me that the difference between two alleged wills, especially if they have been executed at a short interval is a matter which the Court may legitimately take into account in determining whether the later will represents the conscious and voluntary act of the testator. And if the circumstances attending the execution of the second will

---

1. **Tyrrell v. Painton, (1894) L R P 151 = 6 R 540=70 L T 453=42 W R 343.**
2. **Sarat Kumari Devi v. Sakhichand, (1929) 16 A I R P C 45=113 I C 471=56 I A 62=8 Pat 382 (P C).**
3. **Vellaswami Servai v. Sivaraman Servai, (1930) 17 A I R P C 24=121 I C 230 = 57 I A 96=8 Rang 179 (P C).**

suggest that the party substantially benefited by the change must have had some share in bringing it about, the burden lying on him is proportionately heavier and the least that the Court is entitled to expect from him, if he desires to sustain the will, is that there should be a frank and full disclosure of all material circumstances. Considering the case from this point of view, I agree with the lower Court that those who propound the will, Ex. I, have not discharged the burden of proof which the law casts upon them.

In para. 12 of its judgment, the lower Court has set out the points of differences between the two wills, Exs. B and I. Under the earlier will, which purported to deal only with the immovable properties of the testator, the sister was only given a sum of Rs. 1100 outstanding on usufructuary mortgages. Under Ex. I, which purports to deal with the whole estate of the deceased (both moveable and immovable), she is given immovable property (buildings) of the value of Rs. 4000. In considering the significance of this change, the Court has to take note of the plaintiff's allegation that defendant 3, who was the sister's husband and was admittedly present at the execution of the will, took a prominent part in bringing it about. There is also the fact that though he was admittedly conducting this suit on behalf of his wife and was present in Court during the trial, he has not thought fit to go into the witness-box. The position as regards the brother is that under the first will he was given the testator's share in the old family house, on condition of his performing the obsequies of the deceased. This share was valued at about Rs. 2000 and the first will contained a further provision that if the brother (defendant 1) would not perform the obsequies, the widow should herself perform the ceremonies and take even this item of property. The relative insignificance of the gift and the introduction of this divesting clause even in respect of that small gift are certainly not indicative of extreme cordiality in the relations between brothers or of a desire on the part of the testator to bestow any large bounty on the younger brother, on the ground that he had children. Under the second will, the brother is given not merely the testator's share in the ancestral house but additional immovable properties valued at Rs. 10,100 subject to the liability to pay Rs. 300 to one Mooka Kothanar. The clause as to his performing the funeral ceremonies of the testator is repeated but the divestitive condition found in Ex. B has been omitted. That the disposition under Ex. I involves a very substantial change in favour of defendant 1 has not been disputed. I shall in due course deal with that portion of his evidence which suggests a possible explanation for this change and states the part which he took in connexion with the transaction. As regards the widow, the position under the first will was that she took the moveable properties of the deceased as heir-at-law and she took an absolute interest in immovable properties of the value of about Rs. 21,000. She was also given an unrestricted power of adoption. In the later will, the power to adopt is omitted. She is given a house worth Rs. 4000, a sum of Rs. 1100 due under usufructuary mortgages and Rs. 2500 in cash. That these changes are distinctly prejudicial to the widow can admit of no doubt. It has not been suggested that the relations between the husband and the wife were not quite cordial. The attitude of the wife to an adoption proposed by the husband on the day before the execution of Ex. I has been suggested as a possible explanation for the change. I shall deal with this suggestion in due course.

The provision in Ex. I in favour of defendants 4 to 9 is wholly new. The documentary evidence shows that in or about 1912, there were disputes between the testator and these defendants leading to civil and criminal proceedings which ended in the testator's favour. It is unnecessary to assume that the estrangement resulting from these proceedings endured to the end. But it is significant that in the first will the testator never thought of extending his bounty to them. None of these defendants has gone into the witness-box to suggest a possible reason for the change within the fortnight that intervened between the registration of the first will and the execution of the second. Proceeding next to the evidence relating to the actual execution of the second will, I am unable to minimize the importance of the fact that out of six attestors to the will, only one, namely D. W. 4, has been examined by the propounders. Two of the attestors (P. Ws. 1 and 4) have been examined on the plaintiff's side. I shall deal with the evidence of these witnesses in due course. Attestors Nos. 1 and 2 to the will, Ex. I, are asserted by the defendants to be respectable persons. But yet no intelligible explanation has been given for the omission to examine them in support of the will. A suggestion was made in the course of the trial that there was some estrangement between defendant 3 and the first attestor in connexion with some election to the trusteeship of Sri Minakshi temple. But seeing that defendant 3 took no interest under the will and that defendant 1 was the main beneficiary, Mr. Rajah Aiyar realized that there is not even plausibility in the attempted explanation. He therefore asked us to deal with the case on the footing that his clients have no explanation to give for the non-examination of the first or the second attestor. The remaining attestor is defendant 10, who filed a written statement repudiating the allegations of partisanship made against him in the plaint and asserting that the will was freely and openly executed by the testator with full knowledge of its contents and that it was duly attested by himself. It is certainly a matter for legitimate comment that even this attestor has not been examined in support of the will ; and here again, no explanation for the omission has even been attempted. It remains to add that the writer who is said to have taken instructions from the testator in respect of the changes to be made in the dispositions contained in the first will has not been examined either. It is stated by defendant 1 in his evidence that the fair copy (Ex. I) was prepared by the writer in his own house. But defendant 1 asserts that the writer prepared the fair copy from the draft made in the testator's presence as per the testator's instructions and read and approved by him. This assertion rests on the sole testimony of defendant 1 whose interest in the success of the litigation cannot be denied. The doubts and suspicions aroused by the circumstances above adverted to are only increased by the story that it was considered worth while—if not necessary—to complete the execution of the will at 10 P. M. on the night of the 2nd, according to the evidence of defendant 1 and D. W. 4, while two of the attestors (P. Ws. 1 and 4) would say that it was between 1 and 2 A. M. (that night) when their attestation was obtained.

Mr. Rajah Iyer, the learned counsel for the appellant, did not dispute the adverse significance of the above circumstances, but he contended that all doubts and difficulties arising therefrom must be held to have been removed in this case by reason of the fact that the will has been registered during the testator's lifetime and by the evidence given by the Sub-Registrar (D. W. 1) and by the identifying witness (D. W. 2) as to the condition and knowledge of the testator at the time of the registration. I shall presently deal with the oral evidence of these two witnesses. I do not under-estimate the importance of registration during the lifetime of the testator; but in assessing the significance of that fact, there is a well-marked distinction between cases in which the subsequent dispute relates to the fact of execution and cases in which the question raised relates to the 'testamentary capacity' of the executant. The instances in which Courts have declined to uphold even registered wills (*cf.* 32 Mad.400,[4] 8 Rang 179,[3] A I R 1925 Cal 739[5] and A I R 1932 Cal 574[6]) go to show that the scope of the enquiry by the officer who registers a will during the testator's lifetime does not always comprise all the ingredients which the Court considers material when called upon to determine a question of testamentary capacity. Registration may well be conceded to be a solemn act, 33 Cal 537,[7] *cf.* 24 C W N 674,[8] so far as it goes; but where a will is presented by the executant himself and he admits execution, the requirements of the registration law are nearly satisfied and the only matter for enquiry by the Registrar in such a case is the identity of the person appearing before him and alleging that he executed the document (see Ss. 34 and 35, Registration Act). An enquiry as to the 'capacity' of the executant is provided for only if the executant appears to the registering officer to be a minor, an idiot or a lunatic. With this, one may compare the rule frequently laid down by the Court that the mere fact that the testator could say that it was his will or could answer some simple questions which were put to him does not show that he had a sound disposing mind at the time. (A I R 1925 Cal 739[5] at p. 741, quoting from (1858) 1 F & F 578.)[9] And considerations like those indicated in

---

[4] Shanmugaraya Mudaliar v. Manikka Mudaliar, (1909) 32 Mad 400=3 I C 799= 36 I A 185 = 19 M L J 640 (PC).

[5] Brajeshwari Dasi v. Rasik Chandra, (1925) 12 A I R Cal 739=85 I C 581.

[6] Surendra Nath v. Jnanendranath, (1932) 19 A I R Cal 574=139 I C 287=55 C L J 189.

[7] Gangamoni Devi v. Troiluckhya Nath, (1906) 33 Cal 537=33 I A 60=3 C L J 349=10 C W N 522 (P C).

[8] Bindeshri Prasad v. Mt. Baisakha Bibi, (1920) 7 A I R P C 70=61 I C 431 = 24 C W N 674 (P C).

[9] Sefton v. Hopwood, (1858) 1 F & F 578.

13 E R 117[10] and 163 E R 961[11] are ordinarily foreign to the registering officer's enquiry though his evidence in the witness box may help the Court to ascertain important details as to the knowledge and condition of the testator.

On behalf of the appellants, strong reliance was placed in this connexion on the decision of the Judicial Commissioners of Nagpur in 96 I C 401.[12] I am not concerned with the observations of the learned Judges on the evidence before them, but, it seems to me, with all respect, too wide to lay it down as a general proposition (if they meant it) that the registration endorsements 'completely' prove that the document was read over to the executant and understood by him. The certificate of the registering officer is given only a limited effect under S. 60 (2), Registration Act. As the significance of the registration and the effect of the evidence of the Sub-Registrar (D. W. 1) have to be appraised with due regard to the physical and mental condition of the testator at the time, I now turn to the evidence in the case on that point. Till D. W. 2 went into the box, both parties proceeded on the assumption that the testator had been suffering from consumption; this is also the statement of the deceased as recorded by the Registrar (in Ex. III) in the presence of D. W. 2. When D. W. 2 was examined in chief, he stated that when he examined the testator two or three days prior to the registration, he found nothing wrong with his lungs or heart and the patient only complained of abdominal discomfort which the witness attributed to flatulence. The witness added that the patient 'had nothing wrong with him except chronic indigestion but that the case was mismanaged.'

I do not think it necessary to criticize the diagnosis made by the witness; he is entitled to have his own opinion. It is sufficient to take the symptoms spoken to in the evidence. D. W. 2 admits that the deceased had been practically bedridden for about a month before his death, though it appears that with some difficulty he attended at the office on 19th August 1930 for registration of the first will (Ex. B). The plaintiff and some of her witnesses have undoubtedly exaggerated when they deposed that for several days before his death the deceased was lying speechless and unconscious. It however appears even from the evidence of the Sub-Registrar that he understood the deceased to be seriously ill, that when he went in, the testator had to be helped to sit up in his cot, that he was very weak, that his answers were very low though audible and that he had such difficulty of speech as a man seriously ill would have. In the face of this evidence, the account given by some of the defendants' witnesses that they did not find him to be seriously ill, that on the afternoon of the 2nd, he was able to sit up of his own accord and dictate the lines on which the new will was to be drafted, that he read the draft himself and read the fair copy of the will a number of times does not deserve credit. Defendant 1 as D. W 3 went the length of deposing that at the time of the execution of the will, the testator "was able to walk about inside his house" and he attributes to him every step taken in getting the will prepared and attested. Though the written statement referred to 'tuberculosis,' he preferred to discard it and, taking the clue from D. W. 2, he stated that his brother was only suffering from light cough and flatulence. Cross-examined as to his brother's condition on the second afternoon, D. W. 3 stated that he was not confined to bed; he was able to talk well and, excepting the survey numbers, he himself dictated to the writer the matter of the draft. The witness is of course interested and the learned Judge has not believed him.

I find it difficult to reconcile the above story with the description given by the Registrar as to the condition of the testator on the morning of the 3rd. The defendant's witnesses are obliged to say that they did not expect the testator to die soon and his death on the fourth night came upon them as a surprise. On the other hand, P. W. 1 states that for ten days before his death, the testator was not able to move about, was able to talk but not much and at the time the witness attested the will (on the second night) he only beckoned to him to do so by a shake of his head. The witness is admittedly a friend and neighbour of the deceased and a man of status and even defendant 1 does not deny his respectability. Nothing has been suggested against him beyond a possible sympathy with the plaintiff; but even allowing for some exaggeration for this reason, the story of this witness is decidedly in conflict with the defendants' version.

---

[10] Harwood v. Baker, 13 E R 117.

[11] Durnell v. Corfield, 163 E R 961.

[12] Nilkanth v. Guna Bai, (1926) 13 AIR Nag 482 =96 I C 401.

The completion of the will at midnight on the second and the anxiety to bring in D. W. 1 for registration without delay, early on the third morning, though in the ordinary course the matter would have to be dealt with by Sub-Registrar No. 4 (a Mahomedan gentleman who could not be found at the time) are clearly indicative of a consciousness that the testator's condition at the time was not such as to permit of delay. The nature of the disease was certainly such as greatly to reduce the physical capacity of the patient and though he might have retained 'consciousness' almost to the end, his capacity for exertion, whether mental or physical, must have become greatly diminished a few days before his death. I may here make a passing reference to the inference suggested by a comparison of the signatures affixed by the testator to Ex. B presumably on 7th August and again at the time of its registration on 19th August with those affixed to Ex. I at the time of its execution and also at the time of registration. The signatures to Ex. B seem firmer and more uniform than those affixed to it at the time of its registration. The signatures to Ex. I are much less uniform and even more shaky than the registration signatures on Ex. B, while registration signatures on Ex. I are decidedly weak and shaky. The inference suggested is that the testator was progressively declining in strength.

There is one small episode brought out in the cross-examination of D. W. 2 which seems to me to have some significance in this connexion, namely that some time on 3rd September, the witness gave the testator a mixture of Digitalis Tr. Mus and Tr. Nux Vomica. Without attaching quite as much importance to this as the learned Subordinate Judge has done, I am content to say that this clearly indicates that the condition of the testator on the morning of the third was one of extremely low vitality and while hastening the Sub-Registrar's visit, the people who were interested in getting the will registered also thought it prudent to give the patient a stimulant dose, both to avoid suspicion on the part of the Registrar as to his condition and to enable the testator to go through the requisite formalities. The presence of D. W. 2, at the time as an identifying witness leads me to think that he had been brought in there only to disarm any suspicion or inquisitive enquiries on the part of the Registrar as to the condition of the testator, as the presence of a medical man is likely to reassure him. I would not have drawn this inference if I had been satisfied as to the truth of D. W. 2's story that a couple of days before he had been called in to treat the testator.

The learned Subordinate Judge who recorded his evidence has strongly characterized his evidence. I can only say that the witness brought down those strictures upon him, by the way he gave his evidence; because, a man of his position, if he desired his word to be accepted, must have given his evidence with a sense of responsibility and an attempt at accuracy. In the chief examination, the witness mentioned only one occasion when he 'gave him some medicine for it (flatulence) from my dispensary' and this occasion, he stated, was two or three days prior to the registration. He never referred to his having given any mixture to the patient on 3rd September. In cross-examination, he was asked about his prescription book which he undertook to produce after lunch and when on production, it was found to contain a prescription for a stimulant mixture on the 3rd and contained no other prescription for the testator, the witness put forward the story of his having prescribed twice and suggested that the medicine prescribed by him on the previous occasion must have been compounded elsewhere. The story was, to say the least, lacking in candour; and I am not prepared to say that the learned Judge was wrong in declining to accept the testimony of the witness at its face value. It was a strange coincidence that the witness was at least an acquaintance of defendant 3 for some years and was living as a tenant in a house of defendant 3 who was certainly interested in propping up the will. I am not prepared to accept the suggestion that this stimulant was given after the registration; as I have already stated, the witness did not choose to disclose this fact in his chief examination and so far as I can gather from the evidence, the defendants and their friends seem to have shown very little concern for the testator and for his treatment, after the will had been registered.

Reading the evidence of the Sub-Registrar in the light of the foregoing discussion, I am unable to hold that it is sufficient to bring home to the testator such knowledge of the contents of the will as the law requires in the case of a man whose physical and mental condition at the time must have been greatly impaired by prolonged illness and approaching death. The Registrar states that he "conversed with him" found him to be in "a sane and sound condition of mind," that "he was conscious of what he was doing and was giving rational answers to questions put to him." This, I consider, is only formal evidence, though it is an answer to the extreme case of the plaintiff that the deceased was lying speechless and unconscious for several days before his death. Then comes the following statement:

> I read out the will to the testator. He understood and followed me. He also read the will for himself. After I read out the will and asked him if he had affixed his signature to it, he took the will from me and read it for himself and said 'yes' . . . . I asked him if he had revoked the prior will and he said 'yes' . . . . I took down his answer in statement form (Ex. III).

Except the reference to the testator reading the will for himself, I accept the above evidence. I am inclined to think, having regard to my view as to the testator's physical condition at the time, that he would have been wholly unequal to the task of reading a document of six pages which I was able to read only with some effort and that an attempt of the testator to turn over the pages slowly before putting his signature to the registration endorsement must have been interpreted by the Registrar as an attempt to read. While I have no doubt that the Registrar must have done his duty under the statutory rules, I cannot help thinking that he could not have been unduly critical or inquisitive as to the testator's condition because the presence of a medical man (D. W. 2) at the time must have reassured him and the temporary effect of the heart stimulant given to the testator must have led the Registrar to overestimate the physical fitness of the patient.

Taking it that there has been some sort of a reading to the testator, its bearing on the question under consideration is largely a matter of degree, depending upon the Court's view as to the capacity of the testator at the time. The Sub-Registrar does not say that he drew the testator's attention to the points of difference between the two wills and it was not part of his duty to do so or ask for reasons or explanations as to the difference. The statement recorded in Ex. III that under Ex. I properties were bequeathed to the wife, to the sister and to the dayadis cannot be very informing, because this will not bring home to him the difference between the two wills, as the general description was equally true of the first will. It may be noticed, for what it is worth, that the statement above quoted from Ex. III makes no specific reference to the bequest to the brother, unless he is included in the generic term 'dayadis' and the term 'dayadis' on the other hand was not appropriate to refer to defendants 4 to 9 who are only bandhus. Mr. Rajah Iyer, relied strongly on the propositions stated by Lord Penzance in (1866) 1 P & D 116,[13] particularly on proposition No. 5 to the effect that the fact of a will having been "duly read over to a capable testator on the occasion of its execution" or of its contents having been "brought to his notice in any other way should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof." The decision of the House of Lords in (1875) 7 H L 448[14] clearly implies that the above statement should not be taken as an absolute rule of law. But even on the terms of the rule as stated, the question remains, whether the testator to whom the will was read was a "capable testator." In the circumstances of this case I am unable to uphold the will merely on this evidence, without a consideration of the circumstances attending the execution of the will.

As to the execution of the will and the preparation of its draft, we are left to depend almost wholly on the evidence of defendant 1. D. W. 4, the only attestor examined by the defendants no doubt says that he went to the testator at about 9 P. M. on the 2nd, that the testator told him of his dissatisfaction with the previous will and the execution of a new will, that the testator read out the new will in his presence and then signed it. The learned trial Judge was not impressed with the evidence of this witness; and though his interest in defendant 9 may be said to be remote, I am not prepared to differ from the Judge's estimate of his evidence. His statement that at the time of the execution of Ex. I, the testator did not appear to be seriously ill is certainly calculated to convey an erroneous impression. The suggestion that the testator read through the will in the presence of the witness, with the aid of a hurricane lamp, spending half an hour over the task and sitting all the while, does not seem to me credible. I have already referred to the fact that the writer who is said to have prepared the draft under instructions from the testator has not been

---

[13] Guardhouse v. Blackburn, (1866) 1 P & D 116.

[14] Fulton v. Andrew, (1875) 7 H L 448=23 W R 566.

examined and no explanation has been suggested for this omission or for the omission to examine the remaining three attestors.

Mr. Rajah Iyer contended that there is no duty on the propounders to examine all the available attestors or account for their absence. In this connexion, reliance was placed on the observation of Mookerjee J. in 49 Cal 132[15] at p. 148. He overlooked the fact that in reversing this judgment, the Judicial Committee laid stress on the absence of these witnesses: 44 M L J 699.[16] On p. 705 of the report, their Lordships observed :

> It may be that when the proponent's case was closed the precise character of the adverse evidence in disparagement of the alleged will was not anticipated. But the strength of the opposition must have been sufficiently apparent to show the urgent necessity for calling all available evidence.

In the present case, the evidence given by two of the attestors P. Ws. 1 and 4, if believed, so greatly weakens the case in favour of the will that the defendants could not have been blind to the necessity of supporting their case by the evidence of the other attestors, especially when two of them are asserted to be respectable men. Mr. Rajah Iyer asked, whether the very fact of two respectable people having attested the will is not itself strong evidence in its favour. I do not think he is entitled to ask us to make any such presumption when the defendant did not choose to call them, though they were available. The defendants could not, when they were leading evidence, have been ignorant of the fact that P. W. 1 who is also described by them as a respectable man was going to depose on the plaintiff's side, because they seem to have summoned him upto one stage but afterwards have given him up. This only made it the more incumbent upon them to place before the Court the evidence of the writer and the other attestors. Even assuming that evidence of P. Ws. 1 and 4 is discredited, this by itself will not advance the defendants' case, because the onus of affirmative proof rests on them. In 44 All 495[17] at p 500, the Judicial Committee observed as follows :

> As it is impossible that he (the deceased) can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law . . . . In case of doubt or dispute justice requires that the best evidence procurable of the testator's signature (*Note.*—The factum of execution was in question in the case) should be furnished and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect.

Their Lordships then proceeded to comment on the propounder's omission to call certain witnesses. On principle, the above remarks equally apply to a case where the testator's capacity is in question. Having given the case my most anxious consideration, I am unable to resist the suspicion that several witnesses have been deliberately kept back only because the execution of Ex. I was not altogether above board. Mr. Rajah Iyer contended that judgment of the Court must not rest on mere suspicion but on proved facts. But this theory has to be applied with considerable qualifications to cases relating to wills ; because, in this branch of the law, it is well established that when the circumstances attending the execution of the will are calculated to raise the suspicion of the Court, the will ought not to be pronounced for unless the suspicion is removed. Mr. Rajah Iyer laid some stress on the fact that the plaintiff came to Court with a false case and failed in her attempt to prove that the testator was unconscious and that the will was procured by undue influence. This is no doubt regrettable ; but even this does not materially advance the defendant's case, for

> "it is for those who propound the will to remove suspicion and to prove affirmatively that the testator knew and approved of the contents of the document and it is only where this is done, that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will." 8 Pat 382[2] at p. 388 quoting from (1894) L R P 151.[1]

Some point was made of the fact that the plaintiff must have been present at the execution and the registration of the will and the story of her absence is false as also the story of her complaint to the police. I am prepared to ignore her story, in view of the fact that Mr. Subramania Iyer, the vakil who is said to have filed the police complaint on her behalf, has not been examined when the petition itself was found to be not forthcoming. But I do not feel that much could be made of her presence, when it is remembered that she was an illiterate Marava woman, aged about 25, and that a number of males were putting the will through beside the bed of her dying husband. Assuming that she knew that a new will was being executed, she could not have even known of its contents, unless her husband or some of the defendants or the writer informed her of the same or of the difference between the two wills. It was urged in this connexion that at the time of the preparation of the draft for Ex. I, possession of Ex. B must have been obtained either from the plaintiff or from her husband as also information as to the repayment of a sum of Rupees 2000 by a debtor between the dates of the two wills. I am not satisfied that these facts have been established and do not therefore pause to consider what inference those facts, if true, will lead to. There is no force in the argument as to acquiescence; because it is clear even from the evidence of D. W. 2 that within a short time of the testator's death, disputes arose between the parties and this is also shown by the reference in Ex. K to some petition by the plaintiff to the police before 26th September. The story of the presence of the plaintiff's father at the time of the execution or the registration of Ex. I does not rest on the reliable evidence and the absence of his attestation from Ex. I is clearly inconsistent with the theory of his having consented to the new arrangement. The delay of about five months before instituting this suit cannot be put against the plaintiff, because in view of the status and capacity of herself and her father, it is clear that they must have depended on others for help and advice. That their case is in the hands of some law tout may regrettably be true; but that has little bearing on the merits of the case.

---

[15] Prasanna Moyi v. Baikuntha Nath, (1922) 9 A I R Cal 260=66 I C 782=49 Cal 132=34 C L J 384=25 C W N 779.

[16] Baikuntha Nath v. Prasanna Moyi, (1922) 9 A IR P C 409=72 I C 286=44 M L J 699 (P C).

[17] Ram Gopal Lal v. Aipna Kunwar, (1922) 9 A I R P C 366=69 I C 31=49 I A 413=44 All 495 (P C).

It remains to deal with the suggestion made as a possible explanation for the differences between the two wills. Defendant 1 would not directly make himself responsible for the suggestion but dropped one or two hints and left it to his counsel to make the best use of the same. His story is that though he was on good terms with the testator, who was only living in the opposite house and was frequently going to him, he was ignorant of the execution and registration of the first will till the brother chose to inform him of it on 31st August. I find it difficult to believe this, in view of the fact that the testator's visit to the Registrar's office, in the then state of his health, must have come to his notice and provoked enquiry even if there had been any attempt at secrecy. In the written statement, a suggestion was made that the first will did not represent the voluntary or deliberate intentions of the deceased, but was secretly brought about at the instance of P. W. 5. This suggestion has not been persisted in. It may be noted that there was an interval of twelve days between the writing and the registration of the first will; in view of this long interval and of the fact that the testator thought it fit in the then state of his health to go to the Registrar's office to register it, I am not disposed to accept the suggestion that it did not represent the mature or deliberate intentions of the testator. Defendant 1 deposes that he was present at the preparation of the draft for the second will and at its execution, but he denies having even talked to his brother about its contents or made suggestions or requests to him to increase the legacy in his own favour. Even his presence on the second evening, when the fair copy of the will was brought and signed, was according to him, merely casual and accidental. It is stated in Ex. II that defendant 1 was being sent to the Registrar with the application, but defendant 1 would prefer to associate Rajaramier with the visit of the Registrar. It seems probable that the witness is attempting to put forward this attitude of absolute non-intervention, if not of indifference, with a view to avoid the onus of proof becoming heavier on him, on the ground that he is not only a benefited party but also took a prominent part in the preparation of the will. The witness stated that on 1st September, his brother proposed to adopt the youngest son of the witness and that evening, the plaintiff questioned her husband what was to happen to her if the adopted son should drive her away, he adds 'hence my brother said he would execute a will to provide for her and also for our sister.' Mr. Rajah Iyer contends that this conversation must have led the testator to re-arrange his dispositions.

Having given the argument my best attention, I fail to see any logical connexion between the testator's adoption idea (or the request made by the plaintiff in that connexion), and the new scheme of dispositions under Ex. I. It does not serve to explain the omission of the power to adopt from the second will or the increase of the bounty in favour of defendants 1 and 2 or the introduction of the bequest in favour of defendants 4 to 9. Defendant 1 would say that the brother told him of a request by defendants 4 to 9 for a gift of some property to them as they were poor, but those defendants have not come forward to speak to any such request. In this case, the decision was given by the Judge who had recorded the whole evidence. It has not been shown that he has misdirected himself on any material question. I see no sufficient reason for differing from his conclusion. I would therefore dismiss the appeals with costs of the plaintiff-respondent. As my learned brother has come to a different conclusion, the papers will be placed before the Chief Justice for directions, under Cl. 36 of the Letters Patent for the decision of the question raised by issue (1) in the case.

A special argument was urged in A. S. No. 201, as to the wording of the lower Court's decree so far as it deals with the costs payable by defendants 5, 6 and 9. At the end of para. 41 of the judgment, the learned Judge directed that "not more than one-eighth of the total costs is to be recovered from any of defendants 5, 6 or 9." The Court below seems to have thought that this would be a fair proportion for them to bear, as the bequest under Ex. I in favour of the group 4 to 9 defendants, was roughly of one-eighth of the whole estate. The decree, however, has been so drafted as to suggest that plaintiff was entitled to recover one-eighth of the costs from each of defendants 5, 6 and 9 making their total liability three-eighths. We do not think this was intended; but if it was intended, it seems to us that there was no justification for it. The decree will be amended so as to make it clear that (even if the appeal to this Court is dismissed), defendants 5, 6 and 9 will together be liable only for one-eighth of the costs awarded to the plaintiff in the lower Court, but the plaintiff will be at liberty to recover that one-eighth from any of these defendants.

Horwill J. — The circumstances under which the will Ex. I came into existence have been set out in the judgment of my learned brother Varadachariar J. but as unfortunately I have not been able to draw the same conclusions from the evidence as he does, I have set out below my reasons for thinking that the judgment of the lower Court is wrong. The most important evidence is that of D. W. 1, the Registrar, who came to the house of the testator to register the will. He definitely states that he conversed with the testator and found him in a sane and sound condition of mind, and able to give rational answers to the questions put to him. D. W. 1 read out the will to the testator, who, in the opinion of the Registrar, was able to understand and follow what was read out, and who stated that it was correct and that he had executed it. The short deposition, Ex. III, given by the testator to D. W. 1 seems to me to be worth setting out in extenso; for many of the sentences could not be the result of a nod of the head to questions put by the Registrar and showed that the testator was fully aware of what he was doing. Ex. 3 is as follows:

> I executed a will on 2nd September 1930. I have just presented the will for registration. The will just read out is the identical document. By the will, I bequeath my properties to my wife Rajathi Ammal and to my sister, Sadachi Ammal and dayadis as mentioned in the will. I am willing to register the will. I have been suffering from tuberculosis for the last one month and I am bedridden. Hence, I requested attendance at my residence. I revoke the previous will by this will.

I do not think it possible that the testator could have made such a statement if he had not fully understood the will and had not the strength of mind necessary to realise what he had done and was doing. The will was prefaced by an introductory paragraph to the effect that the testator thought that the terms mentioned in the earlier will were unsatisfactory and that he therefore revoked the will. In order to satisfy himself that there was no ground for supposing the will not to be the free act of the testator, the Registrar asked the plaintiff if she had any objection, and she replied that she had not. I see no reason at all to doubt the truth of a single statement that the Registrar has made. The learned Subordinate Judge suggests that some person may have impersonated the plaintiff; but I do not think that this suggestion is worthy of serious consideration. The Registrar identified her by her photograph; and her presence is also spoken to by D. W. 2.

The evidence of D. W. 1 is confirmed by that of D. W. 2, a registered medical practitioner with a good practice, who owns 16 acres of land under the Periyar. He was present at the registration, having been called as an identifying witness by the plaintiff's father. His deposition was a long one; and he stood the test of cross-examination extremely well. The learned Subordinate Judge considers that that portion of his evidence dealing with his professional treatment of the testator as an affront to the Court and absurd; but I cannot agree with him in this criticism. It does look as if D. W. 2 is not a very capable physician; but there is nothing in his evidence which is not reasonable. I understand that there is nothing improbable, for example, in his giving a prescription if his dispenser were absent. The learned Subordinate Judge seems to have come to the opinion that the testator was able to execute this document only by the help of drugs given by D. W. 2. In the first place, I see no reason why one should doubt the evidence of D. W. 2 that the medicine was given after the registration and was intended as a mental, as well as a physical, restorative. The learned Subordinate Judge is certainly wrong in thinking that the medicine given by D. W. 2 would be given only to persons with weak hearts. Even if it be true that the medicine was given before the will was registered, and not afterwards, it would make little difference. The medicine given was a very moderate dose; and the only effect it would have would be that the testator would feel a little more alert both in mind and body.

The plaintiff has given an incredible story that she left her husband for the twelve hours during which this will was executed and registered. If it were true, it would show that the testator had a very good reason for giving her a smaller portion of his property than he had originally intended; but it seems most unlikely that when her husband was in such a serious state of health, she would go away and desert him. D. W. 1 not only stated that a woman there represented herself to be the wife of the testator, but he identified her from a photograph filed in Court. The evidence of D. W. 2 corroborates him in this matter and shows that the plaintiff's father was there also. Neither of these persons told the Registrar that at the time of execution, when the plaintiff must have been present, the testator was not in a fit state to know what he was doing.

The evidence of D. Ws. 1 and 2 proves, in my opinion, that the testator admitted execution of the will, that he understood what he had done, that he had sufficient strength of mind to conceive of an intention to dispose of his property in the way he did, and that he, therefore, had what is ordinarily known as a 'disposing state of mind' at the time of registration. The execution took place 12 hours earlier; and it is incredible that the testator was then in a worse condition than when the Registrar saw him; and he might well have been better. That the will was executed by the testator is not only shown by the direct evidence of defendant 1 (D. W. 3) and D. W. 4, who were present when the execution took place, but by the admission of the testator himself before the Registrar. D. W. 4 is an old friend of the family and apparently disinterested. He was present at the time of the partition between the brothers three years before, and then attested the partition deed. As against the evidence of D. Ws. 3 and 4 we have the evidence of P. Ws. 1 and 4. P. W. 4 deposes that he signed the document because he was threatened by defendant 3, an explanation which cannot for a moment be believed. He was driven away from the house later, by the defendants and might be deposing later, against them on that account. P. W. 1 is a more respectable witness and very little can be said against him. He was summoned in the first instance by the defendants; and they alleged that he was won over during the long interval that the lower Court allowed between the examination of D. Ws. 1 and 2 and those of the earlier plaintiff's witnesses. However that may be, he deposes that he was called to attest the document, that when he reached the house of the testator, he saw him lying there and in a very weak state, and that the testator signified to him by a nod of the head that he desired him to attest the will. Although P. W. 1 states that the testator could not talk much on the day of execution, yet he admits that when he saw the testator two days before, he was able to talk about things and understand what was said to him. The preparation and execution of the will was a trying ordeal for the testator; and it is not surprising that he should have been somewhat exhausted at the time of execution. According to the defendants' evidence, the discussion about the will began soon after noon. The testator looked into certain documents and dictated the draft. After the draft was faircopied, the various attestors were summoned and the document executed at about 10 o'clock on that night.

The conclusion drawn above from the evidence regarding the execution and registration is confirmed by what seems to be the probable condition of the testator's mind. The deceased was suffering from pulmonary tuberculosis, and although he became gradually physically weaker and died two days after the execution of the will, yet there is no reason to believe that he differed from other sufferers of that disease by being mentally feeble and unable to think about the disposal of property. It is well known that sufferers from this disease remain mentally alert and in full possession of their faculties up to an hour or two of their death. Only a fortnight before he had personally gone to the Registrar's office to have the earlier will registered; and P. W. 1 as well as the witnesses examined for the defendants, say that he was taking an intelligent interest in his affairs not long before this will was executed. A point made by the learned advocate for the defendants which is not, I think, without significance, is that for the drawing up of the will in question, it was necessary to refer to the will earlier and to a payment of Rs. 2000 which had taken place only on the previous day. The defendants probably knew nothing of the payment of Rs. 2000; nor could they have procured a copy of the previous will during the lifetime of the testator, to have known the various registration particulars which find a place in the second will. The evidence of the plaintiff herself shows that she had possession of the will; and it is, therefore, argued that she must have been concerned in the drawing up of the new will. This deduction gains support from the statement of the plaintiff to the Sub-Registrar that she had no objection to the will.

The learned Subordinate Judge has made a great deal of the fact that a will had been executed less than a month ago, and registered only a fortnight before, in which the plaintiff was given a great deal more than she has been given now and the brother and sister very much less. He is of the opinion that there was a heavy burden cast upon the defendants of explaining why this change took place. It is impossible for the defendants to explain why the testator changed his mind. It is a matter of common experience that after a man has made a decision, he often begins to doubt the wisdom of it and to wonder whether some other decision would not have been better. It seems not at all strange to me that a Hindu husband without children should leave sufficient to his wife for her maintenance and should give the rest of his property to his brother. Under the second will, the wife is still the second biggest legatee. Defendant 1, the brother of the testator, under the new will, gets Rs. 11,800, the wife, Rs. 7600, the sister, Rs. 4000 and six cousins together Rs. 3300. By the first will, although the widow was to have Rs. 21,000, she was empowered to adopt; and presumably, the testator contemplated the bringing into existence of an adopted son who would eventually enjoy his property.

The second will shows that he had given up the idea of adoption; and if that were so, there would not be the same reason for leaving such a large sum of money in the hands of his widow, a thing which most Hindu villagers are disinclined to allow. The defendants contend that after the first will was executed, the testator thought of his own brother's youngest son as a suitable boy to be taken in adoption. The wife demurred that if that son were adopted he might take all the property and she be left with nothing. It is said that it is for that reason that the second will was drawn up which, as already indicated, the plaintiff and her father seemed to accept. Whether this story be true or not, there is nothing so strange in this change of disposition as would constrain a Court to conclude that the only reasonable explanation for this change of opinion was that the testator was not in a sound disposing state of mind when he drew up the second will. I find myself unable to draw that conclusion from this change of opinion. The plaintiff and some of her witnesses stated that the testator and his brother were not on good terms; but a photograph was filed in Court of a group consisting of the testator, the plaintiff, and three children of defendant 1, his brother. The plaintiff is there actually holding in her arms the youngest child, who is said by defendant 1 to have been intended to be adopted to the testator. Defendant 1 states that this photograph was taken a day or two before the execution of the second will, at a time when this adoption was contemplated; but even if it be true, as the plaintiff states, that the photograph was taken two months earlier, the existence of such group photograph does show that the relationship existing between the testator and his brother was not in any way strained.

A great deal has naturally been made of the fact that out of the six attestors and a writer, only one, D. W. 4, has been examined on the side of the defendants. The plaintiff has examined two, the other four have not been examined on either side. This omission does, no doubt, show that the defendants, for some reason or other, have been keeping something back from the Court—probably the part they played in the discussions preliminary to and at the drafting of the second will; but as there is in this appeal no question of undue influence, it seems to me that this omission on the part of the defendants should not allow one to lose sight of the simple question before the Court, whether the testator was in a sound disposing state of mind when he executed the document. If the testator had been suffering from a disease that impaired the mental faculties, if the earlier will had benefited a number of persons and the later one only the person under whose constant care he was, there might be some ground for suspicion that the testator was not in a sound disposing state of mind; but I can think of no reason for such a suspicion in the circumstances of this case. I have not thought it necessary to refer to any of the many reported cases cited before us because the question we have to answer is a very simple one and because there is no disagreement between the learned advocates who have argued this case before us as to the meaning of "a disposing state of mind." The circumstances under which the wills were executed in the cases cited are all very different from what they are in the case before us; and the dicta extracted from them have been accepted without discussion by both sides.

I cannot leave this case without referring to the very objectionable procedure adopted by the learned Subordinate Judge in the trial of this suit. The examination of eleven witnesses—many of them quite short ones — was spread over a period of twelve months. D. Ws. 1 and 2 were examined on 17th December 1931. D. W. 3 was examined on four occasions extending over a period of seven weeks from 27th February 1932 to 12th April 1932. D. Ws. 4 and 5 were not examined until 13th August 1932, eight months after the examination of D. Ws. 1 and 2. The examination of the plaintiff's witnesses began on 26th August 1932; and until 12th December 1932, no two witnesses were examined on the same date. This was a scandalous procedure that put a premium on perjury. As the parties had plenty of opportunity to see how the suit was progressing, both sides must have striven to persuade the witnesses to speak to what they wished, the plaintiff having the great advantage of examining her witnesses after those of the defendants. The very unsatisfactory nature of the evidence can largely be laid, in my opinion, at the door of the learned Subordinate Judge. The judgment was not pronounced until 6th March 1933, fifteen months after the examination of D. Ws. 1 and 2. Under these circumstances, the fact that the learned Subordinate Judge saw D. Ws. 1 and 2 in the box gave him very little advantage, if any, over the Appellate Court. For the reasons set out by me above, I think that the will, Ex. I, was executed while the testator was in a sound disposing state of mind and that the appeal should therefore be allowed with costs. [The appeal again coming on before Pandrang Row J. for opinion, the Court delivered the following judgment.]

Pandrang Row J.—These appeals come up before me under Cl. 36 of the Letters Patent. The point on which the learned Judges differed was whether the testator was in a sound disposing state of mind when he executed the will (marked Ex. I) on 2nd September 1930. The trial Court held that the existence of a sound disposing state of mind had not been established and Varadachariar J. saw no sufficient reason to differ from the conclusion of the trial Judge, whereas Horwill J. was of opinion that the finding of the learned Subordinate Judge is wrong and that it had been established that the testator was in a sound disposing state of mind when he executed the will. On 7th August 1930, the testator had executed a will (Ex. B) and had it registered after personally attending at the Registrar's office on 19th August 1930. The present will, namely Ex. I, was executed on 2nd September, that is to say about a fortnight after the registration of the earlier will. It was never contended at any time that the previous will, Ex. B, was not executed when the testator was in a sound disposing state of mind. In fact the previous will is referred to in Ex. I and is formally revoked thereby. The subsequent will, Ex. I, alters in very material particulars the dispositions made in the earlier will, Ex. B, and, generally speaking, the dispositions in Ex. I are more favourable to the divided brother of the testator, namely defendant 1, and less favourable to his wife, the plaintiff in the suit. The earlier will practically left the bulk of the property to the wife who was also given authority to adopt. In the second will the wife gets only about a quarter of what she got by the earlier will and the bulk of the property goes to the brother, defendant 1. Ex. I also increases the bequest in favour of the sister of the testator, namely, defendant 2 and makes a fresh bequest for the first time in favour of comparatively remote relations, defendants 4 to 9.

The short interval between the earlier will and the later will and the important character of the changes introduced by the later will necessarily create an atmosphere of suspicion and increase the burden which lies on the party seeking to propound the will of proving that it was executed at a time when the testator was in a sound disposing state of mind. It is not disputed before me that this circumstance, namely the important changes brought about within a short interval of time by the later will, does not legitimately give rise to suspicion as regards the later will, or that it does not appreciably add to the burden that lies on the defendants who support the later will. It is, however, claimed that this burden has been discharged entirely, and reliance is placed particularly on the evidence of D. Ws. 1 and 2 and also on some other circumstances which appear in the evidence. As regards the evidence of D. Ws. 1 and 2, after going through the same I see no sufficient reason to differ from the conclusion arrived at by the learned Subordinate Judge who heard the evidence. In other words, the evidence of D. W. 1, the Sub-Registrar has to be accepted generally to the extent to which it goes, whereas the evidence of D. W. 2 is not sufficiently reliable and is not entitled to acceptance as it stands. I have no doubt that D. W. 2 was brought in specially for the purpose of preparing the testator for the interview which was necessary in connection with the registration of the will at the residence of the testator. There is no doubt in my mind that D. W. 2 gave the testator what is described by the learned Subordinate Judge as a triple cardiac stimulant in order to prepare him for the interview with the Registrar. He was brought in for the purpose of enabling the testator to go through the formalities of registration and also for the purpose of inducing the Sub-Registrar to believe that everything was all right. The Sub-Registrar's own evidence does not really establish the fact that the testator was in a sound disposing state of mind even at the time of the registration and still less that he was in that state at the time of the actual execution of the will.

The mere fact that the testator was able to answer a few leading questions does not suffice to show that he was really capable of knowing the nature of the dispositions made in the will that was being registered. It may be that the will, except the schedules, was read to the testator by the Sub-Registrar and it may be that the Sub-Registrar was of opinion that the testator understood the contents of the will, but the latter is only a question of opinion, and there is no guarantee that the Sub-Registrar's opinion that the testator understood the contents of the will is correct, having regard to his extremely weak physical condition at the time. There can be no doubt from the evidence of the Sub-Registrar himself, apart from the other evidence in the case, that at the time of the registration the testator was so weak as to require assistance in order to sit on his cot and also in lying down after the signatures were affixed in token of registration. The testator died within about 40 hours after the registration and he had been suffering from a serious illness for at least two months. In these circumstances, it is impossible to regard the registration as being equivalent to proof of capacity for making a will. The evidence regarding the actual execution which has been adduced on the side of the defendants is practically worthless. Only one attestor out of six has been examined on their side and the writer has not been examined though he is obviously an important witness, being the writer not only of the later will but also of the earlier one. The evidence of the single attestor examined on the side of the defendants is not reliable and on his own showing he was not present when the preliminaries were discussed. He appears to have been present only at a later stage and apparently he knew nothing more than that the testator signed his name to the will or admitted that he had signed it. On the other hand, two attestors have been examined on the side of the plaintiff and their evidence shows that their signatures were obtained by some pressure or inducement and that they were not really present when the testator signed the will. One of those witnesses, P. W. 1, is a very respectable man and there is really no reason to reject his evidence. The omission to examine the other attesting witnesses and the writer has not been satisfactorily explained by the defendants. The attestors must have been selected by those who took part in getting the will executed and among them defendant 1 as well as defendant 3 were prominent. Defendant 3 himself has not been examined though he was present during the trial. No reason is given for his omission to go into the box to support his case. Failure to examine so many of the attesting witnesses and the writer makes the suspicion which surrounds the later will much stronger than it otherwise would be. There is no reason why so many persons should be unwilling to give evidence if the will had been properly executed by the deceased when he was in a sound disposing state of mind.

The evidence of defendant 1 is in my opinion too interested and unreliable to be accepted. His story that he took no part in inducing the testator to change his will cannot be believed, and I have no doubt that it must have been at his instance and owing to his persuasion, though such persuasion might not amount to coercion or undue influence, that the new will was executed by the testator when he was physically too weak to form his own opinion in the matter. There is no suggestion that there was any unpleasantness between the testator and his wife at any time and in particular during the interval between 19th August and 2nd September. The explanation given for the change in the dispositions cannot be accepted. It is obviously a figment of the imagination. It is most unlikely that the new will would have been executed in order to soothe the plaintiff who had some doubts as to what her own position would be if an adoption took place. In short, there can be no doubt in this case that the persons who were intended to be benefited by the new will were present at the time the new will was brought about and that the testator being surrounded by these relations of his was unable on account of his physical weakness due to his prolonged illness to form his own opinion as to what dispositions he should make, and that he was really not in a fit state of mind to make a will of his own. What happened was that a will was made for him by defendants 1 and 3 and in his weak state he affixed his signature thereto without being able to apply his own mind to the necessity of changing his former will or to the propriety of the dispositions made in the new will. It was argued before me that the particular reference made to the old will as well as to the payment of Rs. 2500 in cash by the new will clearly show that the new will must have been the result of independent volition on the part of the testator.

I am unable to accept this contention. It is possible that a copy of the will had been kept by the writer and that the note made by the registration authorities on the original will was also copied into the draft. Even otherwise, the will was obviously available in the house and could have been got at by the first or third defendant. The reference to Rs. 2500 is extremely vague. It is not proved that such a sum was paid in cash by the testator to his wife during his lifetime. All that is proved is that a sum of Rs. 2000 was paid on 22nd August 1930. It may be that information about some payment was known in some way or other to defendant 1 or defendant 3, and a lump sum like Rs. 2500 was mentioned in the new will with a view to minimize the magnitude of the change made so far as the wife was concerned by the new will by including in the bequest to the wife not merely a portion of the property bequeathed to her by the earlier will but also a lump sum of Rs. 2500 in cash alleged to have been paid to her by the testator. As regards the bequest in favour of defendants 4 to 9, I do not think that by itself is a guarantee that the later will was executed as the result of independent volition on the part of the testator. In the circumstances it was perhaps considered necessary that all possible opposition except that of the wife should be avoided, and the bequest of a comparatively small sum of money to defendants 4 to 9 was probably dictated by this motive.

On the whole therefore after careful consideration of the evidence and the probabilities in the case, I see no reason to differ from the conclusion arrived at by the learned Subordinate Judge who heard the evidence in the case, and I entirely agree with Varadachariar J. that there is no sufficient reason made out for interfering in appeal with the finding of the learned trial Judge on a question of fact like this. It must follow from this that the appeals must fail. They are accordingly dismissed with costs.

C.R.K./G.N. *Appeals dismissed.*

A. I. R. 1940 Madras 329

PANDRANG ROW J.

Rex v. *V. Krishnan.*

Criminal Case No. 4 of 1939, Decided on 28th August 1939.

(a) Penal Code (1860), S. 405 — Criminal breach of trust—Essentials necessary to constitute offence stated.

In order to constitute criminal breach of trust there must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with dishonest intention. Every payment of money by one person to another does not amount to entrustment unless there are circumstances attending it from which one can gather that it was an entrustment and not a mere payment. Whether in a particular set of circumstances a delivery or passing of property from one to another amounts to an entrustment or not is not a point of law on which the Judge can give a binding direction to the jury. [P 331 C 2; P 332 C 1, 2]

(b) Criminal Trial — Prosecution should not press case when complainant is not witness.

It is not fair for the prosecution to press a case against a man when the complainant is not a witness. [P 333 C 2]

(c) Criminal Trial — Offenders should be put on their trial within reasonable time.

The Crown which has considerable facilities at its disposal ought ordinarily, unless for very good reasons, be able to put alleged offenders on their trial within a reasonable time. It is not merely a question of enabling witnesses to have distinct recollection, though that is a very important one, because the greater the lapse of time, the fainter will be the recollection, at least, of truthful witnesses who do not imagine or invent but it becomes more difficult for the accused person to defend himself and all the more difficult if he happens to be an innocent man. [P 335 C 1]

(d) Criminal Trial — Duty of prosecution — Prosecution must prove guilt of accused.

The cardinal or basic rule of the administration of criminal justice, according to British notions, is that the prosecution must prove the guilt of the accused and that the accused need not prove anything. He is entitled to stand on the innocence which the law imputes to him till it is displaced. If a man is shown to have been given some money or entrusted with it and he does not account for it, it cannot be said that he must have embezzled or committed criminal breach of trust, in the absence of other evidence unless one proves some kind of conversion, i. e. a wrongful diversion to his own purposes or a purpose not consistent with law or with contract. [P 335 C 2; P 336 C 2]

(e) Criminal Trial — Misappropriation — Meaning.

Misappropriation is the wrongful setting apart or assigning of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart. [P 336 C 1]

(f) Criminal Trial — Criminal breach of trust — Difference between civil and criminal liability should be borne in mind.

The jury should always bear in mind the difference between civil and criminal liability especially in dealing with a case of criminal breach of trust. [P 336 C 1]

(g) Penal Code (1860), S. 405—Agent having no claim against principal merely retaining principal's money without doing anything else with it — He is not guilty of criminal breach of trust.

Even when an agent may have no claim against the principal, even then if he retains it merely and does not pay it, but does not do anything else with it, there is no criminal breach of trust. It is only a civil liability, and of course the principal can at any time if he chooses compel him to pay, send him a notice and file a suit. Mere retention of money entrusted to a person without any misappropriation, even though he was directed by the person to pay it to so and so, or to deal with the money in a particular way is not a criminal breach of trust; unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user there must be a dishonest intention. Putting the money into one's own account may not be misappropriation. If it is drawn upon for his own purposes it is misappropriation. But if he does not draw on it but keeps the money in the Bank there is no misappropriation, and no criminal misappropriation, because unless there is misappropriation there can be no question of dishonest misappropriation. [P 337 C 1]

(h) Penal Code (1860), S. 405—Person having reasonable claim against another for more than sum of money belonging to other in his hands—His user of this sum for his own purpose would not amount to criminal breach of trust.

If a man is proved to have had a reasonable claim against another for more than the sum of money belonging to the other in his hands, his retention of it, and even his user of it for his own purposes would not amount to criminal breach of trust because the intention could not have been dishonest, that is to say, to cause wrongful loss or wrongful gain. [P 338 C 1, 2]

(i) Penal Code (1860), S. 405 — Mere payment by debtor to creditor is not entrustment.

If the person paying intends to repose trust in the other expecting him to dispose of the money in a particular way, then only there is entrustment. The mere payment by a debtor to a creditor is not entrustment. [P 339 C 1]

K. S. Jayarama Ayyar — *for Accused.*

The Crown Prosecutor — *for the Crown.*

The charge of the Jury

The charge against the accused is on two counts, and I desire that you should pay particular attention to the wording of the charge. In substance it relates to two sums of Rs. 4000 each paid into the hands of the accused by Mrs. Appasami on the 20th November 1933, and the 2nd March 1934, respectively in discharge of a mortgage for Rs. 8000 executed by her husband, the late Dewan Bahadur Paul Appasami in 1923 in favour of the Foreign Mission at Pondicherry of which Father Pinel who was examined before you was Procurator at all material times. The particular point to which I wish to draw your attention is that the charge itself is to the effect that by receiving these amounts in his capacity as an attorney or agent of the Mission and by failing to pay the same to Father Pinel the accused had committed criminal breach of trust. You will thus see that the charge says that the non-payment to Father Pinel after entrustment by Mrs. Appaswami constitutes criminal breach of trust. I will lay stress once more on it, because the point is very important. The trust that is alleged by the prosecution or the entrustment was by Mrs. Appaswami with the accused.

Father Pinel had nothing to do with it. We are dealing not with a breach of trust as between Father Pinel and the accused. If the accused has committed any breach of trust vis a vis Father Pinel, that is to say, of anything entrusted to him by Father Pinel, that is not the subject-matter of the charge, and you should not venture to express an opinion on it; in other words, whether the accused has been guilty of a breach of trust as against Father Pinel is not the subject-matter of the charge. The subject-matter of the charge is that he is guilty of a breach of trust reposed in him by Mrs. Appasami when she paid the two amounts of Rs. 4000 each. That is the entrustment in this case. I am afraid a good deal of your time has been taken up with the question whether there was a duty on the part of the accused to pay this amount to Father Pinel's account or whether he had a right to retain this money under the lien granted by law in favour of attorneys and agents. It is unfortunate that I have to raise a point which does not seem to have been emphasized in the course of the speeches addressed to you but I must do my duty and tell you that the breach of trust charged in this case is breach of the trust reposed by Mrs. Appasami in the accused. So you must remember that the genesis of the trust was the delivery of this money to the accused by Mrs. Appasami.

I will tell you in formal words what the offence of criminal breach of trust is, but that will come a little later on. To enable you to understand the definition properly, I will put to you an ordinary case. Suppose one of you gives your servant a certain sum of money telling him at the same time: "Go and pay this to the shopkeeper so and so." Here there is entrustment of money by the master to the servant with a direction that he should deal with that money in a particular manner, that is to say, pay it to the particular shopkeeper. If he does not do so but pockets the money himself, then there is clear violation of the terms of the contract, which may be either express or implied, which he had entered into at the time of taking charge of the money in regard to the discharge of the trust reposed in him. In other words, the money is entrusted to him for the particular purpose of paying it to a particular person in which case if that has not been done and if the money is utilized by the servant for his own use, then you can say he has acted in violation of the contract, express or implied, entered into regarding the way in which the trust is to be discharged. If, on the other hand, a man comes to you whom you know to be a bill collector of so and so and brings a bill to you and you pay the money to him without saying anything or doing anything but merely take his receipt and pay the money, then if there is no contract at the time, express or implied, that he would actually go and pay it to the principal you have not imposed any trust in him. If you are satisfied, in other words, that the payment by you to the bill collector is payment to the principal and is binding on him, and you really do not care what he does with it, because you have paid it to the person authorized to receive payment and you have no more concern with it, and if in the circumstances it cannot be reasonably implied that there was any contract between the person making the payment and the bill collector, then there is no trust nor any question of any contract, express or implied, regarding the way in which the trust is to be discharged.

With these two concrete cases of a simple nature before you, you will probably be able to understand clearly what I am going to say in a somewhat more formal way as to what the offence of criminal breach of trust is. The words of the Section which define the offence of criminal breach of trust have been read to you and it is unnecessary for me to reproduce the exact words, but hardly any of the words can be left out without danger of giving rise to misunderstanding. For the purpose of this case it is enough for me to tell you that if any person, who is entrusted with property in any manner, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust he commits 'criminal breach of trust.' You will remember that stress is laid on three important points in the definition of the offence. There must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with a dishonest intention.

It is argued that it is unnecessary to consider whether there was an entrustment in this case because that is admitted. The word 'entrusted' which I have used and which is found in this Section is not a legal term which has a definite precise meaning attached to it. It is an ordinary word, a word in common use. So it is for you as members of the jury to say whether in a particular set of circumstances any property or any money was entrusted by *A* to *B*. When money passes from *A* to *B* in a certain set of circumstances, was it entrusted by *A* to *B* is for you to answer. But in this case it is clearly established by the evidence that the money was paid by Mrs. Appasami to the accused as agent of the French Mission at Pondicherry. The entrustment is said to be the payment. It would be an entrustment only if it was in your opinion something more than a mere payment. When a man pays to his creditor what is due to the creditor, there is no entrustment; there is no trust attached to that passing of property. The property passed because it has to pass from one to another according to law and there the matter ends. Every payment of money by one person to another does not amount to entrustment unless there are circumstances attending it from which you can gather that it was an entrustment and not a mere payment. It is necessary for you to understand in this case the importance of deciding this fact whether the so-called admitted entrustment was really an entrustment in your opinion. You will remember what Mrs. Appasami herself says. She says that she paid the moneys into the hands of the accused because she knew that the accused was authorized to receive it on behalf of the French Mission to whom the money was due; in other words, she made the payment without making any direction at the same time that the accused who received it should pay it to anybody in particular. All that she apparently wanted was that receipts should be given for the moneys paid and that the original mortgage deed should be given back to her. So far as appears from her evidence that was all that took place. It is however for you to say having regard to the circumstances whether the payment of these two sums of Rs. 4000 each on two different dates must be regarded as constituting entrustment of the money. I cannot put it more clearly to you.

I have already told you that every payment is not an entrustment. It is not a point of law on which I can give you a direction. Whether in a particular set of circumstances a delivery or passing of property from one to another amounts to an entrustment or not is not a point of law on which the Judge can give a binding direction to the jury. Suppose a man who has stolen some property hands it over to a brother thief, is it entrustment? That question does not arise in this case for you to answer, but that is the sort of case in which the Judge would find it difficult to give a definite direction as to whether it is an entrustment. Suppose a man sends a postal order to the advertiser of a newspaper or certain sums are sent to him, can you say when the postal order or money is received by the advertiser that he was entrusted with the money by the person who sent the postal order or the person who sent the money? You can imagine a number of cases where it may be a matter of some difficulty to declare whether the passing of property amounts to entrustment or not. I have already taken the view—and I have expressed it before—that it is a question of fact to be left to the jury. You just visualize for yourselves what took place when this money was paid by Mrs. Appasami into the hands of the accused. We do not know whether they met face to face. No correspondence has been produced. We do not know whether the money was sent in cash or in notes or by cheque, or whether there was any covering letter if it was sent and not paid face to face. On these points there is no evidence but such of the evidence as you have before you you have had from Mrs. Appasami. From her evidence so far as I can recollect, I find no reference made by her to any circumstances under which the payments were made. She simply said: "I have paid these two amounts on two particular dates and I have taken receipts." She also added that the original mortgage was after a few days returned to her by the accused, and she was unable to say whether the mortgage deed bore any endorsement of discharge made by either the accused or Father Pinel, and strangely, even after the validity of these payments was questioned by learned counsel on behalf of the Mission, Mrs. Appasami appears to have destroyed the original mortgage, so that we are not now in a position to know whether there was an endorsement on the back of the mortgage deed or not.

You will remember in this connexion that this payment took place nearly $5\frac{1}{2}$ years ago. It is not usual in cases of this kind for such a long delay to occur between the commission of the alleged crime and its trial. The delay is all the more to be deplored because a good deal depends on the actual circumstances under which the moneys were paid by Mrs. Appasami to the accused, and unless there is very clear evidence about these circumstances it may be very difficult for you to say whether there was only a mere payment which closed a particular transaction or whether there was an entrustment which required something to be done by the person to whom the money was paid besides giving a receipt and handing over the document. For instance, you will remember that in the case of the earlier mortgage of Rs. 6000, which was discharged by Mrs. Appasami in the same way, that is to say, by payment to the accused of the entire sum, she got a receipt and later on got the original endorsed on the back and Father Pinel remembers having done it. In the case of the Rs. 8000 mortgage Father Pinel has no recollection of having done it, and Mrs. Appasami is unable to say whether there was any endorsement signed by the accused on the back. That is the position in which you are and in view of the long delay that has taken place and the extreme, if I may say so, tenuity of the evidence it makes me hesitate to give any opinion of my own in this matter. I therefore leave it to you to consider in the light of the circumstances attending these two payments of Rs. 4000 each by Mrs. Appasami to the accused whether you can say clearly that there was any entrustment and not a mere payment in full discharge of a debt that was due, to a person authorized to receive payment.

The case is peculiar as the accused's counsel remarked at the beginning of his speech. It is peculiar in many ways. It is peculiar because it has a curious origin. So far as I can see there was no criminal complaint by Father Pinel or anyone else on behalf of the Mission. According to the investigating officer the complainant was the Registrar of the High Court who presumably was directed by the then Chief Justice to address a communication enclosing a copy of the letter received by him from the Archbishop of Pondicherry relating to this matter. The complainant has not been cited or examined in this case, and unfortunately this has had the effect of excluding the letter written by the Archbishop to the Chief Justice, which was really and in substance the complaint in the case. It is unfortunate for the accused that it had to be ruled out because if it had been admitted, the result of it would have been favourable to the accused. I think it is my duty to tell you that much, and I can tell you that much because it was not a criminal complaint in the sense that it was not suggested in that letter that there was any criminal offence committed nor any request made that the accused should be dealt with criminally. I have to say it, though the document is not put before you, because the omission on the part of the Crown to examine the complainant which is the invariable practice in all these cases, has led to this result. It is not a kind of prosecution which I can countenance or approve. It is not fair in my opinion for the prosecution to press a case against a man when the complainant is not a witness. The real complainant in this case was not the Registrar who had no knowledge of the case but the Archbishop of Pondicherry. But even he did not, so far as I can see, intend his letter to be treated as a criminal complaint, in other words, a complaint asking that criminal proceedings should be started.

* * * * *

As Mr. Jayarama Iyer has pointed out, the definition of the word 'complaint' in the Criminal Procedure Code is very clear. It means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer. No doubt the letter of the Registrar addressed to the Commissioner of Police, Madras, who for this purpose is a Magistrate or rather has the powers of a Magistrate so far as receiving the complaint and ordering investigation is concerned, may be treated as a complaint. But if so, it is a case in which the complainant himself had no information to give but merely passed on something which had been received from the Archbishop of Pondichery. It is necessary in this case to lay some stress on this because though it was on the letter addressed by His Grace the Archbishop of Pondichery to his Lordship the Chief Justice at the time that the prosecution was begun, the Archbishop subsequently, when this case was pending, desired that the criminal case should be withdrawn and addressed communications to this effect both to the Chief Justice and to the Commissioner of Police. This was in March 1939 when the matter was in the course of being enquired into by the Presidency Magistrate in Madras. Father Pinel has stated before you that these letters of March 1939 were written at his suggestion and that what is contained therein has his entire concurrence; in other words, he was satisfied that the accused had no criminal intention. You will remember that the fact that these amounts of Rs. 4000 each were received by the accused from Mrs. Appaswami towards the discharge of the mortgage debt of Rs. 8000 was known to the Mission's new solicitor Mr. Pais who displaced the accused some time in December 1934. He came to know of it from the accused own letter dated 28th March 1935, Ex. P. 5. Even before that, it would appear in January 1935—as appears from Ex. P. 4—that the accused had, in a covering letter, sent sometime in January 1935, stated that he had not sent the mortgage of Rs. 8000 along with the other deeds and documents which he had to hand over to the new solicitor. Mr. Pais is unable to recollect exactly what was contained in the covering letter, and at this distance of time, it is no wonder that he is unable to remember. He says, the accused did give some explanation for not sending the mortgage.

In these circumstances, it is for you to say whether as a matter of fact, even then the accused did not say that he was not sending the mortgage deed because it had been handed over to Mrs. Appaswami and that was done because the money had been paid. It however does not matter any way whether the accused informed the new solicitor of the French Mission in January or March 1935. There can be no doubt that at least in March 1935 the French Mission including Father Pinel knew that this money had been received by the accused as their agent and that the document had been handed back to Mrs. Appaswami. Nevertheless, you find the extraordinary fact that nearly six months afterwards, a correspondence is started by Mr. Pais with Mrs. Appaswami which proceeds on the basis that neither he nor the French Mission nor Father Pinel knew anything about the payment of this Rs. 8000 mortgage because in the first letter which starts the correspondence this mortgage is shown as subsisting. We have had no explanation for this extraordinary step taken on behalf of the Mission and, as it were, this attempt to make Mrs. Appaswami pay twice over the same debt. Anyhow a reply was sent on behalf of Mrs. Appaswami by another advocate Mr. Coelho (who is now a District and Sessions Judge) pointing out that the whole mortgage of Rs. 8000 had been discharged by payment in two instalments of Rs. 4000 each and that Mrs. Appaswami was in possession not only of the receipts granted by the accused but also of the original bond which had been returned to her by the accused. It was claimed on behalf of Mrs. Appaswami that payment to the accused was payment to the principal because the accused had authority to receive the payment on behalf of the principal. It was not contended therein that there was any entrustment, or that there was any direction given to the accused at the time the money was paid that he should pay it over to Father Pinel or pay it into the bank account of the Mission. On the other hand, the case put forward in that letter, Ex. D, dated 9th September 1935, is clearly to the effect that payment to the accused was payment to the principal, and these receipts were sufficiently confirmed, as it were, by the return of the original mortgage deed, and it was added in so many words in that letter that if the Mission had not received the money from the accused, that was a matter between the Mission and the accused with which Mrs. Appaswami had nothing to do, thereby showing clearly that at the time when that letter was written—presumably under Mrs. Appaswami's instructions—Mrs. Apppswami was not under any impression that when the money was paid by her to the accused, it was accompanied by a direction that he should pay it to Father Pinel or into the Mission's bank account at Madras.

An extraordinary coincidence in this case is that the complaint by the Registrar was sent just the day after the written statement had been filed by the accused in the civil suit instituted against him by the Mission. You have got evidence in this case that the civil suit was instituted in respect of the Mission's claim against the accused in which one of the most important items claimed related to the present amount of Rs. 8000. That plaint was presented on 18th February 1937, that is to say, very nearly two years after the accused had admitted having received the amount and acknowledged his liability to account for it, in case it was found that anything was due by him after the taking of accounts. A written statement was filed by the accused in which he raised the contention that this sum of Rs. 8000 was in his hands and that he had with the consent and knowledge of the plaintiffs adjusted the same towards the amount he was entitled to get from the plaintiffs as his remuneration for professional services rendered by him. His claim against the Mission for work done, for out of pocket expenses, etc., was very nearly Rs. 13,000, the plaint claim being very nearly Rs. 15,000. It was on the day after this written statement was filed that the letter of the Registrar was sent to the Police Commissioner and investigation began on the very next day; that is to say, the Registrar's letter is dated 16th March, the Commissioner's order sanctioning investigation is dated 17th March and the investigation was actually begun by the Sub-Inspector (P. W. 5) on 17th March 1937. Though the investigation was begun very promptly very little expedition appears to have been shown in the actual completion of the investigation. For, it is seen that the charge-sheet was not laid till nearly the end of July 1938; that is to say about 15 months after the commencement of the investigation—an unusually protracted investigation—considering the few witnesses examined before you and the comparatively simple point to be established in the case. Apart from that, you find there was considerable delay in the Magistrate's Court as the committal order was not pronounced till nearly the end of June 1939; that is to say, there was another delay of 11 months.

I am mentioning these delays to you, not with a view to express my dissatisfaction with the delays, but as features of the case which you are bound to take into account, because the greater the delay the less the chance for an accused to defend himself. You have to look at it from this point of view. The Crown which has considerable facilities at its disposal ought ordinarily, unless for very good reasons, be able to put alleged offenders on their trial within a reasonable time. It is not merely a question of enabling witnesses to have distinct recollection, though that is a very important one, because the greater the lapse of time, the fainter will be the recollection, at least of truthful witnesses who do not imagine or invent, but it becomes more difficult for the accused person to defend himself and all the more difficult if he happens to be an innocent man. You must therefore bear this delay in mind when you consider the question of the accused's not having clearly established what he did with this money. As a matter of law, I can tell you that such a consideration ought not to weigh in your minds, that the accused has not proved his innocence; it may be an ordinary man's outlook, but that is not the outlook of the law. You may well ask: Why cannot the man show that he is innocent if he is innocent? In the first place, he cannot go into the box and give evidence; the law does not allow it. Secondly, the cardinal or basic rule of the administration of criminal justice, according to British notions, is that the prosecution must prove the guilt of the accused, and that the accused need not prove anything. He is entitled to stand on the innocence which the law imputes to him till it is displaced. It is not for you or for me, gentlemen, to ignore this important rule of law.

Whatever your own individual notions of the wisdom of such a rule may be, it is a rule which has been described by a great legal authority as the golden thread which runs through the system of British criminal jurisprudence. It will never do for you to disregard or to ignore that rule, and that rule is all the more important to remember in a case like this, where, as I know, even judicially trained persons are apt to run away with the idea that if a man is shown to have been given some money or entrusted with it and he does not account for it, he must have embezzled or committed criminal breach of trust because it is for him to show what he has done with it; he knows it best and because he has not done it, he must have done something that is wrong and dishonest, that is, criminal misappropriation, with that money. I say that is not the law and I say it with all emphasis. I am glad that Mr. Jayarama Iyer for the accused brought to your notice what Lord Shaw said in a case which went up to the Privy Council from the Isles of Seychelles. It is a peculiar case but some of the words that he read to you are well worth a repetition from me. I shall preface my quotation with one observation. I am reading that to you to show that it is all important to make a distinction between a civil responsibility and a criminal responsibility or a civil liability and a criminal liability. You are not here to decide the question of civil liability. If I may say so, that question of civil liability has been decided in the best way possible in the High Court by mutual consent. That is the best kind of decision you can expect in the world. Parties themselves agree that such is to be the decision, and the Judge says "yes" after satisfying himself there is nothing illegal or improper about it.

It is very essential therefore in this case to remember that you have got nothing to do with the question of civil liability. It may be that the accused is civilly liable for the whole sum. It may be that his claim to appropriate the whole money towards fees is utterly indefensible. But what you have got to decide here is whether first of all he was entrusted with the money and it was not a case of mere payment to an agent with the idea of merely paying the principal thereby and nothing more. When the person making the payment does not look forward to any other thing or expect anything else to be done by the person receiving the money except that he should give receipts and hand over the document, or in other words, the payer is not interested to know what is going to be done with the money but merely says "It is his own affair. I do not care, I am satisfied if I get a receipt and the document;" in these circumstances, is it an entrustment of money? Secondly whether the accused did anything with that money which would show that it was a misappropriation? Misappropriation is the wrongful setting apart or assigning of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart. It is in this connexion that you have heard a fairly long argument addressed to you about the rights of an agent and the rights of an attorney and so on, to which I shall refer shortly. I am reading one or two sentences from Lord Shaw's judgment just to show that it is all important—and indeed of the greatest importance—that you should always bear in mind the difference between civil and criminal liability especially in dealing with a case of criminal breach of trust because it is not at all uncommon to find cases which are really nothing but cases involving civil liability somehow made to assume the form of criminal cases, and unless one is very careful, the person who gives such colour may succeed in achieving his object. As his Lordship says, and it is needless for me to add that what he says is of the highest authority; it is binding on me as well as on you:

> The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts.

That is to say, though it is necessary to preserve in its full implication and in its fullest measure the civil responsibility of one person in respect of property which he has received, it is quite a different matter when you come to deal with a crime alleged against him in respect of that property. Then he says:

> A Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind,

and he points out that in the case before him the Acting Chief Justice of Syechelles did not seem to have present to his mind the distinction between criminal liability and civil liability to account. That is the reason why I am repeating the same thing over and over again to you. It is all important for you to remember that you are not dealing with a civil case but with a criminal case, and you have to decide, not whether this money should be accounted for by the accused or should be paid by him and so on but whether he has committed any crime in respect of it. One thing I might mention that the mere fact that the accused failed to account for the money which he was entrusted with is not in law sufficient to establish that he has committed the offence of criminal breach of trust in the absence of other evidence, unless you prove some kind of conversion, i.e. a wrongful diversion to his own purposes or a purpose not consistent with law or with contract. In this case we have no evidence as to what the accused did with this money, namely Rs. 8000. It is really difficult for me to state the evidence in this case on this point. There was a vague mention—if I am not mistaken—in the opening speech of the Crown Prosecutor that the accused put this money into his own account with the bank. Now that the Crown Prosecutor says he does not recollect having said it, and Mr. Jayarama Iyer for the accused who according to the Crown Prosecutor said it, does not plead guilty to having said it, I think we may leave it out of account. But the point remains that it ought to have been possible, whoever said it or did not say it, for the Crown to show whither the money went and what the accused did with it. If he put it into his account, the account was available for the police for inspection and should have been put before you. Assuming for argument's sake that this

Rs. 8000 remained in that account all the time, that he did not actually draw it; if for instance in the account of the accused with the Bank all the time Rs. 8000 was kept without being touched, you cannot say that the mere retention was a criminal breach of trust. It was safer and wiser to keep it in a Bank than at home. I am mentioning this; merely keeping the money and not paying it over as required by law, that is to say, even when an agent may have no claim against the principal, even then if he retains it merely and does not pay it, but does not do anything else with it, there is no criminal breach of trust. It is only a civil liability, and of course the principal can at any time, if he chooses, compel him to pay, send him a notice and file a suit. A criminal complaint is not the way to get one's civil rights established. If money due to a particular person is not paid, the law allows only a civil suit and not a criminal proceeding, for in the case of mere retention without any misappropriation, there is only a civil liability. It may be he may have to pay interest; that is a different matter, that also is a civil matter. On the criminal side you can take it from me that mere rentention of money entrusted to a person without any misappropriation, even though he was directed by the person to pay it to so and so, or to deal with the money in a particular way, is not a criminal breach of trust; unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user there must be a dishonest intention. In the case of mere retention it is impossible to say it is dishonest. Apart from that, there must be some definite act to show misappropriation. Putting the money into one's own account in the bank may be misappropriation or may not be misappropriation. If it is drawn upon for his own purposes, it is misappropriation. You can then say he drew the money for his own use, but supposing he did not draw on it but kept the money in the bank there is no misappropriation, and no criminal misappropriation, because unless there is misappropriation there can be no question of dishonest misappropriation.

As regards the point of law which has been raised I do not think I need say much. It was by virtue of his position as the agent of the French Mission that the moneys were paid by Mrs. Appasami to the accused. That is clear from Mrs. Appasami's evidence. It is not because the accused was an attorney-at-law engaged as an attorney to receive this money that the money was paid by Mrs. Appasami. Mrs. Appasami says:

> I knew that he was dealing with such matters as receiving collections, granting receipts in respect of the properties belonging to the Mission in Madras and because he was an agent authorised to do all these things that the moneys were paid to him.

So the accused's position as an attorney on the rolls of the High Court has very little bearing on this case, except in so far as it supports his claim for remuneration for appearances and other expenses which he had to incur himself on behalf of the French Mission. So far as the case for the prosecution is concerned, it is not in his capacity as an attorney that he is supposed to have received the money but in his capacity as agent. The agent's rights are described in S. 221, Contract Act, which has been read to you. In substance the law on the point is as follows: An agent is entitled to retain goods, papers and other property, whether moveable or immovable which will certainly include money of the principal received by him until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for by him. As I understood the learned Crown Prosecutor, he laid stress on the saving clause 'in the absence of any contract to the contrary' and he referred to the evidence of Father Pinel on the point. I am unable to say that Father Pinel's evidence is very clear but you have heard it and I shall read to you the relevant portions in his evidence which relate to this matter and leave it to you to form your own opinion. He said at first that the accused had no authority to collect the principal. Later on, in his examination, he admitted that the accused could receive the principal but could not give discharge or claim commission on the principal amount. He added that he had no authority to retain any money received by him. Whether this represents Father Pinel's view of the law on the subject or whether there was any specific understanding or contract between the two that he was not to retain any money received by him is for you to decide. He added that the accused was to remit all the moneys to the Mission's account in the Chartered Bank. He also said that he never authorized the accused to utilize any portions of the collections for meeting any charges such as taxes or repairs and that the accused had no right to use any part of the collections for disbursing anything though he made an exception in the case of collections from Chetput market. He admitted in cross-examination that the accused had to look after the Mission's properties, to look after its investment and to look after the Court work also. He admitted that when accused files suits he has to incur expenses for court-fees and costs, and that he pays the municipal taxes and spends for repairs. He also added that no account was settled between the Mission and the accused during the four years the accused looked after the Mission's affairs and the accused's claims for remuneration or reimbursement were not gone into during that period. What is more important in this case to remember is that even if there was a contract to the contrary and the accused as agent had no legal authority to retain the money in his own hands, mere retention, as I have said already, will not be sufficient to show that he dishonestly misappropriated the money.

Another aspect of the case which bears on this point is the subsequent compromise of the suit between the Mission and the accused. It is admitted both by Father Pinel and Mr. Pais that a claim of nearly Rs. 15,000 was settled for Rs. 3000 of which Rs. 700 was paid in cash and a decree was taken for the balance of Rupees 2300. You will remember in this connexion that the remuneration claimed in the accused's written statement was very nearly Rs. 13,000. You will thus see that the settlement by the two parties was as it were a middle course.

The plaintiffs, that is, the Mission, gave up nearly Rs. 12,000 and the accused gave up about Rs. 2000. It is stated before you that both Father Pinel and Mr. Pais were satisfied that this was a reasonable settlement, or in other words, that the difference between what was claimed and what was accepted finally, represented what was just and reasonably due to the accused in respect of various claims for remuneration, out-of-pocket expenses and so on. If that is the case, it is obvious that whether he had a right to retain it or not, he must have retained it in the honest belief that he was entitled to do so when he had a just and reasonable claim to the extent of Rs. 11,000. If a man is proved to have had a reasonable claim against another for more than the sum of money belonging to the other in his hands, his retention of it, and even his user of it for his own purposes I would say, in law, would not amount to criminal breach of trust because the intention could not have been dishonest, that is to say, to cause wrongful loss or wrongful gain. You have to look at these cases from what I may call a common sense point of view. Did the man act as a criminal; did he act with a guilty mind and with the dishonest intention of walking off with somebody else's money? Or was he merely hanging on to it because he knew he was entitled to more than that? It is for you, Gentlemen of the Jury, to look at the case in that way. You have had some evidence as to how the accused was dealing with the affairs of the Mission. You know what large sums he has actually collected for the Mission and remitted into the Bank. You know his status, his antecedents, you know what he has done in respect of this money, and it is for you to consider all these circumstances and say whether it has been established to your satisfaction that he dishonestly misappropriated the money, provided you find in the first instance that there was an entrustment of that money to him. Unless there was an entrustment in your opinion you need not go further and trouble yourselves about the question whether there was a subsequent misappropriation and if there was, whether such misappropriation was dishonest. If there was no entrustment, the case goes and as I said, it is a question for you to decide whether in the circumstances there was an entrustment of this money to the accused by Mrs. Appasami. I would give one word of caution.

There was a so-called admission of entrustment in this case probably made without understanding what exactly it meant. Apparently what was meant was, the receipt of the money was admitted. Because it was put in the other way as admitting the entrustment, it does not mean that you are relieved of your duty of finding out whether there was entrustment. That admission should not be taken as settling that question because whatever the advocate may say, it is not binding on the accused; it is the accused's statement that you must consider. What he says is he has received the money. Let not any careless use of the word 'entrustment' in this connection lead you to think "There is the admission on the other side. Why should we trouble about it?" It is not so. It is an essential point for you to determine having regard to all the circumstances appearing in the evidence which surround the passing of the money from Mrs. Appasami into the hands of the accused. You must first decide what those circumstances are, what all happened at the time. And from those, can you say there was an express or implied contract that he would deal with the money in a particular way, if so, in what particular way, and whether he followed it, are questions which arise later. But if it was a mere payment and no entrustment as such, the transaction is not more than a payment. If the person paying intends to repose trust in the other expecting him to dispose of the money in a particular way, then only there is entrustment. The mere payment by a debtor to a creditor is not entrustment. Mere payment by a debtor to a creditor's agent is not entrustment. I lay stress on the word 'mere.' There may be circumstances from which you can say that it is not a mere payment but was something more than a payment. The trust you can infer either from express words or conduct. It need not be in any specific form of words. If you think that there was a trust in this case, then of course there would be an entrustment and not otherwise. I cannot put it more clearly to you. The word is a common word and I need not say more about it. I have gone so far just to make you understand the exact importance of the question which you have to solve or answer.

Only one other thing I wish to say to you. In this case the evidence could not have given you much difficulty, so far as the decision of its truth is concerned, because no witnesses were examined whose veracity was questioned; but if you have any doubt as to what is the reasonable or safe inference to draw from the evidence, that is, if you entertain any reasonable doubt it means that the prosecution has failed to establish the guilt of the accused and you have to return a verdict of not guilty. Gentlemen, please consider your verdict.

Verdict of the jury.

First Count.—Unanimously not guilty.

Second Count.—Unanimously not guilty.

Order.—In accordance with the verdict of not guilty returned by the jury, the accused is acquitted and his bail bond is cancelled.

C.R.K./D.S. *Accused acquitted.*

A. I. R. 1940 Madras 339

VARADACHARIAR AND ABDUR RAHMAN JJ.

Muthyala Ramachandrappa — Appellant.

v.

Muthyala Narayanappa and others — Respondents.

Appeal No. 189 of 1937 and Civil Misc. Petns. Nos. 4514 and 4356 of 1937, Decided on 26th August 1938, against decree of Dist. Court, Bellary, D/- 10th April 1937.

(a) Hindu Law — Partition — Mere fact that after division in status old manager enters into business transactions and junior members do not object will not justify inference that they adopt new business or become partners with erstwhile manager.

The proposition that after separation, the family business resembles an ordinary partnership and junior member is bound by every act done by the old manager which was prudent and necessary in the transaction of the business and conduct of the family affairs as if it had been his own is not correct in law unless there was evidence to show an express or implied agreement between the former joint owners to continue as partners after the separation. The mere fact that after the division in status the old manager enters into business transactions and that the junior members do not interfere with him or take objection to his doing business will not justify the conclusion that they adopt the new business as one carried on on their behalf as well or that they become partners with the erstwhile manager. Even if the business transactions entered into after the separation are of the same kind or on the same lines as the previous transactions, the business is in law a new business. [P 342 C 2; P 343 C 1]

(b) Hindu Law—Partition—Jewels proved to have been purchased with family funds—Onus to prove that by reason of gifts as stridhanam they have ceased to be family property is on those who deny their divisibility.

When there is prima facie proof that certain jewels were made or purchased with family funds or there is other proof that they are family jewels, the onus will be shifted on to those who deny their divisibility on the ground of their being stridhan, to prove that by reason of gifts as stridhanam they have ceased to be part of the family property. [P 345 C 1]

(c) Hindu Law—Partition—Manager collecting outstandings due to family cannot be said, till accounts are taken, to be debtor to other members and is not liable to pay interest on amount collected by him.

In partition proceedings the manager as a co-owner is entitled to collect the outstandings due to the family, and till the accounts are taken and the respective rights and liabilities of the parties are ascertained, it cannot be said that he is in the position of a debtor to the other members or in the position of one who is liable to pay over any particular sum then and there to the other members and as such liable to be called upon to pay interest in the event of non-payment. But in respect of whatever amounts he might be found liable to pay over to the other members under the final decree, he is liable to pay interest to the other members from the date of the final decree: *A I R 1936 Mad 12 and (1867) 2 Ch 225, Ref.* [P 349 C 1,2]

(d) Cosharers — Fraud.

The mere fact that in respect of an alleged disbursement of the amounts collected, the co-owner made fraudulent entries cannot be held to be fraud. [P 349 C 2]

(e) Hindu Law—Partition—Division of status —Coparcener is not entitled to take moneys for maintenance and other personal expense from common purse.

After division of status a coparcener is not entitled to take money for maintenance and other personal expenses from the common purse and such items cannot be treated as drawings debitable to the common account. [P 349 C 2; P 350 C 1]

(f) Hindu Law—Partition—Coparcener after division of status carrying on business and suffering losses — He is not entitled to remuneration from common account.

Where after division of status a coparcener has without any definite arrangement with other members merely continued to enter into new contracts for purchase and sale of goods and in the course of those contracts incurred enormous losses he is not entitled to be remunerated out of the common account for the period subsequent to the division of status. [P 350 C 2]

(g) Hindu Law—Partition—After division of status old manager continuing business — His position explained.

As long as the family remained joint the managing member enjoyed under the law, and not by any contract or arrangement, certain powers in respect of the carrying on of the family business; but on the disruption of the joint status, these powers so far as they rested only on his status as managing member must be held to come to an end. It is true that it may be sometime before the properties are actually divided between the members but in the meanwhile it is the duty of the person in possession or management merely to preserve the estate and not to enter into new transactions unless he is prepared to do so on his own responsibility or the new transactions are necessary merely to fulfil obligations already contracted or to prevent loss to the estate. From the mere fact that even after disruption the old manager continues to do business even if it be the same kind of business as before, it cannot be held that it is a family business or even that he is doing it or intends to do it on behalf of the other members of the family. The omission of the other members to object to his doing business will not of itself amount to an authorisation or even to a consent to the carrying on of the business on their behalf: *(1914) 1 Ch 604, Rel. on; A I R 1936 Mad 94, Expl.* [P 352 C 2; P 353 C 1]

There is no warrant for the contention that in every case in which there has been a joint family business, the result of the division of status in the family is to make the family members partners in any business that might thereafter be done by the former manager. [P 353 C 1,2]

B. Somayya and Kasturi Seshagiri Rao — *for Appellant.*

V. S. Narasimhachar and M. Guruswami Ayyar — *for Respondents.*

Judgment.—*Appeal No. 189 of 1937.*— This appeal arises out of a suit for partition between two brothers. The plaintiff is the second son of one Nagappa and defendant 1 is the elder son. Defendants 2 and 3 are the sons of defendant 1 and defendant 4 is the widow of Nagappa. Nagappa died in March 1921; and it is clear from the evidence that at his death, he left the family in very affluent circumstances. He was possessed of immovable properties of considerable value, of valuable jewels and of outstandings estimated at more than three lakhs of rupees, subject to payment of debts estimated at between Rs. 30,000 and Rs. 50,000. In the course of the evidence in this and the connected suits it has been suggested that out of the outstandings then due, considerable allowance must be made for bad debts; but beyond the suggestion, there is little evidence to show what the extent of the bad debts might have been. The parties belong to the Vysia community; and for some generations at any rate the family has been carrying on trade. There has been some dispute as to the nature of the business carried on during Nagappa's lifetime, particularly as to whether it included anything speculative; the materials before us are not full or clear as to this matter.

Between Nagappa's death and October 1926, the parties to the suit continued to remain joint. In the course of 1926, the relations between the two brothers became progressively less cordial. The plaintiff is said to have been sickly and weak minded and had no issue; it is nothing strange if in these circumstances the elder brother who had male children expected that in due course all the family property would pass to his branch by survivorship; a demand for partition on behalf of the plaintiff would not have been agreeable to him, especially if as has been suggested he thought that the plaintiff was being set up to make that claim by people behind the scenes. Whatever the motives of the parties and their advisers might have been, it is admitted that on 31st October 1926 the parties executed Ex. I, a muchilika in favour of three arbitrators asking them to divide the family properties. The proceedings before the arbitrators do not seem to have made smooth or rapid progress. The account books of the family were produced before them, some lists were prepared by them and the immovable properties seem to have been to a certain extent divided. It was only more than a year after the reference that one of the arbitrators died. It cannot therefore be that it was the death of one of the arbitrators that delayed the course of the arbitration proceedings. It appears from the evidence that soon after the execution of the muchilika the plaintiff thought fit to leave Bellary and he spent a considerable time at Sholingur. Far from attributing this step to any desire to give up the claim for partition the Subordinate Judge who heard the suit in the first instance held that the plaintiff whom he found to be a weak minded man must have resorted to this course with a view to avoid pressure from the elder brother and his friends to give up his claim for partition or come to terms with defendant 1. Seeing that the arbitrators did not effect a partition the plaintiff instituted this suit on 22nd March 1929.

The present appeal by the plaintiff is against the final decree passed in the suit and relates to two heads of claim, namely (1) jewels which must be treated as part of divisible property and (2) the liability of the plaintiff for debts incurred by defendant 1 or defendant 2 in connexion with the business conducted by them between the date of Ex. I and the institution of the suit and even subsequent to the institution of the suit. But in dealing with the arguments bearing upon these questions, it is necessary to refer in some detail to the course of the prior proceedings. The suit was in the first instance tried by the Subordinate Judge of Bellary, Mr. Venkataramayya Pantulu. Out of the issues framed in the case, it is sufficient for the present purpose to refer to issues 6 and 7 :

> Issue 6: what are the assets and liabilities of the family and from and up to what date is the account to be taken for effecting a division ? and issue 7 : whether any of the suit properties are stridhanam.

Under issue 6, the plaintiff's contention was that as the execution of the muchilika for arbitration had effected a division in status in the family, accounts ought to be taken of the assets and liabilities as on that date and that defendant 1 should be made liable to account to the plaintiff for all the income subsequently realized by him by the use of the joint family property but that the plaintiff should not be held liable for debts incurred in the course of the business carried on by defendant 1 or defendant 2 after that date. The defendants' contention was that there was no division in status resulting from the mere execution of Ex. I, that in any event defendant 1 must be regarded as having been in the position of a manager of the family properties upto the date of the institution of the suit and that accounts ought to be taken of the assets and liabilities as on the date of the institution of the suit. With reference to issue 7, the plaintiff alleged that the family was possessed of jewels and gold and silver of very considerable value and that the defendants were suppressing many items out of them and suppressing documents which would prove their existence. The plaint did not give details of these jewels, but merely gave an approximate valuation. Immediately after the institution of the suit, the plaintiff applied for the appointment of a commissioner to prepare an inventory of the moveables in the house of the defendants, but in the circumstances stated in Mr. Venkataramayya's judgment no complete inventory was prepared. The commissioner produced a list subsequently marked Ex. B, which was found in the iron safe in the family house, and this list referred to a number of jewels. The bearing of this document on this part of the claim will be discussed later on. In the written statement defendant 1 referred to a list, which he had given to the commissioner, of jewels which he admitted to be liable to division, and in answer to the claim put forward in the plaint under this head, he pleaded that that claim was in substance one for division of the stridhanam jewels belonging to the ladies of the family.

On issue 6, the learned Subordinate Judge held that notwithstanding the execution of Ex. I, the plaintiff had no right to ask for accounts to be taken as on its date ; he seems to have thought that as a matter of law defendant 1 continued to have all the powers of joint family manager till the date of the institution of the suit. He accordingly directed that accounts should be taken of the assets and liabilities of the family as they stood on the date of the plaint. In respect of liabilities incurred by defendant 1 after the institution of the suit, he took it for granted that the plaintiff could not be held liable therefor. Dealing with issue 7, he held that Ex. B might reasonably be taken as the basis to start from. The family admittedly maintained a book showing the jewels possessed by it from time to time ; the learned Judge was of opinion that this book which had been produced before the arbitrators was suppressed by defendant 1 during the trial of the suit. He declined to accept the defendants' case that certain entries in Ex B itself showed that all the jewels specified in Ex. B except those found in col. 3 must have been given away as stridhanam to the ladies in the family ; he observed that the three entries in Ex. B, relied on by the defendant, which refer to particular ladies being in possession of the specified jewels must have been interpolated by defendant 1 to serve as evidence in support of his contention. The rest of the document was admittedly in the handwriting of the father Nagappa; there was no reason why these entries alone should have been written by defendant 1; the entries are clearly in a different ink from the rest of the documents. As the learned Judge thought that an examination of the accounts might also be of use in dealing with the plaintiff's claim under this head, he left it to the commissioner, who was expected to determine the assets of the family, to determine also the jewels available for partition.

Against the directions given by the learned Subordinate Judge in his preliminary decree and judgment, both parties appealed to the District Court and the appeals were heard by Mr. Mackay. The learned District Judge did not agree with the lower Court as to the effect of Ex. 1 and he took the law as stated in 50 Mad 866,[1] namely, that when there has been a division in status, accounts must be taken as on that date and that in respect of subsequent transactions the person in possession of the family property will be bound to account for all receipts and expenses and can take credit for only such expenses as have been incurred for the benefit or necessity of the estate. But the learned Judge thought that where the family had a family business and the plaintiff who demanded partition did not object to the erstwhile manager carrying on business even after the demand for partition, the legal position would be different. We have had some difficulty — and the learned counsel who appeared for defendants has also felt as much difficulty as ourselves —in reconciling the observations in various portions of Mr. Mackay's judgment. As it was strenuously contended that this Court had accepted Mr. Mackay's findings when the case came before this Court on second appeal, we are obliged to refer to some portions of Mr. Mackay's judgment.

The basis of Mr. Mackay's decision seems to us to be contained in the following observation of the learned Judge:

> After Ex. 1, undoubtedly defendant 1 ceased to be the manager of the joint family; but he did not cease to be manager.

With all respect we are not able to appreciate the antithesis contemplated. The judgment proceeds:

> It is the plaintiff's own case that he had never taken any considerable share in the business, whether from indifference or incapacity and that since their father's death defendant 1 had been managing. The business had obviously to be carried on and defendant 1 continued it.

Stopping here for a moment we have to observe that the learned Judge was not right in saying that the plaintiff's case was that defendant 1 was managing, if he intended to suggest that the management of the business by defendant 1 after the date of Ex. 1 was admittedly on behalf of the plaintiff as well. All that the plaint said was that even after 1926 defendant 1 either in his own name or in defendant 2's name had been doing business and his complaint was that "defendant 1 and his son were wasting recklessly large amounts of money in various undesirable concerns." (*See* para. 10 of the plaint.) Our attention has not been drawn to anything in the plaintiff's evidence in the case which can be construed as any admission by him that after the date of Ex. 1, defendant 1 was carrying on business on behalf of the plaintiff. We may also observe that we are unable to see what the learned Judge seems to regard as something obvious, namely that the business had to be carried on and that therefore defendant 1 continued it. Lower down in the same paragraph, he observes:

> It is not a case in which he (the plaintiff) was excluded from taking his part in conducting the business throughout that period. He abstained from taking any part as apparently he had done prior to Ex. 1. He allowed defendant 1 to continue the management as he had done before.

Having stated these facts, Mr. Mackay concluded :

> Plaintiff by his conduct must be taken to have assented to defendant 1 continuing to transact business and defendant 1 must be held to have acted as his agent.

With all respect to the learned Judge, we are unable to agree that the facts set out in his judgment warrant the conclusion of law stated in the sentence last quoted. In the next sentence, he states the proposition that after separation, the family business resembles an ordinary partnership and as a corollary he holds that the plaintiff was bound by every act done by defendant 1 which was prudent and necessary in the transaction of the business and conduct of the family affairs as if it had been his own. The proposition above stated will not be correct in law unless there was evidence to show an express or implied agreement between the former joint owners to continue as partners after the separation. The mere fact that after the division in status the old manager enters into business transactions and that the junior members do not interfere with him or take objection to his doing business will not justify the conclusion that they adopt the new business as one carried on on their behalf as well or that they become partners with the erstwhile manager. Even if the business transactions entered into after the separation are of the same kind or on the same lines as the previous transactions the business is in law a new business. In the result, the learned Judge directed accounts to be taken as on the date of the plaint.

---

[1] **Sri Ranga Thathachariar v. Srinivasa Thathachariar, (1927) 14 A I R Mad 801=104 I C 472=50 Mad 866=53 M L J 189.**

Against the decision of Mr. Mackay the plaintiff preferred a second appeal (105 of 1932) which was heard by Krishnan Pandalai J. The directions given by this Court are contained in the concluding portion of the learned Judge's judgment. We have had elaborate arguments at the Bar as to the effect of those directions; we find it very difficult to accept the contention which seems to have prevailed in the lower Court that the effect of those directions was to leave defendant 1 practically in the position of the manager of a joint Hindu family even after the date of Ex. 1 and indeed even after the date of the institution of the suit and the application for the appointment of a receiver. The learned counsel for the defendants contended that these directions ought to be interpreted in the light of certain observations of the learned Judge in the course of his judgment and particularly of one sentence in the paragraph setting out the substance of the argument in the second appeal. In the preceding paragraph the learned Judge has, if we may say so, rightly pointed out the inconsistency between Mr. Mackay's directions and that portion of his judgment which purported to follow the rule in 50 Mad 866.[1] He next states that the correctness of the proposition laid down in 50 Mad 866[1] was not disputed before him. It is the next sentence after this that has formed the subject of discussion. The learned counsel for the defendants contended that in that sentence the learned Judge of this Court must be taken to have accepted what he wishes to treat as a finding of fact by the lower Appellate Court to the effect that even after the date of Ex. 1 defendant 1 was carrying on business on behalf of himself and the plaintiff to the plaintiff's knowledge and with his assent. So read, it is difficult to reconcile that sentence with the directions actually given by the learned Judge nor does such a reading fit in with the way in which the next sentence is introduced with the words

> in these circumstances, I think it necessary to amend the direction given by the learned Judge in the decree on the point.

We may also point out that, as we have already observed, it was not on any evidence bearing upon the question of agreement that Mr. Mackay made the observations which we have already quoted. He seems to have thought that when the plaintiff did not interfere with defendant 1 carrying on business after the date of Ex. 1 it followed as a necessary consequence that defendant 1 must be taken to have carried it on behalf of both and the plaintiff must be taken to have authorised it or agreed to it. It is true that in the evidence recorded in a later suit before Mr. Stodart, defendant 1 attempted to suggest that the plaintiff expressly authorized him to carry on the business as before and the present plaintiff denied it; but there was no such evidence in the partition suit and the other evidence was given before Mr. Stodart long after Mr. Mackay's judgment had been pronounced. There was indeed no such allegation in defendant 1's written statement in the partition suit, nor even in defendant 1's evidence in the partition suit. We do not therefore see any basis for the argument that there was a finding of fact by Mr. Mackay and we think there is even less basis for the suggestion that Pandalai J. was accepting any such finding of fact. The particular sentence relied on is perhaps worded in a manner open to criticizm; this seems to be the result of a correction in punctuation made by the learned Judge in the transcript of the shorthand judgment without fully realizing the effect of the correction. It seems to us much more likely that in this sentence the learned Judge was stating the argument advanced before him. Even assuming for a moment that he was stating his own conclusion, this sentence ought to be read in the light of the directions which he had himself taken care to frame.

We invited Mr. Narasimhachar to draw our attention to anything on the record from which an inference of an implied partnership might be drawn or even of an agreement authorizing defendant 1 to carry on business as before or on behalf of the plaintiff. He was not in a position to point to anything in the evidence in support of that suggestion. He was therefore driven to contend that, whether the evidence on record supported it or not, the matter had become concluded between the parties by reason of Pandalai J.'s judgment. Hence the necessity for scanning that judgment carefully. One thing is certain, that the learned Judge differed from the view of the lower Appellate Court as to the date with reference to which the accounts should be taken, because in cls. (a) and (b) of the concluding paragraph of his judgment, he directs accounts to be taken as from 31st October 1926, the date of Ex. I. Clause (c) has been relied on in this connexion by the defendant's learned counsel. It runs as follows :

> In taking the said accounts let there be a direction that defendant 1 is entitled to all just allowances on the footing that he was authorized to act bona fide for the benefit or necessity of the estate on behalf of both the plaintiff and himself and bound to exercise the diligence of a person acting on behalf of a co-owner as well as himself.

Mr. Narasimhachar laid stress upon the use of the word "authorise" and of the expression "bona fide" in this paragraph and contended that the learned Judge proceeded on the footing that defendant 1 had authority from the plaintiff in fact and that he was not thinking of the authority which in law he would have as a co-owner to manage the property for the benefit of himself and his co-owner. He also contended that if the latter was intended, the reference to bona fide was unnecessary. As against this, we would point out that this clause was meant as a direction governing not merely the accounts of the business but also the accounts relating to the other properties of the family. So far as these other properties are concerned, obviously there was no question of contractual relationship or agency, but merely the ordinary obligation of a co-owner. What is more significant is that the learned Judge made the direction apply not merely (as the lower Appellate Court did) to the period prior to the institution of the partition suit but even to a subsequent period, that is, down to the date of the receiver taking charge (i. e.), to a period extending to 20 months after the institution of the suit and several months after the plaintiff had applied for the appointment of a receiver. We are unable to accede to the suggestion that the learned Judge must have intended to hold that even after the plaintiff had filed his suit for partition and even after he had asked for the appointment of a receiver making allegations against defendant 1 that he was wasting the property, defendant 1 had implied authority to carry on the business or management on behalf of the plaintiff as well. All that Mr. Narsimhachar could say was that the learned Judge might have lost sight of this aspect of the matter. We see no reason to make any such surmise. On the other hand, the direction in cl. (c) specifically refers to the privilege of a person acting on behalf of a co-owner as well as himself; likewise when the learned Judge refers to authorization, he refers to authorization to act on behalf of "both the plaintiff and himself." It cannot surely be said that the word "authorized" when it refers to the defendants, was intended to refer to authority in fact. Taking the judgment as a whole, we hold that the learned Judge was giving effect to the law as stated in 50 Mad 866,[1] and applying it to the circumstances of the case he so worded cl. (c) as to cover both the kinds of accounts directed in cls. (a) and (b). If the learned Judge had in his mind any idea that the business was being conducted on foot of a partnership or an implied agreement, this was certainly not the kind of account that ought to have been directed in respect of a business so conducted. One would have accepted a direction of the kind familiar in partnership actions or some reference to transactions in the usual course of business or incidental to the business and not a restricted provision in favour of acts done for the benefit or necessity of the estate—the very expression found in 50 Mad 866.[1] We do not therefore accept the contention that there is anything in the judgment in S. A. No. 105 of 1932 which precludes the plaintiff from asking us to apply the ordinary law to the present case. On the other hand, the directions given in the second appeal are in conformity with the ordinary law, governing a family which had become divided in status.

* * * *

We now proceed to deal with the points arising for decision in the appeal. The defendants have filed a memorandum of objections, but the arguments have not been separately dealt with because the arguments bearing thereon are also part of the arguments in the appeal itself. Dealing first with the question of the assets available for division, the principal dispute under this head relates to the jewels which can be claimed by the plaintiff to form part of the joint family property.

There can be very little doubt that when there is prima facie proof that certain jewels were made or purchased with family funds or there is other proof that they are family jewels, the onus will be shifted on to those who deny their divisibility on the ground of their being stridhan, to prove that by reason of gifts as stridhanam they have ceased to be part of the family property. Issue 7 is rightly so worded as to throw the onus upon those who set up their stridhanam character. When he filed the plaint, the plaintiff was entitled to assume that the family account book in which admittedly the family jewels had been entered and which had been produced before the arbitrators would be available in the suit. That the family must have possessed jewels of considerable value has scarcely been disputed. D. W. 2 who was examined on behalf of defendant 1 says that even during Nagappa's father's time the family possessed jewels of the value of more than Rs. 30,000. Ex. B, whose genuineness is not disputed, also proves that during the last days of Nagappa, the family must have possessed jewels of considerable value. There is also the fact established by the account books produced in the case that year after year this family has been in the habit of purchasing gold and making jewels; and it is common knowledge that in this part of the country this is regarded as a method of investment or a convenient way of keeping money. When it was found that the family account book relating to jewels was not forthcoming, the plaintiff was obliged to fall back upon Ex. B. But as Ex. B was written so long ago as in 1920 and there was also the plea as well as the likelihood that some jewels must have been given as stridhanam to the various members of the family, the learned Subordinate Judge rightly left the matter to be determined by the Commissioner in due course with the aid of the accounts. The accounts produced go back only upto 1911, and the result is that barring Ex. B and a list marked Ex. AA., we have no documentary evidence as to the jewels possessed by the family prior to 1911; nor have we any documentary evidence as to the jewels given away as stridhanam either to defendant 4 or to the plaintiff's wife or defendant 1's wife.

Not merely the probabilities of the case but even the admissions of the plaintiff clearly establish that jewels of considerable value must have been given as stridhanam to the ladies, but the plaintiff has not chosen to give definite evidence as to what the stridhanam jewels given to his mother or to his wife or to his brother's wife are. Defendant 1's wife has not been examined; defendant 4 has given evidence, but though she is the mother of both the parties we are unable to accept her evidence without reserve, because she is obviously under the protection of defendant 1 and is attempting to support him as far as possible. Her sympathies are likely to be with him in the circumstances of the litigation already adverted to, namely that defendant 1 has children while the plaintiff has none and the family apparently suspects that the plaintiff is being set up by other person to make this demand for partition. It is certainly noteworthy that when she was asked to state what the jewels given to her were, she was unable and unwilling to enumerate more than four or five and merely stated that if the patti was read to her that she would be able to say what they were. We are unable to believe that any Hindu woman will be unable to say what the jewels presented to her by the husband's family are. That is the one thing they are keen about and they are sure to remember. A perusal of her evidence has left on us the impression that she was anxious as far as possible not to say anything that will conflict with the defendant's case that the entries interpolated by him in Ex. B represented the stridhana gifts to the various ladies and she therefore preferred not to enumerate the jewels given to her. The Commissioner has attached some importance to the circumstances that the jewels produced before him by defendant 4 and by defendant 1's wife seem to correspond to those specified in cols. 1 and 2 of Ex. B. This argument ignores the fact that defendant 1, his wife and defendant 4 are sailing together and defendant 1 can always persuade his wife and defendant 4 to produce these jewels, himself putting them in their possession at any time that he chooses. We are thus left without any positive evidence as to what the stridhanam jewels given by the family to defendant 4 and to the wives of the plaintiff and defendant 1 are. But in the nature of things these gifts must have been made quite a long time ago because such gifts would have been made either at the time of the marriage or in connexion with some other ceremonies of some importance. While we do not therefore rule out the possibility of stridhanam gifts to these ladies we are unable to decide what they are and when they were made.

In the circumstances, we are also unable to say positively what are all the jewels that came into defendant 1's possession after his father's death and what their value was. His learned counsel rightly argues that mere proof of the existence of jewels during the father's time or grandfather's time will not suffice to make his client accountable for their value. But as we have already observed, if defendant 1 had produced the book, which admittedly existed showing the family jewels and presumably also showing what has been given away to the various members of the family as stridhanam, he could well have exonerated himself from liability to account for more than what actually came into his possession. But if he chooses to suppress that book, it certainly does not lie in his mouth to contend that the plaintiff should give positive proof as to what came into defendant 1's possession after his father's death. Some confusion was caused by a statement of D. W. 2 that the arbitrators had prepared a copy from the jewels account book of the family. But it is clear from the evidence of D. W. 1 that this copy was merely prepared from the regular day books and ledgers and it only corresponds to the list which the commissioner has now made out from the account books available from 1911. In the circumstances, the commissioner was obliged to prepare a list from the day books and ledgers subsequent to 1911 in respect of jewels purchased by the family and jewels sold by the family or given away by the family. Some of the entries themselves state the purposes for which particular jewels were made or purchased; in other cases the entries are silent as to the purpose. The course finally adopted by the commissioner was to hold that the jewels shown in Ex. A and the jewels which he showed in Sch. H to his report as jewels found from the accounts to have been made or purchased between 1911 and 1930, would be prima facie available for division but that out of them the jewels shown in cols. 1, 2 and 4 of Ex. B, the jewels shown by the accounts entries themselves as having been made for particular members of the family, and the jewels shown in Ex. 13 and 15 should be excluded on the ground that they represented stridhanam gifts. As regards the jewels stated in the accounts to have been sold by defendant 1, the commissioner refused, except in a few cases, to allow a deduction in defendant 1's favour.

Before the lower Court, it was contended on behalf of the plaintiff that defendant 1 must be held accountable for all the jewels shown in Ex. B and the jewels shown in the commissioner's Sch. H. On behalf of the defendant, it was contended that the commissioner should have deducted the jewels shown by the accounts to have been sold away by defendant 1. The learned Judge substantially confirmed the commissioner's report in this respect except in respect of the jewels sold by defendant 1. It is this conclusion of the learned District Judge that has been challenged before us on behalf of the plaintiff. The learned counsel for the appellant has asked us to make every presumption against defendant 1 because of his suppression of the jewels account book and because of the way in which he has interpolated entries in Ex. B to support his defence that all the jewels in cols. 1, 2 and 4 of Ex. B have been given away as stridhanam to the ladies of the family. Mr. Somayya has even asked us to hold that the jewels shown in Exs. 13 and 15 as being the stridhanam property of the wives of defendants 2 and 3 may not be jewels given by the family at all and therefore no deduction ought to be made in defendant's favour on that account. He has also taken exception to the learned Judge's view as to the jewels sold by defendant 1.

We agree with the view taken by the learned Subordinate Judge who heard the case on the former occasion and with the view taken by the learned District Judge now that defendant 1 has suppressed the jewels account book and that his explanation for its non-production cannot be accepted. But while this may justify certain presumptions being drawn against him, it will not by itself justify the contention that none of the jewels shown in Ex. B could have been given away as stridhanam, nor will it enable us to give a decree in plaintiff's favour for an arbitrary amount under this head. It may be that defendant 1 acted foolishly in trying to insert into Ex. B evidence in support of the stridhanam plea. But it was open to the plaintiff to prove what really were the stridhanam properties of his mother, of his wife and of defendant 1's wife. Even his admission as to the stridhanam jewels of his wife clearly shows that jewels of considerable value must have been given as stridhanam jewels to the various ladies in the family. We are in these circumstances unable to go the length of holding that the jewels specified in Ex. B must necessarily have come into defendant 1's hands as part of the joint family property and still remained available for division, except to the extent admitted by him in Ex. A. We are however unable to concur in the view of the commissioner, which was confirmed by the learned District Judge, that even out of the jewels shown in the Commissioner's list, Sch. H, defendant 1 is entitled to claim that deduction ought to be made of the jewels specified in cols. 1, 2 and 4 of Ex. B. Merely from similarity or even identity or description or weight, it does not seem to us in a case like this reasonable to conclude that the stridhanam gift to the ladies must have been made out of the jewels specified in the Commissioner's Sch. H. As we have already stated, the stridhanam gift to defendant 4 and to defendant 1's wife must have been made long prior to 1911 and therefore could not have been made out of the jewels comprised in Sch. H of the Commissioner's report because these jewels were made or purchased only after 1911. If the defendants wished to maintain that even after 1911 stridhanam gifts were made in favour of defendant 4 or defendant 1's wife of any particular jewels it was open to them to prove such gift beyond doubt. The mere fact that stridhanam gifts in their favour are probable will not suffice in the circumstances to show that such gifts were made after 1911. On the other hand, we are unable to accept Mr. Somayya's contention that no deduction ought to have been made by the Commissioner even in respect of the jewels specified in Exs. 13 and 15. Defendants 2 and 3 were married only between 1922 and 1926 and it is not unlikely that the stridhanam gifts to their wives would have been made out of the jewels shown in the accounts as purchased or made between 1911 and 1930. The mere fact that it is not shown in the accounts that any particular jewel has been so given away or was made for such purpose is not by any means conclusive. Exs. 13 and 15 were allowed to be marked without any contest and no suggestion was made at the time, on the plaintiff's behalf, that the jewels shown therein were given to these ladies by the outsiders or were not given from out of the family properties. In these circumstances, we think the proper course will be to confirm the method adopted by the commissioner in this connexion except in respect of the exclusion which he made of the jewels specified in cols. 1, 2 and 4 of Ex. B.

As regards the jewels shown by the commissioner to have been sold by defendant 1, we are unable to agree with the view of the learned District Judge that they must be taken to have been accounted for by defendant 1 to the plaintiff. In the first place, that line of argument cannot be based on any presumption, because it was open to defendant 1 to show how these proceeds had been accounted for. If, for instance, he had applied the proceeds in payment of some debts not binding on the plaintiff, that would not be accounting to the plaintiff at all. Further there is no evidence that the jewels sold are jewels that were made or purchased subsequent to 1911. For aught one knows, they may be jewels or gold that were in existence in the family even prior to 1911 and we are not giving any decree to the plaintiff in respect of jewels that existed prior to 1911. We see no justification for the learned Judge excluding from the Commissioner's Sch. H, which only relates to jewels that were made or purchased subsequent to 1911, any items which have been sold by defendant 1. In respect of such jewels, we modify the decree of the learned Judge and restore the method of calculation adopted by the Commissioner. As we have already stated, the Commissioner's calculation must be further modified by disallowing the exclusion from his Sch. H of the items found in cols. 1, 2 and 4 of Ex. B.

Under the head of the assets, two more items remain to be dealt with. We have already referred to the fact that shortly before the receiver was appointed by the Subordinate Judge and even for some time after the appointment of the receiver, defendant 1 collected outstandings to a considerable extent. The account books produced by him purport to show that out of these collections, payments had been made to various creditors. Apart from the plaintiff's allegation against the binding character of the debts thus sought to be discharged, the plaintiff has also challenged the genuineness of the alleged payments in some cases. It was contended that they were mere fictitious entries in the books, made with a view to enable defendant 1 to retain for his own benefit the outstandings collected by him. Dealing with this objection the Commissioner found that in certain instances the plaintiff's charge was well founded and he accordingly held that the amounts shown as paid to creditors in those instances must be treated as not paid to anybody but as remaining with defendant 1 and hence available for partition. Before the learned Judge, defendant 1 took exception to this conclusion of the Commissioner. The learned Judge agreed with the view of the Commissioner on this point except in respect of one item, a sum of Rs. 5000 odd, purporting to have paid on 14th October 1930 to one Moolchand for Marvadi Asalaji to settle a debt found in the accounts from 1923 as due to certain other persons but shown in 1926 as due to one Gomaji. The allowance of this item in the defendant's favour has been objected to on behalf of the appellant.

That the circumstances under which the collection as well as the disbursement was made by defendant 1 justify scrutiny is a point that can scarcely be disputed. In the objection list which the plaintiff filed after inspection of the accounts produced by defendant 1, specific reference was made to this item of Rs. 5000 odd and it was challenged as a fictitious debt and a fictitious payment; and yet defendant 1 did not choose to lead any positive evidence on the point or even go into the box to depose to his own knowledge and part in the transaction. The plaintiff examined two witnesses, P. Ws. 5 and 6, two Marwari dealers in Bellary, and elicited from them that no Marwari firm of the kind mentioned in the accounts in this connexion existed to their knowledge or had money dealings in Bellary. We have little hesitation in this state of the evidence in finding that the payment has not been proved to be a genuine payment. The learned Judge differed from the commissioner on two grounds: (1) that P. W. 5 admitted that there existed somewhere a person called Asalaji Gomaji who died 20 years ago and that his son came here about five years ago; (2) that in the circumstances it was difficult to see how the defendant could have produced any further direct evidence than his own statement. As regards the second ground, we are unable with all respect to the learned Judge to appreciate it. As we have already pointed out, defendant 1 never cared to make a statement on the point from the witness box. If the learned Judge merely intends to refer to the statement in the account book, it will be an extraordinary way of holding that the genuineness of the payment has been proved, particularly when one has regard to the circumstances in which the transaction is said to have been brought about. As regards the alleged admission of P. W. 5 we do not see how that admission lends much support to the defendant. Read in the light of the rest of the evidence given by the witnesses it only means that Asalaji Gomaji was not a fictitious person but the evidence taken as a whole establishes that that person who died 20 years ago in Marwar never had money-lending transactions in Bellary; on that evidence it is impossible to hold that this Asalaji Gomaji became the transferee by an arrangement made in 1926 of debts due by defendant 1 to other persons in Bellary. It would certainly not have been difficult for defendant 1, if he so chose, to call the creditors in Bellary to whom on the face of the entries the original debt is said to have been due before it was transferred to Asalaji Gomaji. When it is remembered that the transactions are only of 1923 and 1926 we are unable to appreciate the reliance placed by the learned Judge upon presumptions in defendant 1's favour, when as already stated even defendant 1 did not care to go into the witness box to prove his story. The argument based by the learned Judge upon the non-inclusion of of this item in the list of liabilities, as it should have been if the discharge is not true, seems to us a non sequitur. In the situation in which defendant 1 stood at the time, it was not easy for him to arrange these things logically, whereas there was a strong temptation, if not necessity, to find some way of retaining for his own advantage as much as possible out of the collections which he undoubtedly made very improperly even after the Court had passed an order appointing the receiver.

Reference was made in this connexion to some statements contained in the evidence of defendant 1, when he was examined as a witness in one of the creditors suits, O. S. No. 15 of 1932. When he was cross-examined in that suit by the present plaintiff, questions were incidentally put to him in respect of this entry. These are his answers:

> On 13th October 1930 there is a debit entry against one Asaji Aslaji of Rs. 5699. That man is a man of Bellary. He is a man who lends money and trades. I do not know if he is in Bellary now. He was not in Bellary. He sent a letter to a Kamsala man called Kesoji and I paid the money to

Kesoji. That letter might be extant. It might be mislaid in the disturbance. Asaji Asalaji has his business in Bombay. He used to go to Bellary occasionally and lend money. I might have entered his address in my books.

Even Mr. Narasimhachar was not prepared to go the length of asking us to take these statements seriously. It is obvious that defendant 1 was not in a position to give any definite information as to who this Asaji Aslaji was, whether he was a man of Bombay, Bellary or of anywhere else. He was not in a position to give his address or produce any correspondence that passed between them. A statement in re-examination that Asaji Asalaji had been having dealings with him from September 1929 and that he took on the debt that he owed to Gomaji does not advance the position very much because it merely repeats what is found in the account books. The Court put a question to him what the address of Gomaji was; defendant 1 naturally said that he did not remember. When asked whether he had written any letters to him, he said "yes," and added that he had got letters from him, but none such has been produced. We must accordingly set aside the conclusion of the learned Judge as regards this item and restore that of the commissioner.

Mr. Somayya contended that in respect of items which according to the commissioner's report defendant 1 is found to have retained in his own hands notwithstanding the appointment of a receiver and even in defiance of orders passed from time to time as to paying the whole or portions thereof into Court, defendant 1 should be directed to pay interest as from the date of the collection or at least from the date of the Court's order appointing a receiver or directing defendant 1 to pay into Court. We do not find any justifiable ground for acceding to this contention. It may be unfortunate that defendant 1 thought fit to make in his accounts what we have held to be fictitious entries as to the disbursements of these amounts.

But as a co-owner he was entitled to collect the outstandings due to the family, and till the accounts are taken and the respective rights and liabilities of the parties are ascertained, it cannot be said that he is in the position of a debtor to the plaintiff or in the position of one who is liable to pay over any particular sum then and there to the plaintiff and as such liable to be called upon to pay interest in the event of non-payment. The circumstances in which a co-owner who has collected moneys due to himself and to other co-owners can be held liable to pay interest have been discussed in several cases. See for instance, 42 M L W 674[2] *cf.* also (1867) 2 Ch A 225,[3] though it did not relate to a co-owner. Mr. Somayya did not contest the general proposition as to the position of co-owners, but he contended that an exception has been made in cases where the co-owner who made the collection has been guilty of fraud. But we do not think that, the mere fact that in respect of an alleged disbursement of the amounts collected, the co-owner made fraudulent entries can be held to be fraud within the meaning of this principle. There is no doubt much force in the argument that it was the duty of the defendant to refrain from making any collection after the appointment of a receiver and that in any event he ought to have complied with the orders of the Court to the effect that part of the collections should be deposited in Court; but the consequence of any improper conduct of defendant 1 in this respect will be punishment by the Court for the alleged disobedience or contempt; it does not seem to warrant the award of interest in plaintiff's favour. Mr. Somayya is however right in his contention that in respect of whatever amounts defendant 1 might be found liable to pay over to the plaintiff under the final decree, defendant 1 is liable to pay interest to the plaintiff from the date of the final decree. This claim is supported even by the judgment in (1867) 2 Ch A 225.[3] We are inclined to think that the omission of a direction for payment of interest in para. 1 of the learned Judge's decree was probably due to oversight. The decree will accordingly contain a direction that the amount which may be found to be payable by defendant 1 to the plaintiff will carry interest at six per cent. per annum from 10th April 1937 up to date of payment.

Out of the moneys that came into defendant 1's hands by way of income or collections between 1926 and 1930, it is found from the accounts that he had drawn large amounts for personal purposes. Dealing with these items, the Commissioner held that they could not be treated as drawings debitable to the common account but must be debited to defendant 1 and his branch. He rightly overruled the contention of defendants 1 to 3 that they were entitled to take moneys for maintenance and other personal expenses from the common purse even after the date of Ex. 1. In the same view he debited against the plaintiff the amounts which had been paid to him under the orders of the Court for his maintenance. The learned District Judge agreed with the Commissioner's opinion that the contention that defendants 1 to 3 are entitled to maintenance from out of the joint account was untenable both under the general law and on any construction of the directions given by this Court in S. A. No. 105 of 1932. He however was of opinion that under the terms of those directions, the defendants were entitled to claim remuneration for the period between the date of Ex. 1 and the date of the receiver taking charge; and he fixed it at Rs. 300 a month. Mr. Somayya takes exception to this award of the learned Judge. It may be, as the learned Judge states, that the mere fact of a business ending in a loss will not always be a defence to a claim for remuneration by a person who conducted the business. But it is not always that a person is entitled to claim remuneration for what he did in connexion with a business; the law also knows of instances in which a Court will allow remuneration if at all only out of profits, if any had been made.

---

[2] Yasobadra Nainar v. Samanatha Badran, (1936) 23 A I R Mad 12=160 I C 602 = 59 Mad 154 =70 M L J 311=42 M L W 674.

[3] Blogg v. Johnson, (1867) 2 Ch A 225=36 L J Ch 859=16 L T 306=15 W R 626.

We would point out at the outset that the way in which the learned Judge has attempted to base his conclusion on the reference to "just allowances" in Pandalai J.'s judgment seems to us wholly foreign to the intention of the learned Judge of this Court. Either as a manager of a joint Hindu family business or even as managing partner or as a co-owner looking after the common business or property, defendant 1 would not ordinarily be entitled to remuneration at all. See Lindley on Partnership, Edn. 10, p. 468, as to partners and Freeman on Co-tenancy, Edn. 2, S. 260 as to co-tenants. It is only in very special circumstances, especially where a person who by contract has bound himself to give his services to the management of the business has in violation of his contract declined to do so, that remuneration has been allowed: *vide* 12 M L W 777,[4] and 16 C W N 299.[5] In connexion with dissolved partnerships, the question has frequently arisen whether a partner who has continued to trade with the assets of the old firm before a settlement of accounts is entitled to claim remuneration when the former partner claims a share in the profits of the new business. In that class of cases it has been held in England, that, while it is fair that the former partner should not claim a share of the profits, without a deduction by way of reasonable remuneration for management of the new business, the partner who continued the business is not entitled to claim remuneration except when profits have been made by the new business: *see* (1894) 2 Ch 97.[6] In the present case, what happened is, that without any definite arrangement with the plaintiff, who even according to the defendant's version left Bellary soon after Ex. 1, defendant 1 and defendant 2 merely continued to enter into new contracts for purchase and sale of grains, cotton, etc. and in the course of those contracts incurred enormous losses. We do not see any justification for the claim that in those circumstances defendants 1 and 2 are entitled to be remunerated at the rate of Rs. 300 per mensem out of the common account for the period subsequent to the date of Ex. 1. This allowance must accordingly be set aside and the commissioner's direction under this head will be restored. A point was raised before us that defendant 3 at least might be entitled to some remuneration. We do not see any difference in his position. If the business is to be regarded as a family business, he was equally a member of the family; but this is certainly a case in which he carried on business in his own interest and not for the benefit of somebody else. The mere fact that somebody else may be entitled to claim a share in the profits made by that business on the ground that his assets had been utilized in the business, will not give the person carrying on the business a right to remuneration. A familiar instance of this kind is the case of a trustee who utilizes the trust funds in carrying on a business. He may be subject to certain disabilities and to certain liabilities as the result of his conduct but he cannot claim any remuneration or advantage on that ground.

A further suggestion was thrown out before us that even if the claim for remuneration as such should be disallowed, it might be possible to bring a claim for at least some portion of the amount within the formula given in cl. (c) of the directions given by this Court in S. A. No. 105 of 1932 on the ground that some moneys must have been spent for the preservation of the estate. We think this claim is more theoretical than well founded on the facts of the case. No such separate claim was formulated before the commissioner or before the lower Court. Mr. Narasimhachar has attempted to explain that this was due to the fact that sufficient time was not allowed by the Commissioner to his clients to work out an independent list on these lines. But having regard to the general course of defendant 1's conduct and the way in which, far from preserving the family property, he has done his very best to ruin it so far as it lay in his power, we do not think it worth while to give any further opportunity to him or to his sons to see if any amount can at all be claimed under this new head.

---

[4] Krishnachariar v. Sankara Sah, (1921) 8 A I R P C 91=57 I C 713=12 M L W 777 (P C).

[5] Gokul Krishna Das v. Sashimukhi Dasi, (1912) 16 C W N 299=13 I C 23=15 C L J 204.

[6] In re Aldridge, Aldridge v. Aldridge, (1894) 2 Ch 97=63 L J Ch 465=8 R 189=70 L T 724 =42 W R 409.

Proceeding next to the liabilities to be provided for in the final decree, the learned Judge has directed that the plaintiff should be equally liable with defendants 1 to 3 for debts amounting to Rs. 1,11,938-4-9. The plaintiff takes exception to this direction. As shown by Sch. A to the Commissioner's report, the position on 31st October 1926, was that the family was indebted only to the extent of about Rs. 43,000, if we exclude item 3 therein which is really the amount set apart for charity which has been separately dealt with by the Judge and the outstandings due to the family at that time were as per Sch. B of the same report more than Rs. 1,80,000. The position in November 1930 was that taking the liabilities of the business carried on by defendant 1 and the liabilities of the business carried in the name of defendant 2, the total liabilities to outsiders, excluding the charity item, amounted to more than a lakh of rupees. In another part of his report it is pointed out by the Commissioner that between 1926 and 1930 the businesses carried in the names of defendants 1 and 2 brought on a loss of more than Rs. 75,000. Out of the outstandings due in 1926 some had been collected by defendant 1 even before the receiver took charge; of the remainder, it was stated that many had become bad debts; an auction sale of the debts between the plaintiff and defendant 1 realized only about Rs. 30,000. It is pointed out by the learned Judge that most of the debts which were found outstanding in November 1930 had been contracted in the course of that year itself and that the year 1930 was a year of particularly heavy loss in the business. On these facts, Mr. Somayya contends that the plaintiff cannot be held liable for any portion of the debts or at any rate he ought not to be held liable except to the extent to which it is shown that these debts were necessary or beneficial to the estate within the meaning of the direction in cl. (c) of the judgment in S. A. No. 105 of 1932.

It is no doubt theoretically possible that some of the existing debts might have been borrowed to pay off debts that existed even prior to 1926 and as such they might be binding on the plaintiff as well. But the investigation has not been directed to this aspect of the matter, in the view that the learned Judge took of the nature and effect of the directions in S. A. No. 105 which are no doubt binding as between the parties. The learned Judge recognised the significance of the circumstance that the directions then given by this Court do not make any distinction between the period anterior to the institution of the suit and the period subsequent to the institution of the suit. But he gives to that circumstance an effect and a significance which seems to us the very opposite of what must naturally be regarded as its effect or significance. As we have already observed, it surely could not have been the intention of this Court to make the plaintiff responsible for debts incurred by defendant 1 in carrying on business even after the institution of the suit. But because the learned Judge thought that it must have been intended to make the plaintiff liable for the business debts of defendant 1 between the date of Ex. I and the date of the institution of the suit he goes further and holds that the order makes the plaintiff liable even for debts incurred after the institution of the suit. With reference to the direction confining the allowances in defendant 1's favour to what has been done "for the benefit or necessity of the estate," the learned Judge states that that must be interpreted in the light of decisions laying down the powers of the manager of a joint family carrying on a family business during the joint stage itself and he accordingly holds that whatever debts had been incurred by defendant 1 in carrying on the business in the way in which he used to do before the division will be binding on the plaintiff. Incidentally, he dwells on the practical difficulty of otherwise carrying on a business and also of tracing the connexion between debts that existed at one time and debts that have subsequently been contracted and utilized in the discharge of pre-existing debts.

In answer to an argument that between 1926 and 1930 defendant 1 was carrying on business of a very speculative kind and incurring heavy losses in that connexion, he observes that the manager must conform to the necessities of the business world in which speculation is the very essence and he must be able to borrow for the purpose of investment at risk. When his attention was invited to the decision of this Court in 70 M L J 214,[7] as to the position of the erstwhile manager in relation to the family business when once a disruption in status has taken place, the learned Judge explains it away by observing that it only related to the claim of the creditors against the junior members and was not intended to decide the question of accountability as between the members of the family and he thinks that in any other view that decision cannot be reconciled with the decision of this Court in S. A. No. 105 of 1932. He also adds that many of the debts that existed in November 1930 must presumably represent the debts that existed in October 1926. It seems to us that this last statement is a gratuitous assumption; if only the learned Judge had remembered how much of outstandings had been collected by defendant 1 during that period it is hardly likely he would have made that statement. He winds up his discussion of this question with the observation that it is not necessary to investigate every item and require the manager to prove its necessity or benefit and that the plaintiff cannot escape the consequence of the business losses unless they are shown to have been the result of management that was not prudent and reasonable. He seems to think that the losses are the results of the ordinary risk of business and that there is no indication of recklessness in defendant 1's management. The learned Judge says at the end of para. 8 that no allegation appears to have been made against the truth of the accounts produced. It is difficult to reconcile this remark with the elaborate statement of objections filed by the plaintiff in which the genuineness of several payments entered by defendant 1 in his accounts has been challenged, particularly when it is remembered that the Commissioner as well as the Court has upheld this very objection of the plaintiff in some instances.

The question of the liability of the other members of the family for debts incurred by the former manager in the course of business carried on by him after a division in status, has been argued at some length before us, both on general principles and in the light of the directions and observations in S. A. No. 105 of 1932. The learned counsel for the appellant has relied upon the judgment in 70 M L J 214.[7] in support of his contention that in cases where a manager has been conducting a family business, his power to continue the business on behalf of all the members of the family ceases with the disruption of the joint status and that thereafter all that he is entitled to do is to take such steps as may be necessary for preserving it, but that he has no right to continue it. Mr. Narasimhachar, who appeared for defendant 1, suggested that it is difficult to appreciate the antithesis drawn by the learned Judges between taking steps to preserve the business and continuing the business. We fail to see any difficulty in appreciating that distinction. In the case of a dissolved partnership, for instance, it is well established what kind of transactions it is open to any of the partners to enter into so as to bind the other partners and what kind of transactions it is not open to them to enter into. Similarly in cases where a testator has been carrying on a business, decisions have had to consider the powers of the executor in continuing it. These decisions recognise that in the absence of express authority it is not open to the executor to continue the business except to the extent to which this may be necessary to sell it as a going concern, though it is also established that if the business carried on by the executor brings profit, such profits accrue to the benefit of the estate. It seems to us that a similar limitation on the powers of the former joint family manager is quite intelligible and justifiable in principle. As long as the family remained joint, the managing member enjoyed under the law, and not by any contract or arrangement, certain powers in respect of the carrying on of the family business; but on the disruption of the joint status, these powers, so far as they rested only on his status as managing member, must be held to come to an end. It is true that it may be some time before the properties are actually divided between the members; but in the meanwhile, it is the duty of the person in possession or management merely to preserve the estate and not to enter into new transactions unless he is prepared to do so on his own responsibility or the new transactions are necessary merely to fulfil obligations already contracted or to prevent loss to the estate. From the mere fact that even after disruption the old manager continues to do business even if it be the same kind of business as before, it cannot be held that it is a family business or even that he is doing it or intends to do it on behalf of the other members of the family.

---

[7] Ramasami Chettiar v. Srinivasa Iyer, (1936) 23 A I R Mad 94 = 162 I C 371 = 70 M L J 214.

We see little force in the argument based upon the fact of the omission of the other members to object to his doing business. We do not see what right they have to object. If he at least made it clear that he was doing it on behalf of the rest, some duty might lie on them to repudiate it; but if all that is known is that he did business, we do not see any justification for throwing upon the other members any obligation to repudiate. They might no doubt be running a risk in allowing their property to be dealt with by him in the course of that business but they might well have thought that his share of the assets would be sufficient security for their claims; or for other reasons they might not have cared to object. Such omission will not of itself amount to an authorization or even to a consent to the carrying on of the business on their behalf: See the observations of the Court of Appeal in (1914) 1 Ch 604.[8] In respect of transactions taking place after the disruption of status, the distinction between their status as tenants-in-common and a possible relation of partnership must not be lost sight of. In particular circumstances, the Court might even in the absence of an express agreement infer that in the business carried on after the division of status, the members of the family had agreed to become partners. This will have to be determined like any other case of implied partnership, without laying undue stress on the fact that prior to the division of status there was a joint family business. There is in our opinion, no warrant for the contention that in every case in which there has been a joint family business, the result of the division of status in the family is to make the family members partners in any business that might thereafter be done by the former manager. We do not see any justification for the distinction suggested by the learned District Judge between the position of creditors as against the members of the family and the position of the members of the family inter se. On questions of personal liability of the other members or matters of estoppel and holding out, there may no doubt be a distinction; but on the question whether the debts incurred in the course of the business subsequent to the division of status are or are not binding upon the family estate on the ground of the authority of the manager to carry on the business, we see no reason for applying one test when dealing with the claims of creditors and another test when dealing with the rights and liabilities of the members inter se. For reasons already explained we do not agree with the learned District Judge's view that there is any inconsistency between the decision in S. A. No. 105 of 1932 and the decision in 70 M L J 214.[7] The decision in the second appeal only recognizes the rights and privileges arising out of the situation of co-ownership and does not give countenance of any higher rights in the former manager. We are unable to agree with the learned District Judge that the observations contained in judgments defining the powers of the manager of a joint family business during the time that the family continues joint are applicable to any business which the former manager may do after the joint status has come to an end.

It was contended before us that where the family had a joint family business, the division in status alone does not put an end to the managership and that the former manager has independently of any contract or arrangement the same rights as before to continue the family business till he is actually displaced by the appointment of somebody else or by a division by metes and bounds. We see no warrant for this contention. The analogy of a Dayabhaga joint family was relied on and it was argued that after the division in status, a Mitakshara joint family must merely be assimilated to the Dayabhaga joint family. The analogy seems to us misleading. It is no doubt true that so far as the right of survivorship is determined by reason of the division in status in the Mitakshara family there is some analogy with the Dayabhaga joint family; but the position which the manager has under the law is one which is available to him only during the joint status. It has nothing to do with the existence or non-existence of the rule of survivorship. During the continuance of the joint status, the other persons have ordinarily no right to interfere with his management and are only entitled to demand partition; but, once the joint status is broken up, he has no status under the law as joint family manager and the privileges which attach to his position during the joint status cease; it does not seem to us to make any difference for this purpose that among the assets of the joint family there was also a family business. It is true that it may sometimes prove detrimental to the interests of the family if the family business should be suddenly stopped; but the decision in 70 M L J 214[7] recognizes a power in the former manager to take all steps necessary to preserve the business. It seems to us a travesty of facts to suggest that what happened in this case between 1926 and 1930 was only an attempt by defendants 1 and 2 to preserve the family business.

---

[8] In re Oxley; Hornby v. Oxley, (1914) 1 Ch 604 =83 L J Ch 442=110 L T 626=58 S J 319=30 T L R 327.

Mr. Narasimhachar contended that what the learned Judges in 70 M L J 214[7] meant was that the business should even after disruption be preserved as a "family business" and this, he argued, could be done only by the former manager continuing it as a family business. This overlooks the clear distinction that they draw between 'preserving' the business and 'continuing' the business. All that they meant was that its value as an asset should not if possible be allowed to be impaired. They might have referred to the preservation of the good will of the business if any and to all steps necessary to avoid loss to the family by breaches of contract already entered into or by omission to take steps to realize the assets of the business and so on. We are unable to agree that they intended to recognize an unlimited power in the manager to enter into new transactions merely on the ground that the transactions are of the same kind as used to be entered into during the joint stage. Where, as in the present case, the nature of the business is undoubtedly attended with risk and involves an element of speculation, the limitation imposed by the learned Judge seems to us all the more necessary. It appears from the evidence in the case as well as the evidence adduced in some of creditor's suits that what defendant 1 did during the years 1927 to 1930 was that either in his own name or in the name of his son defendant 2, he entered into extensive contracts for the purchase of cotton, ground nut, rice and other commodities and entered into other contracts for their sale. In many instances, especially in the later years, he had to borrow money from marwadis to purchase these goods and the conditions of the market at the time were such that prices fluctuated much and it turned out that he had to sell at much lower rates than he purchased at. That is how, as pointed out by the Commissioner, defendant 1 and defendant 2 incurred a loss of nearly Rs. 75,000 during these four years. When asked why he continued to do business and even continued to borrow for making these purchases in spite of his having incurred loss and in the then existing market conditions, all that defendant 1 could say was that he merely did what other people were doing and that he could not have otherwise traded.

The learned Judge thinks that this was a normal course of business, having regard to the nature of the trade that the family had been engaged in before. It is not easy to concur in this opinion. If a man is dealing with his own moneys and trading at his own risk, he is of course at liberty to incur the risks of trade and investments; but to the extent to which he seeks to bind other people and their property by his transactions, it does not seem to us right to apply the same test, viz., whether from his own point of view he was acting in the usual way of trade or not. It is true that the Privy Council have laid down that even when there have been losses in the business, the question as to whether the trade is to be continued or not must ordinarily be left to the discretion of the joint family manager; but as we have already observed, this principle cannot be extended to the stage when the joint family has ceased to exist and the person doing the business is no longer the manager of the joint family. We must accordingly hold that the grounds on which the learned Judge has held the plaintiff to be equally liable with defendants 1 to 3 for the debts referred to in the judgment and decree are not tenable. He must have applied the test of benefit or necessity in the sense in which it is applied in respect of property belonging to co-owners, independently of the special considerations applicable to the manager of a joint family business or even to partners. He was not right in thinking that it was not necessary to investigate the several items of debts individually. We do not agree in his view that it will involve an impossible burden to insist on such proof in respect of each item of debt. It was certainly the duty of the first defendant in the circumstances so to keep his account as to furnish materials necessary for affording such proof.

We have been asked by Mr. Narasimhachar to give his client a further opportunity to prove the binding character of all or at least some of the debts, with respect to the tests now laid down by us. In dealing with this application, we cannot ignore the considerations we have adverted to in an earlier portion of this judgment, as to the way in which defendant 1 has withheld information and help from the Court in the conduct of this case. There is also the fact that from a very early stage the plaintiff's counsel has been insisting that it is only by satisfying this test that defendant 1 can hold the plaintiff liable for the debts contracted by him. This is made clear by the numerous petitions that have been filed on the plaintiff's behalf. Defendant 1 cannot therefore say that he has been misled by anything said or done by the plaintiff. Even before the Commissioner on whose report the final decree was passed, it was stated on behalf of the plaintiff that the question of the plaintiff's liability for the debts must be determined by the Court and the Commissioner accordingly referred it to the Court. It has not been suggested before us that defendant 1 desired to adduce any evidence before the Court and that the Court shut out such evidence. We may also point out that the terms of the directions given in S. A. No. 105 of 1932 clearly throw the onus upon defendant 1; and whatever interpretation may be put upon other parts of the judgment we cannot accept the contention that defendant 1 was left in any doubt as to where the onus lay. We have also had our attention drawn by Mr. Narasimhachar himself to the evidence of defendant 1 in some of the creditor's suits. Those suits relate to some of the items comprised in the total of Rs. 1,12,000 referred to in the lower Court's decree ; in none of them was the attempt to connect the later debts with pre-existing debts successful. Indeed, we are inclined to think that in view of the course of dealings spoken to by defendant 1, there cannot be anything like a connexion in most cases between old debts and the new. What happened seems to have been that debts were borrowed from time to time either to make purchases of goods or to pay off losses incurred in connexion with the particular contracts. The mere fact that these new transactions were entered into by defendant 1 in the hope that out of any profits that he might make in them, he might pay off the old debts will not by itself connect the new debts with the old, so as to make new debts binding upon the plaintiff on the ground that the older debts might have been binding. There is also the fact that on the date of Ex. I, the debts as shown by the Commissioner were only Rs. 40,000 excluding the charity amount and there were outstandings of considerable value. Defendant 1 has also been in receipt of a decent income from the immovable properties of the family during the interval. Even if in some instances it should be found that moneys had been borrowed to pay off some items of debts that existed prior to November 1926, it would not necessarily follow that the plaintiff is liable for such new debts, unless it can also be shown that the older debts could not have been otherwise discharged. If, for instance, as is clear at least to some extent, defendant 1 should realize the former outstandings and utilize them for his own advantage or for paying off his personal debts and then borrow new debts to pay off the pre-existing debts, it will be difficult to maintain that merely on the ground that the money thus borrowed was utilized to pay off the old debts the plaintiff can be held liable for the new debt.

Having given the matter our best consideration, we cannot help thinking that defendant 1 and his advisers could have been under no misapprehension as to what they had to prove but that in the light of what they knew as to the nature of the business and of the transactions entered into by defendant 1 between 1926 and 1930, they must have thought that the only contention which they could possibly hope to succeed on was the line they adopted, viz., that under the law or at least by reason of the directions given by this Court in S. A. No. 105 of 1932 defendant 1 was justified in entering into the transactions that he entered into between 1926 and 1930. As in our opinion this contention cannot prevail, defendant 1 must fail and we see no justification for granting his request for a further opportunity of adducing evidence after the lapse of nine years since the litigation began and after all the investigations that have been made in the meanwhile and the apathy if not obstructiveness which defendant 1 has shown in helping that investigation. In the result, we set aside the declaration that the plaintiff is liable for the debts referred to in para. 3 of the decree of the lower Court.

It has been brought to our notice that some proceedings are pending in the lower Courts and that in some of them the creditors seek to recover debts that came into existence even before the date of Ex. I or debts which might otherwise be found to be binding on the plaintiff as well. It is sufficient to say that those creditors are not parties to these proceeding and if the evidence adduced in any particular case proves that the debt therein claimed was also binding on the plaintiff, nothing that we have said in this judgment will prejudice the rights of such creditors. With reference to the amount which by para. 4 of the lower Court's decree the parties are directed to pay in equal shares to the annachatram, it has been brought to our notice that the lower Court was in error in directing interest to be paid from 28th March 1922 and it was said that the correct date from which interest should run is 28th March 1926. Both sides agree to this correction being made. Para. 4 will accordingly be corrected by inserting 1926 in place of 1922. Mr. Somayya complains that as regards the immovable properties allotted to the plaintiff at the partition, some difficulty is being raised in the way of the plaintiff taking possession thereof. Mr. Narasimhachar denies that there is any such difficulty. We do not wish to say anything that may create further difficulties, but we see no objection to granting Mr. Somayya's request that cl. 2 of the final decree may be modified by inserting the words "possession of" between the words "take" and "the immovable property"; and also between the words "take" and "the lands" occurring later in the same clause.

With reference to the management of the charity, Mr. Somayya asked us to make some provision for his client also participating in the management. We are not disposed to accede to this request at this stage. For one thing, we are not by any means certain as to how far it will be conducive to the interests of the charity to make the plaintiff and defendant 1 joint managers, having regard to the very unfortunate relations that seem to have developed between them in the course of this litigation. We think it better to leave this question of management to be dealt with in appropriate proceedings in which the interests of the charity will be properly represented and safeguarded. A revised decree will be drafted carrying out the directions contained in this judgment. As regards costs, we see no justification for the direction in the lower Court's decree that the plaintiff should pay Rs. 73-2-8 to the defendants. The amount may be small but the direction seems to us wholly unwarranted. We do not however wish to interfere with the lower Court's order except to this extent. The direction that the plaintiff should pay Rs. 73-2-8 to the defendants will be deleted. As regards the costs of this appeal, the position is that the appellant has succeeded in respect of a major portion of his claim in the appeal. Defendants 1 to 3 will therefore pay three-fourths of the costs of the appellant in the appeal. The memorandum of objections is dismissed; but there will be no separate order as to costs therein.

C.R.K./D.S. *Order accordingly.*

✲ ✲ A. I. R. 1940 Madras 356

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Gundavarapu Seshamma — Appellant.

v.

Kornepati Venkata Narasimharao and others — Respondents.

Second Appeal No. 174 of 1936, Decided on 16th November 1939, against decree of Sub-Judge, Guntur, in A. S. No. 25 of 1935; referred to the Full Bench by Abdur Rahman J.

✲ ✲ **(a) Hindu Law— Adoption — Adoption by widow of member of divided family with consent of nearest sagotra sapindas of her husband is valid even if she has not consulted daughter's son :** *49 Mad 652=A I R 1926 Mad 881=95 I C 651, Overruled.*

An adoption by a Hindu widow is valid when the family is divided and she has obtained the consent of the nearest sagotra sapindas of her husband, but has not consulted a daughter's son, he being of age. In other words, the Hindu law does not demand that the daughter's son shall be consulted, if he is of age, before the widow can adopt provided that the proposed adoption has received the approval of her husband's nearest agnates : *A I R 1920 Mad 451 and A I R 1934 Mad 191, Rel. on; 49 Mad 652=A I R 1926 Mad 881 = 95 I C 651,* **Overruled**; *View of Ramesam J. in A I R 1925 Mad 67, not approved; Case law reviewed.* [P 357 C 1; P 361 C 2; P 362 C 1]

(b) Precedents — Decision of one Division Bench is binding on subsequent Division Bench— If it disagrees proper course is to refer matter to Full Bench.

While a Judge of the High Court sitting alone is not bound on a question of law by the decision

of another Judge sitting alone, this principle goes no further. The Division Bench is the final Court of Appeal in Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench, for which rules of High Court provide. [P 362 C 2]

V. Govindarajachari and M. Harisarvothama Rao — *for Appellant.*

P. Satyanarayana Rao, V. Subramaniam and V. Satyanarayana — *for Respondents.*

Leach C. J. — The question which the Court is called upon to decide in this appeal is whether an adoption by a Hindu widow is valid when the family is divided and she has obtained the consent of the nearest sagotra sapindas of her husband, but has not consulted a daughter's son, he being of age. In other words, does the Hindu law demand that the daughter's son shall be consulted, if he is of age, before the widow can adopt, notwithstanding that the proposed adoption has received the approval of her husband's nearest agnates?

In this case one Kornepati Lakshminarayana died divided from his brothers. He was survived by his wife Subbamma and his two daughters, the appellant and one Rathamma, who is now dead. The appellant has four sons who have not been made parties to this litigation. Rathamma had two sons, respondents 5 and 6. In the year 1916, about 40 years after her husband's death, Subbamma adopted a boy named Narasimharao, the son of respondent 3. Before the adoption took place, Subbamma obtained the consent in writing of her husband's nearest agnates, respondents 2, 3 and 4, who are the sons of her husband's brothers. The adopted boy died and Subbamma then adopted with the like consent respondent 1, the son of respondent 2. It is common ground that the adoption ceremony was duly performed and that the appellant's sons, all of whom were majors, were present. Subbamma died on 23rd April 1930, and after her death the appellant instituted in the Court of the District Munsif of Guntur the suit out of which this appeal arises for a declaration that the adoption was invalid and for possession of her father's estate. Various pleas were raised, but for the purposes of the appeal it may be taken that her only ground for challenging the adoption was, that one of her sister's sons, respondent 6, who was a major at the time of the adoption, was not consulted and that he had not intimated his consent to the adoption taking place. Why the appellant did not join her sons as parties to the suit is explained by the fact that they were present at the adoption ceremony and she was unable to contend that they were not consenting parties. The position then is this. The nearest sagotra sapindas gave their express consent to the adoption, the appellant's own sons impliedly gave their consent, but the major son of the appellant's sister was not consulted and did not signify his acquiescence. The Court has been given to understand that the other son of Rathamma was a minor at the time. The District Munsif held that the adoption was valid and on appeal the Subordinate Judge of Guntur concurred in his decision. The appellant then filed this second appeal which has been placed before a Full Bench for decision as there is a conflict of authority in this Court on the question whether it is necessary to consult a daughter's son when the widow of a member of a divided Hindu family adopts a son to her husband without authority to adopt having been given by her husband.

The position of a daughter's son under Hindu law is a special one. While he is not a sagotra sapinda, but a bandhu, he is given the right of succession to his maternal grandfather's estate after the death of his maternal grandmother and his mother when the maternal grandfather has left no son, grandson or great grandson through the male line. According to the Mitakshara law of succession, the agnatic kindred are as a general rule preferred to all cognates, irrespective of proximity of relationship. In the absence of a direct descendant in the male line down to three degrees, the widow, however inherits the estate, and after her, the daughter and the daughter's son. These three come in before all other agnates except the three descendants in the direct male line. The precedence of the widow is due to the theory that she is the surviving half of her deceased husband, and the daughter comes in next because she equally with the son proceeds from the limbs of the father. The special position of the daughter's son is based on ancient texts. Vishnu says: "In regard to the obsequies of ancestors, daughter's sons are considered son's sons," and Manu:

> Between a son's son and the son of a daughter there exists in this world no difference; for even the

son of a daughter saves him (who has no sons) in the next world, like the son's son.

It is clear that the priority given to the widow, the daughter and the daughter's son over agnates not in the direct male line of descent can only be regarded as an exception to the general rule. There is no textual authority bearing directly on the question raised in this appeal, at least none has been quoted to us, and in the course of the argument the Court has been given to understand that none exists. The question admittedly falls to be decided on the principles to be gathered from the decisions of the Privy Council relating to the widow's right to adopt under the Mitakshara law as applied in the Madras Presidency, but the question whether the daughter's son has the right to be consulted before the widow adopts a son to her deceased husband without authority from the husband has not been raised directly before the Judicial Committee. Four Division Benches of this Court have considered the judgments of the Privy Council in cases relating to the widow's right to adopt and there has been a marked divergence of opinion as to their effect in a case like the present one. In order that there may be some finality so far as this Court is concerned on the question of the meaning to be attached to the decisions of the Judicial Committee, it is necessary that they should again be examined and that this Full Bench should decide their bearing in this connexion.

In 12 M I A 397,[1] which is known as the *Ramnad case*, the Privy Council definitely laid down that according to the Mitakshara law as administered in the Madras Presidency, a Hindu widow, not having her husband's authority to adopt, could lawfully adopt a son to him, if the adoption was authorised by the consent of his "kinsmen." With regard to the question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, their Lordships in that case observed:

> Where the husband's family is in the normal condition of a Hindu family, i. e., undivided that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive.

So far as the divided family is concerned it will be observed that the Board here held that: (1) the assent of "kinsmen" is required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption; (2) the consent of the father-in-law, the "venerable protector" of the widow, would be sufficient; (3) when the father-in-law is dead it is not easy to lay down an inflexible rule; every such case must depend upon the circumstances of the family, and there should be such evidence of the assent of "kinsmen" as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive. In the *Ramnad case*, 12 M I A 397[1] the nearest agnates were the mother-in-law of the widow and the natural brother of the adopted boy, and it was held that their consent was sufficient. No cognate was consulted. In all the decisions of the Privy Council bearing on this question, except one, there were agnates living. In the one exception there was no evidence as to what agnates were in existence, and so far as the main claimant was concerned the case turned, not on the consent of cognates, but whether there was an implied authority to adopt independently of any consent. I shall make further mention of this case later. In 1 Mad 69[2] the Judicial Committee made the following observations, which have an important bearing on the matter under discussion, notwithstanding that there the family was undivided :

---

[1] Collector of Madura v. Mootoo Ramalinga Sethupathi, (1867-69) 12 M I A 397=1 Beng L R 1 = 10 W R 17 = 2 Sar 361=2 Suther 135 P C).

> The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that as a widow, she has her claim for maintenance. It is in that family that in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her.

The daughter's son is not of the family. He is a member of his father's family and therefore clearly does not come within this statement. Their Lordships in this case also observed :

> It may be the duty of a Court of Justice, administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and, it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property.

Here emphasis is placed on the necessity for advice in order to prevent the widow acting capriciously or from corrupt motives. In 1 Mad 174,[3] the Privy Council considered the passage in the *Ramnad Case* 12 M I A 397,[1] immediately following the statement that it was not easy to lay down an inflexible rule for the case in which no father-in-law was in existence and said :

> Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

There is no reason to suppose that the word "family" was here used in a sense different from the strict sense in which it was used in the passage which I have quoted from the judgment in 1 Mad 69.[2] A Hindu widow having no authority to adopt cannot ignore the nearest sapindas. If she does and acts only with the consent of remote sapindas the adoption is invalid. This was the decision of the Privy Council in 41 Mad 998.[4] The widow there adopted without the consent of the nearest agnates and the adoption was held to be invalid. The judgment of the Board was delivered by Mr. Ameer Ali, who said that the *Ramnad Case*, 12 M I A 397,[1] established the proposition that under the Dravidian Branch of the Mitakshara Law, in the absence of authority from her deceased husband a widow may adopt with the assent of her "male agnates" (p. 1004 of the report.) At p. 1009, Mr. Ameer Ali said :

> The decision in the *Ramnad Case*, 12 M I A 397,[1] was followed and explained in 1 Mad 174[3] which established the following proposition : That the requisite authority in the case of an undivided family is to be sought by the widow within that family ; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by "community of corporal particles." The father of the deceased, if still alive, continues to be her "natural guardian and venerable protector.". He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has a right to the reversion. His authorization is, therefore, essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest sapindas; they become her natural guardians and protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father, the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the

---

[2] Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo, (1876-78) 1 Mad 69 =3 I A 154=25 W R 291=3 Sar 588 (P C).

[3] Vellankin Venkata Krishna Rao v. Venkata Rama Lakshmi, (1876-78) 1 Mad 174=4 I A 1=26 W R 21=3 Sar 669 (P C).

[4] Veerabasavaraju v. Balasurya Prasada Rao, (1918) 5 A I R P C 97=48 I C 706=45 I A 265=41 Mad 998 (P C).

widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives.

We have here a reiteration of the principle stated in the *Ramnad case*, 12 M I A 397,[1] that the consent of the father-in-law, if still alive, is essential to a lawful adoption and the equally positive statement that in the absence of the father-in-law the consent of the divided brothers of the deceased husband is requisite. The daughter's son in the matter of succession excludes the deceased's father and his brothers, but this judgment clearly lays down that they come before all others when it is a question of advising the widow on a proposed adoption. In my opinion the judgment does not confine the priority to the father and the brothers. The words "she is still dependent for her counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by 'community of corporal particles'," indicate that the priority extends to all the agnates, the nearer, of course, excluding the more remote. But if there were any doubt it would be eliminated by the following statement at p. 1011 of the report:

> The reasons which make the assent of divided brothers a requisite condition apply mutatis mutandis to the case of the nearest sapindas other than brothers.

The word "sapindas" can only be read here as denoting agnates. It is true that in 41 Mad 998[4] it was said that the decisions in the *Ramnad Case*, 12 M I A 397,[1] and in 1 Mad 174[3] show clearly that the rights to property cannot be left out of consideration in determining who should be consulted before a widow of a separated brother makes an adoption. But this statement was made in connexion with the rule which was being laid down that in the absence of the father-in-law the brothers should be consulted. In the absence of a daughter's son they would be the nearest reversioners and their contingent right to the property was given as an additional reason why the brothers should be consulted. I am unable to read into the judgment in 41 Mad 998,[4] an indication that right to property is to be the governing factor; in fact when the authorities are considered as a whole it seems to me that the indication is all the other way. In 43 Mad 650[5] Viscount Cave after reference to the *Ramnad Case*, 12 M I A 397,[1] and to the case in 41 Mad 998[4] said:

> The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however be added that, save in exceptional cases such as those mentioned above, (where the near agnate is a minor or lunatic or actuated by corrupt or malicious motives) the consent of the nearest sapindas must be asked, and if it is not asked it is no excuse to say that they would certainly have refused.

There could be nothing plainer than this statement. The nearest agnates who are capable of forming an intelligent and honest judgment have to be consulted in the matter of a proposed adoption by a widow. It will be observed that the word "sapindas" is used in this passage and that the context demands that it be read as meaning "agnates." In 69 M L J 388,[6] the Privy Council, observed:

> The sapindas are to be regarded as a family council, 1 Mad 174,[3] the natural guardians of the widow, and the protectors of her interests. In giving or withholding their consent, it is their duty, in this capacity, to form an honest and intelligent judgment on the advisability or otherwise of the proposed adoption in, and with reference to the widow's branch of the family.... Their Lordships have no hesitation in holding that where a sapinda whose consent to an adoption is sought, is actuated by motives such as these, (personal loss to himself and enmity) his dissent may be disregarded, and they think it follows that if only the other sapinda in the same degree accords a bona fide consent, the adoption will be valid.

The judgment in 43 Mad 650[5] was referred to in this judgment and it is to be presumed that the word "sapinda" was used in the same sense. On behalf of the appellant great stress has been laid on a short passage in the judgment of the Privy Council in I L R (1938) Mad 551.[7] This is the one case in which there were no agnates living and the decision turned on the question whether there was implied authority to adopt, independently of consent by sapindas. The passage on which reliance is placed by the appellant is this:

> Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates.

It is said that this means that in using the words "kinsmen," "kindred," or "family council," the Privy Council must have had in mind both agnates and cognates. In view of the very definite statements in 41 Mad 998[4] and in 43 Mad 650[5] this argument cannot be accepted in respect of cases where there are agnates living. I consider that the statement in I L R (1938) Mad 551[7] can only be taken as an indication that in their Lordships' opinion consultation is still necessary when the only surviving relatives are cognates. No assent of 'kinsmen' was alleged in that case, but it was contended that as there were no agnates in existence at the time of the adoption whose assent could be sought, the widow had an inherent right to adopt of her own volition. An issue was raised as to this in the trial Court, but the contention was subsequently abandoned. It was not raised in the argument on appeal and was not referred to in the printed case, but the contention was sought to be revived before the Board. The argument was rejected and it was in this connexion that their Lordships made the observation on which the appellant places so much stress.

---

[5] Krishnayya v. Lakshmipathi, (1920) 7 A I R P C 4=56 I C 391 = 47 I A 99=43 Mad 650 (P C).

[6] Krishnayya Rao v. Venkata Kumara Mahipathi Surya Rao Bahadur, (1935) 22 A I R P C 190 = 157 I C 881=69 M L J 388 (P C).

[7] Balasubramania v. Subbayya Thevar, (1938) 25 A I R P C 34=172 I C 724 = 65 I A 93 = 32 S L R 328 = I L R (1938) Mad 551 (P C).

In my opinion the judgments of the Privy Council are to be read as deciding that the widow of a divided brother, not having received from her husband authority to adopt a son to him, can only do so when she has received the consent of her father-in-law, if alive. If the father-in-law is dead she must receive the assent of her husband's brothers. If there are no brothers living, the nearest agnates are her proper advisers. If consent is improperly withheld she may nevertheless lawfully adopt with the consent of the next nearest agnates. If there are no agnates she must look for advice to the cognates, it having been definitely laid down that she is not competent in law to decide on an adoption for herself. The same rule of priority will naturally apply in the case of cognates. In view of the emphatic statement with regard to the position of the father-in-law in the *Ramnad Case*, 12 M I A 397,[1] the equally emphatic statements in 41 Mad 998[4] with regard to priority (first the father-in-law, then the brothers, and after them the nearest agnates) and the express mention of the nearest agnates in 43 Mad 650,[5] I fail to see how any other construction can be reasonably placed on the judgments of the Board dealing with this question. And to read them in this sense accords with the Hindu idea of the family. The agnates are the only true members of the family according to the Hindu idea.

In adopting a son to her husband the widow is only acting in accordance with the tenets of her religion. The happiness of her husband's soul may depend on there being a son to carry out the religious duties imposed upon a son by the Hindu religion. In 12 Pat 642,[8] the Judicial Committee referred to the well-established doctrine as to the religious efficacy of sonship and their lordships felt that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man. The judgment in that case recognizes the importance of an adoption from a spiritual point of view and indicates that the matter of succession to property is a secondary consideration. The only ground on which a daughter's son can really claim to be consulted is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. He may if he cares to do so perform the religious duties which would fall upon the grandfather's descendants in the male line if there were such descendants, but admittedly there is no obligation upon him to perform them. If he neglects to carry out the ceremonies he commits no sin, but neglect in this respect by a son involves the commission of sin. The insistence on the widow seeking advice is based on her own incapacity to form a proper opinion for herself, and obviously the person least likely to give proper advice in such a matter is the son of her daughter who is a member of another family and will lose the whole estate if the adoption takes place. Moreover, he is likely to be a very young man, although he cannot be ruled out on this ground. While interest in the estate has been regarded as a factor in the choosing of advisers the judgments of the Privy Council show that it cannot be regarded as the governing factor. Sound advice to the widow is the most important consideration in the performance of an act which may be regarded as a religious duty, certainly an act which according to the Hindu religion will confer spiritual benefit on her deceased husband. The best advice is obviously to be expected from the dead husband's agnates, and it seems to me that the Privy Council has clearly indicated that if there are agnates, they and they alone, are the proper advisers of the widow.

---

[8] Amarendra Mansingh v. Sanatan Singh, (1933) 20 A I R P C 155=143 I C 441 = 60 I A 242 =12 Pat 642 (P C).

In the present case the widow received the consent of her husband's nearest agnates and I hold that the fact that the major son of Rathamma did not consent does not invalidate the adoption.

The conclusion that the daughter's son is not entitled to be consulted is the conclusion which Oldfield and Phillips JJ., arrived at in 43 Mad 876,[9] by Jackson J. in 20 M L W 503,[10] and by Madhavan Nair and Jackson JJ., in 57 Mad 411,[11] and I may add that the same opinion is expressed in Mayne, Edn. 10 pages 223-5. In 20 M L W 503,[10] Ramesam J. who formed the Division Bench with Jackson J. held that the widow was bound to consult the daughter's son and Spencer and Venkatasubba Rao JJ. agreed with him in 49 Mad 652.[12] Ramesam J. considered that there was nothing in the decisions of the Privy Council to show that cognates were not included in the rule with regard to the consultation of kinsmen and said that the word "sapindas" whatever its meaning in the Smritis may be can include agnates as well as cognates, referring in this connexion to the judgment of the Judicial Committee in 42 Cal 384.[13] The question does not depend on whether the word "sapindas" may or may not be taken to include agnates as well as cognates speaking generally, but on the principles to be gathered from the judgments of the Privy Council and as I have indicated, I can see no reason whatever for supposing that the Judicial Committee ever intended to lay down that cognates shall be consulted when there are agnates alive. In 49 Mad 652,[12] Spencer J. observed that agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen, but he saw no authority for limiting the class of gnatis and sapindas to agnates except the judgment of Oldfield and Phillips JJ. in 43 Mad 876.[9] Venkatasubba Rao J. expressed the opinion that if the judgments of the Privy Council did not embrace cognates as well as agnates a widow could not adopt if there were no surviving agnates, but he did not consider whether the judgments might be taken to apply to agnates in the first place and to indicate that cognates should be consulted in the absence of agnates. I have sufficiently indicated my opinion of the effect of the rulings of the Privy Council and it follows that I consider the judgments of Ramesam, Spencer and Venkatasubba Rao JJ. are erroneous and ought not to be followed.

It is a great pity that this question was not referred to a Full Bench for decision when the question was raised for the second time in 20 M L W 503.[10] While a Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone this principle goes no further. The Division Bench is the final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England where there is the Court of Appeal, Divisional Courts follow the decisions of other Divisional Courts on the grounds of Judicial comity. *See* (1884) L R 9 P D 96;[14] (1925) 133 L T 238,[15] (1929) 1 K B 24[16] and (1935) 1 K B 15.[17] If a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this Court provide. If this course is not adopted the Courts subordinate to the Court are left without guidance. Apart from the impropriety of an Appellate Bench refusing to regard itself bound by a previous decision on a question of law of an Appellate Bench of equal strength and the difficulty placed in the way of Subordinate Courts administering justice, there are the additional factors of the loss of money and the waste of judicial time. There must have been a considerable waste of money and judicial time as the result of the question under discussion not having been referred to a Full Bench when the correctness of the decision in 43 Mad 876[9] was first questioned. For the reasons given I consider the decisions of the Courts below in this case were right. Consequently I would dismiss the appeal with costs and fix the advocate's fee at Rs. 200.

---

[9] Viswasundara Rao v. Somasundara Rao, (1920) 7 A I R Mad 451=59 I C 609=43 Mad 876.

[10] Brahmayya v. Rattayya, (1925) 12 A I R Mad 67=83 I C 59=20 M L W 503.

[11] Murahari Brahma Sastri v. Sunitramma, (1934) 21 A I R Mad 191 = 151 I C 200 = 57 Mad 411=66 M L J 577.

[12] Kesar Singh v. Secretary of State, (1926) 13 A I R Mad 881=95 I C 651 = 49 Mad 652 = 51 M L J 16.

[13] Ramachandra v. Vinayak Venkatesh, (1914) 1 A I R P C 1=25 I C 290=41 I A 290=42 Cal 384 (P C).

[14] The Vera Cruz (No. 2), (1884) L R 9 P D 96 =53 L J Adm 33=51 L T 104=32 W R 783 = 5 Ap M C 270.

[15] Harrison v. Ridgway, (1925) 133 L T 238= 23 L G R 434.

[16] Ratkinsky v. Jacobs, (1929) 1 K B 24 = 97 L J K B 566=138 L T 739=92 J P 142=26 L G R 380=72 S J 354=44 T L R 548.

[17] Phillips v. Copping, (1935) 1 K B 15=104 L J K B 78 = 152 L T 175 = 78 S J 617 = 50 T L R 533.

Krishnaswami Ayyangar J.—I concur in the conclusion reached by my Lord, which appears to my mind to interpret the decisions of the Privy Council more in accordance with the spirit of the Hindu law than the opinions of some of the learned Judges who have had to consider the point in the past. I am unable to find in the pronouncements of their Lordships a sufficient basis for assigning to the daughter's son a position of superiority over the agnatic kindred in the matter of consultation. Considerations of proximity, of religious merit, or of the proprietary interest of the persons to be consulted, have no doubt been mentioned. But it will be found on scrutiny that such considerations were adverted to more by way of additional support for the recognized position of the agnatic group, than as furnishing in themselves independent criteria in making the choice.

Somayya J.—I agree with the judgment which has just been pronounced by my Lord the Chief Justice, but having regard to the importance of the question I wish to add a few words. When a Hindu dies leaving a widow, divided agnates and daughter's sons, and his widow desires to make an adoption is it enough if she gets the consent of the divided agnates or is she bound to consult the daughter's sons as well? In this case Subbamma, the widow of Lakshminarayana, the last male holder, obtained the consent of her husband's divided brother's sons under Ex. G. and adopted defendant 1 who is the son of defendant 2. Defendants 2, 3 and 4 are the husband's nephews who gave the consent under Ex. G, Subbamma did not consult at least one of her daughter's sons. The question is whether the adoption is valid.

The question has to be decided on a few texts of Hindu law and on judicial decisions. Under the Hindu law an adoption is always made to the husband. While the husband is alive he alone can adopt a son. He may associate his wife or one of his wives, if he has more than one wife, in the act of adoption; but he need not associate any one of them and can make the adoption by himself. The wife's capacity to make an adoption is based on the fact that adoption is an act which confers great spiritual benefit on her husband. But when can she make an adoption? The text of Vasishta which is often quoted is, "nor let a woman give or accept a son unless with the assent of her lord." This text is accepted by the various commentators but has been interpreted by them in different ways. One extreme view which has prevailed in the Mithila School is that "this consent of the husband must be given at the time of the adoption itself" so that no adoption is possible after the husband's death. Thus, no adoption by a widow is possible under the Mithila School of Law. The other extreme view is that which prevails in Bombay where it is held that adoption being an act conferring great spiritual benefit on the husband, his consent is presumed in the absence of a prohibition by him and a widow can therefore adopt except where the husband has prohibited it.

Between these two extreme views there are other views propounded by other schools of Hindu law. The Dayabhaga school of law of Bengal holds that if the husband gives the authority to his wife to make an adoption to him, the authority may be exercised after his death. But if there is no such authority given by the husband during his lifetime, his widow cannot adopt. The Benares School of Law agrees with the Bengal view. Yet another view has been advanced and accepted in the Dravida country that even where the husband did not give the requisite authority, his widow can make an adoption with the consent of the husband's sapindas. The presumed incapacity of women to act independently is said to be the reason why she cannot make an adoption except with the husband's authority or his sapindas' consent. The text which is generally relied on in this connexion is that of Yagnavalkya, Chap. I, pl. 85:

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्धके ।
अभावे ज्ञातयस्तेषां स्वातन्त्र्यं न क्वचित् स्त्रियाः ॥

Let her father protect a maiden; her lord a married woman; sons in old age; if none of these, other gnaties. She is not fit for independence.

This supposed want of independence of a woman to act for herself is said to be cured by the consent of her husband's ज्ञातयः "gnathayah." This expression ज्ञातयः in ordinary parlance is certainly confined to agnatic sapindas. But it is said that it may also include cognates as well, i. e. sapindas in general. The Smritis and the Commentaries do not contain any indication as to who is to be consulted by a widow in the absence of the authority of the husband. But in Strange's Hindu Law there are set out a number of cases decided by this Court in which the widow's power of making an adoption with the consent of sapindas was upheld. The matter came up in the *Ramnad Case,* 12 M I A 397,[1] before the Judicial Committee. After referring to Strange and Colebrooke their Lordships recognized the power of a Hindu widow to adopt a son with the husband's kinsmen's consent. In later cases the Judicial Committee expressed the same view in different language.

The question now before us has to be decided mainly on the Judicial decisions. In a case of this kind we have primarily to see what the Judicial Committee has laid down in the several cases which went up for decision. In the *Ramnad case,* 12 M I A 397,[1] there was a very distant agnate of the husband, and the mother of the husband. The widow adopted with the consent of both. The Judicial Committee held that the adoption is valid. The reference to the consent of the mother-in-law may be left out because it is on account of the presumed incapacity of a woman to act independently that the advice of the sapindas is enjoined on a widow. A person who is herself under an incapacity to act independently cannot supply the requisite advice or authority to another incapacitated person. It is conceded before us that female sapindas need not be consulted. In this very case the plaintiff, the daughter, was not consulted and the adoption is not attacked on that ground.

Then comes the question as to who among the husband's sapindas are entitled to be consulted and whose authority it is that has to be obtained by a widow desirous of making an adoption. Adoption introduces a stranger into the husband's family and prima facie it is the members of that family that have to decide on the advisability of introduction of a stranger into that family. The Privy Council observe in the *Ramnad case,* 12 M I A 397,[1] at p. 442 as follows:

> The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption.

Then they say at p. 443 that the Courts in India rightly found the members to be consulted in the Tevar's family and refer to the printed pedigree which is in fact a pedigree of his agnatic sapindas. In 1 Mad 174,[3] the Judicial Committee laid down that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called the family council of the expediency of substituting an heir by adoption to the deceased husband.

Taking these two cases, it is clear that the 'family' spoken of is the husband's family and it is his kinsmen, i.e. the members of his family, that are referred to in the above decisions.

So far, there is no indication that a daughter's son who is not a member of his family is a person who should be consulted by the widow. Then the next question is whether all the sapindas are to be consulted if not who among them are to be consulted and in what order. This question was answered in three decisions of the Judicial Committee: 30 Mad 50,[18] 41 Mad 998[4] and 43 Mad 650.[5] It is clear from these decisions (1) that it is enough if she obtains the consent of the nearest sapindas and that if she gets their consent, she need not go further and seek the consent of the remoter sapindas; (2) that she is bound to consult all the nearest sapindas and failure to consult even one of them will be fatal; (3) that even if it be certain that the nearest sapindas would refuse to give their assent, still she is bound to consult them. In dealing with this question, the Judicial Committee has used in 41 Mad 998[4] language which is relied on by Mr. V. Govindarajachari in support of his case. In that case, the nearest sapinda was not consulted at all; and the widow obtained the consent of the remoter sapindas and made the adoption. The Judicial Committee held that the adoption was invalid. Several passages on pages 1010 and 1011 were relied on by Mr. V. Govindarajachari as supporting his contention. His contention is that in this case the Judicial Committee definitely laid down three tests: (1) who confers greater spiritual benefit on the deceased; (2) who is more closely related to the deceased according to the Mitakshara theory of propinquity; (3) who is the person whose proprietary rights are affected by the adoption. Mr. V. Govindarajachari urges that the Judicial

---

[18] Venkamma v. Subramaniam, (1907) 30 Mad 50=34 I A 22=17 M L J 114 (P C).

Committee approved the opinion of Golupchander Sirkar Sastri extracted on p. 1011 of the report while referring to the analogy of the sapinda whose consent will validate an alienation by the widow. He urges further that whatever test is applied, the daughter's son comes first and that the brother's sons of the deceased come after the daughter's son. For the first test, he refers to Dharma Sindhu and Nirnaya Sindhu which give preference to the daughter's son in the performance of funeral ceremonies. For the second, he relies on the fact that the daughter's son is treated by the Mitakshara School of Law as being more closely related to the deceased than the brother's sons according to the doctrine of propinquity. As for the third, he relies on the fact that the daughter's son succeeds in preference to a brother's son and where the two co-exist it is the daughter's son whose proprietary rights are affected.

The second and third points go together. The preferential right of the daughter's son is based upon specific texts of Manu and Vishnu. The preference given to the daughter's son is to be traced to the practice of an appointed daughter in which case her son was considered to be in all respects equal to that of a son's son. Though this practice had become obsolete even by the time of Manu, the texts which give the preferential right to the daughter's son in general is traceable to the theory of the appointed daughter's son. When one daughter was not treated with a preferential right sons of all daughters came to be regarded alike, but the position that was given to the appointed daughter's son in the scheme of succession is maintained and the Smrithi writers embodied in their Smrithis, special texts giving the daughter's son in general a preferential right and making him inherit next after the widow and the daughter and before the father and the mother. See Manu, Chap. 9, pl. 127 to 136. Vishnu Chap. 15, pl. 46. As for the first ground urged it is not clear that in fact on the true principle of Hindu law relating to the efficacy of the funeral oblations, the daughter's son is in any way superior to a brother's son. See Sarvadhikari, Law of Inheritance, Edn. 2, pp. 662 and 663. He sums up the position thus on page 663 as to performance of parvana sradha :

> In the case of maternal ancestors, the daughter's son should also celebrate these rites as an act of moral obligation although not legally bound to do so.

He also points out that it is legally obligatory on a person to perform these rites as regards his paternal ancestors. Thus a brother's son is legally bound to offer pindas at parvana sradha to the deceased's father and grandfather to whom the deceased also was offering pindas. But a daughter's son is not legally bound to offer any pindas to his maternal ancestors. Further, what a daughter's son offers are termed secondary pindas, whereas the pindas offered by agnates are called preliminary pindas and the latter are supposed to be superior to the former. After all what has to be decided is whether an adoption was proper in the circumstances of any given case. As pointed out by the Judicial Committee, she is not to make an adoption with a view to spite this or that sapinda, but on the expediency of substituting an heir by adoption to the deceased husband. In this task the Courts do not take upon themselves the duty of finding out whether in any particular case it is expedient and proper to introduce an heir by adoption to the husband. This duty is cast upon the widow's advisers and natural protectors. As an adoption introduces a new member into the husband's family, it is the members of that family that have to be approached by the widow to get the necessary consent. The right is the peculiar right of the members of that family. It is their right to Judge whether a new member by adoption should be introduced into this family. As the Judicial Committee said in 12 M I A 397[1] at p. 443, the Courts in India rightly found the members to be consulted in the Tevar family, i. e. his own agnatic family. In the decision in 41 Mad 998,[4] the observations at p. 1009 are decidedly in favour of the view that the father and the brothers at any rate are entitled to be consulted in every case. As expressly laid down there, the father-in-law when alive is entitled to be consulted as the head of the family and as the venerable protector and in his absence, the brothers are said to take his place and they are entitled to be consulted.

Stopping here, if the view that is propounded by Mr. Govindarajachari for the appellant is correct, then the brothers at any rate are postponed to a daughter's son in the matter of consultation. Mr. Govindarajachari states that the father stands on a peculiar footing but he would ascribe it to a special text of Vidyaranya Swami extracted in the judgment of the Judicial Committee in the *Ramnad case*, 12 M I A

397[1] at p. 443. Mr. Govindarajachari says that it is on account of the special text that the father of the deceased or the father-in-law of the adopting widow is given that peculiar position and he argues that even the brothers are not entitled to be consulted in preference to a daughter's son. But the passage in 41 Mad 998[4] at pp. 1008, 1009, leaves no room for doubt that in the absence of the father, the brother is placed in the same position which the father occupied. The Judicial Committee says that the brothers are as much interested in the protection of the inheritance and in the spiritual welfare of the deceased as the father-in-law was and the two are placed in the same position so far as this matter is concerned. If therefore we read the passage at p. 1009 of the above report, it is clear that the Judicial Committee treats the father and the brothers as standing on the same footing. When the father is alive, he is to be consulted and when he is dead the brothers are entitled to be consulted. Their consent is an essential requisite and it is enough if their consent is got. The passages occurring in pp. 1010 and 1011 are therefore to be understood as dealing with practical rules to be applied as to who, among the various agnatic sapindas, are to be consulted and in what order. So understood, the passages at pp. 1010 and 1011 become easy of application among the agnatic sapindas. Those who are nearer in degree, those who offer greater spiritual benefit, those who would succeed in preference to others, are the persons entitled to be consulted first. Indeed, if they are not consulted, the mere fact that she gets the consent of a larger number of remoter sapindas does not cure the defect. Further Mr. Ameer Ali who delivered the judgment of the Board in 41 Mad 998[4] refers at p. 1004 to the decision in the *Ramnad case*[1] as having laid down that a widow may adopt with the consent of male agnates. Whatever doubts there might have been if the judgment in 41 Mad 998[4] stood alone, the later pronouncement of the Judicial Committee in 43 Mad 650[5] leaves no room for doubt that throughout, it is the agnatic sapindas that are referred to in all these decisions. In 43 Mad 650,[5] the Judicial Committee referred to the *Ramnad case*, 12 M I A 397[1] and to the case in 41 Mad 998[4] and then said as follows :

> The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must however be added that save in exceptional cases such as those mentioned above (where the nearer agnate is a minor or a lunatic or actuated by corrupt and malicious motives) the consent of the nearer sapindas must be asked and if it is not asked it is no excuse to say that they would certainly have refused.

Coming after the decision, 41 Mad 998,[4] and that within two years of that decision, the above passage leaves no room for doubt that it is the agnatic sapindas who are nearest in degree and who are capable of forming an honest opinion on the question of the expediency of introducing an adopted son that are entitled to be consulted. We are now not concerned with the question whether in the absence of agnates the widow might adopt with the consent of cognates. If both agnates and cognates co-exist, the agnates must certainly be consulted in preference to cognates. In 49 Mad 652,[12] Spencer J. lays down the rule that when both cognates and agnates exist, the agnates are entitled to preference in the matter of consultation. It is not necessary to say much about the observations of the Judicial Committee in the recent case, I L R (1938) Mad 551.[7] As pointed out in the judgment of my Lord just delivered the question did not arise for decision. The point had been mooted in the trial Court but had been given up in the trial Court. This was not urged in the High Court or in the printed case before the Judicial Committee. The Judicial Committee was not prepared under the circumstances to allow the appellant to raise that question at all. Having said so there is the observation relied upon by Mr. Govindarajachari. This cannot be taken to be a definite pronouncement on the question. At any rate it does not deal with the question which we have now to decide. I therefore concur in the opinion pronounced by my Lord, the learned Chief Justice.

C.R.K./D.S. *Appeal dismissed.*

✻ A. I. R. 1940 Madras 366

SPECIAL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras —Petitioner.

v.

Messrs. Bosetto Brothers Ltd., Madras — Respondents.

Original Petition No. 301 of 1938, Decided on 23rd October 1939.

***Income-tax Act (1922), S. 10 (2) (vi)—Company carrying on hotel business leasing one of its hotels with furniture and equipment—Articles of Association entitling company to lease whole or part of its undertaking—Company is entitled to depreciation allowance in respect of hotel building leased under S. 10 (2) (vi).**

(Per *Full Bench*)—Where the assessee company carried on hotel business in two separate buildings and leases one of them with the whole equipment and furniture for purposes of running an hotel in accordance with the Articles of Association empowering it to let on rent the whole undertaking or any part of it, the letting of the hotel must be deemed to be part of its business and the assessee is therefore entitled to claim depreciation allowance under S. 10 (2) (vi) in respect of the hotel building leased out by him : *A I R 1926 Mad 1032 (FB), Foll.; AIR 1935 Cal 344, Approved.* [P 367 C 2; P 368 C 1]

(Per *Krishnaswami Ayyangar J.*) — The use of the definite article "the," and of the word "such" in cls. (iv) and (vi) of S. 10 (2) makes it clear that the business contemplated in cl. (vi) of the Section in the business carried on by the assessee and not by any person or persons other than the assessee, and that it is in respect of a building belonging to the assessee and used for his business that he can claim a depreciation allowance. [P 369 C 1]

K. V. Sesha Ayyangar — *for Petitioner.*

M. Subbaraya Iyer — *for Respondents.*

Leach C. J. — The assessee is a company carrying on an hotel business. It was formed in 1928 and took over an hotel in Madras. Subsequently, the assessee built an hotel in Ootacamund and carried on an hotel business there until 1934. These facts do not appear in the statement of the case, but they have been mentioned in argument, and they are not in dispute. The assessee found that its business in Ootacamund was not profitable, and in 1934, leased the premises and its furniture and fittings to a firm named Davis & Co. for the purpose, to quote from the order of the Income-tax Officer, " of running an hotel. " Messrs. Davis & Co. have since then carried on this hotel business. For the assessment year, 1937-38, the assessee desired to deduct from its income the sum of Rs. 2450 as a depreciation on the building and furniture at the Ootacamund hotel, the assessee company's contention being that it was entitled to this deduction under the provisions of S. 10 (2) (vi) of the Income-tax Act, 1922. The Income-tax Officer refused to allow the deduction and held that the hotel in Ootacamund must be regarded as property and as such, was assessable only under S. 9 of the Act. His decision was in turn concurred in by the Assistant Commissioner and the Commissioner. The assessee being dissatisfied asked the Commissioner to refer the matter to this Court as it involved a point of law and the Commissioner has in consequence framed this question :

> Whether in this case the petitioner is entitled to an allowance for depreciation under S. 10 (2) (vi) of the Act in respect of their Ootacamund building let out to Messrs. Davis & Co.

Mr. Sesha Ayyangar has very properly conceded that when the assessee was running an hotel it was entitled to be assessed under S. 10 of the Act, and therefore entitled to the deduction allowed by sub-s. 2, cl. (vi) ; but he says inasmuch as the assessee has ceased to utilize the building itself for the purpose of an hotel business the building must be regarded as property and not part of the assessee's business. In this connexion, I would point out that cl. 3 (j) of its memorandum of association gives the assessee power to let on rent the undertaking or any part of it, and therefore the letting of the Ootacamund hotel was part of the company's business. In my opinion the case is governed by the Full Bench decision of this Court in 2 I T C 251 = 51 M L J 360=24 M L W 680,[1] which was followed by the Calcutta High Court in 8 I T C 177=62 Cal 804;[2] Sir Coutts-Trotter C. J. and Krishnan and Beasley JJ. had to consider the case of a company incorporated for the purpose of milling rice. The company's Articles of Association gave it power to lease out its buildings and there was a clause which stated that :

> If it was deemed beneficial to the company with reference to circumstances it might lease or give its factory for contract.

Therefore, the powers of the company were powers which the assessee in the present case possesses. The company let its mill, and the question was whether it was entitled to the deductions allowed by S. 10 (2) (vi). It was held that it was. In his judgment Beasley J. observed :

> The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant.

I can see no difference in principle between the letting out of a rice mill and its machinery and the letting out of a building

---

1. Mangalagiri Rice Factory v. Commissioner of Income-tax, (1926) 13 AIR Mad 1032=97 I C 850=24 M L W 680=50 Mad 529=51 M L J 360=2 I T C 251 (FB).
2. Sadhucharan Roy v. Commissioner of Income-tax, Bengal, (1935) 22 AIR Cal 344=156 I C 394=62 Cal 804=62 C L J 386 = 39 C W N 739=8 I T C 177.

built and fitted for the purposes of an hotel business. As I have indicated, the assessee here has the power to carry on the hotel business or lease the whole or part of its undertaking. It has leased a part of its undertaking and if it had leased its two hotels, there would have been no difference between the present case and the two cases which I have mentioned. I do not consider that the fact that it has only let out one of the hotels and not the two can make any difference, the assessee having full power to let out the whole or a part of its undertaking. As I regard the case as being governed by 2 I T C 251,[1] I would answer the reference in the affirmative. The assessee, having succeeded in the reference, is entitled to its costs, Rs. 250 and the refund of its deposit of Rs. 100.

Mockett J.—I entirely agree. In my view, the decision of the Income-tax authorities was based on the information that what was let in this particular case was "a building." In the decision, 2 I T C 251,[1] it will be seen that the company in that case had their powers separately divided with regard to their properties. They were empowered to lease out buildings and vacant sites of lands, and by a separate provision they were empowered to lease or give their factory for contract. In this case, that power is contained in the memorandum of association, cl. 3 (j), not separately as in the above case. Now, what did Davis & Co. get in this case? In my view they received a lease of the undertaking of a hotel known as a hotel business. In the case to which reference has been made, it was a rice mill business. Now, the equipment of a rice mill is naturally different to the equipment of a hotel. The kitchen, lounges, bars, public rooms, sleeping rooms, bath rooms, and lavatories of an hotel naturally find no place in a rice mill any more than the machinery of a rice mill finds a place in an hotel. But nonetheless, one is just as much a business as the other. It seems to me that when that view is borne in mind, the difficulties which the income-tax authorities found in this case largely disappear, because what Bosetto Brothers Limited leased was this hotel business in Ootacamund, and if that is so, the position is exactly covered by the decision in 2 I T C 251.[1] I have only to add that I cannot for a moment accept the position that if an assessee has one undertaking, be it a rice mill or be it a hotel, and if he leases that undertaking it comes under S. 10, but if he owns two undertakings and leases only one of them, it comes under S. 9. The reasoning for the position that the latter position comes under S. 9 seems to me without any foundation whatever. For these reasons and for the reasons given by my Lord the Chief Justice I consider that the answer to the reference should be in the affirmative.

Krishnaswami Ayyangar J.—It is not without some hesitation that I subscribe to the opinions just now expressed by my Lord and my brother, Mockett J. I take the facts to be that the building which has formed the subject-matter of the contest was built and fitted up by the assessee to be utilized for the running of a hotel business, that the assessee actually ran such a business there for some years until he closed it in 1934. After the business was discontinued, the assessee let the building on a monthly rent of Rs. 120 to Messrs. Davis & Co. who have been running a hotel of their own in it since then. I also take that it was for the purpose of running a hotel that the building was leased. In spite of the fact that the building was not used by the assessee for purposes of his business during the year of account, he claims that an allowance should be made out of his gross business income for the depreciation of his building during the year of account. It is claimed on his behalf, that he is entitled to the allowance under S. 10 (2) (vi).

The question is whether the proper Section to be applied to the case is S. 9 as claimed by the department or S. 10, Income-tax Act, 1922, as claimed by the assessee. On behalf of the department, a suggestion was made but not persisted in, that S. 9 must first be resorted to before considering the applicability of S. 10. It seems to me that if a case properly comes within S. 10, there is no question of having to choose between that Section and some other Section in the Act. Being a taxing statute, the Income-tax Act should receive a strict construction, that is, a construction in favour of the subject, and not in favour of the Crown. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him with a lighter burden. S. 10 lays down the method to be adopted for arriving at the tax payable by an assessee under the head "business" and says that the tax should be payable in respect of the profits or gains of any business carried on by him. In computing such profits and gains certain allowances have necessarily to be made as directed by the various clauses of sub-s. (2). These allowances are peculiar to the case where income from a business is assessed, other rules being made for the computation of income from other sources. It will be advantageous to set out the relevant portions of the Section which throw light on the question at issue.

(1) The tax shall be payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances namely : (i) any rent paid for the premises in which *such business* is carried on . . . . . (ii) in respect of repairs, where the assessee is the tenant only of *the* premises and has undertaken the cost of such repairs . . . (iii) in respect of capital borrowed for the purposes of *the business* . . . . (iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, *used for the purposes of the business*. . . . . . (v) in respect of current repairs to *such* buildings, machinery, plant or furniture. . . . . (vi) in respect of depreciation of *such* buildings, machinery, plant or furniture being the property of the assessee. . . . .

I have italicized the words which have a material bearing on the point under consideration. The meaning of the word 'such' in cl. (vi) is to be got by going back to cl. (iv), and it is clear that a depreciation is to be allowed only if the buildings, machinery, etc. were used for the purposes of the business. Two conditions have to be satisfied by the assessee before he can claim depreciation : (1) the buildings, machinery, plant, or furniture should be the property of the assessee; (2) they must be used for the purposes of "the business." The use of the definite article "the" and of the word "such" in these clauses makes it clear to my mind that the business contemplated in cl. (vi) of the Section is the business carried on by the assessee and not by any person or persons other than the assessee, and that it is in respect of a building belonging to the assessee, and used for *his* business that he can claim a depreciation allowance.

Can it be said in the present case that the Ootacamund building was used in the year of account for the purposes of "the business," that is the business of the assessee? Prima facie I should be inclined to take the view that the business carried on by Messrs. Davis & Co. is not the business of the assessee, but is really the business of Messrs. Davis & Co. only. The position, I concede, may be different if instead of the building, fitted up as this building has been fitted up, being leased, the business itself had been leased as a running concern. The Act, it seems to me, contemplates the business as being something different from the buildings, the plant, machinery or furniture which may be used for the purpose of the business. It is as different from any of these things, as for instance the capital embarked on it, or the establishment with which it is carried on. The term business as used in the Section denotes, I think, an abstract and intangible thing, quite apart from any of these physical adjuncts, and quite apart also from such other elements as the goodwill, the business connexions, the business reputation and so on. In my judgment, it is an entity different from any of these things, and has to be so understood in the Act. A running business can be leased, as it can be sold, as such, together with the buildings where it is carried on. If the lessee carries on the business leased to him, using the same premises together with the fittings and furniture though for the purposes of his own business there may be some ground —even of this I am by no means sure—for saying that the assessee is still carrying on the business, through the agency of the lessee, so as to attract the provisions of Section 10 (2) (vi).

But the position here is different. In the premises leased, it is not denied that the lessees Messrs. Davis & Co., are carrying on their own business, and it is not claimed that the assessee leased the business as a running concern either. The business in question cannot be regarded even in a theoretical and legal sense as the business of the assessee and must in my opinion be held to be the business of the lessees. Can it then be said that S. 10 (2) (vi) applies to such a case. It is this point which created a considerable amount of difficulty in my mind and I should have, if it were open to me to do so, been inclined to answer this question in the negative. But I agree that the decision of the Full Bench in 2 I T C 251[1] binds me and leaves me no option. There, the company which owned a rice mill leased it to a lessee and the latter carried on his own business in the premises but with the plant and machinery of the lessors. There is nothing in the report of the case to show that the lease was of the business as a running concern and there was therefore no warrant for regarding the business that was run by the lessee as the business of the assessee. Still the Court held that S. 10 (2) (vi) applied for reasons, which are, if I may say with great respect, clearly enough stated in the judgment of

Beasley J., as he then was. The learned Judge pointed out:

> The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both in my view are equally a business.

In the present case also, it would appear from cl. (j) of the memorandum of association that the assessee is empowered to let on rent the undertaking or all or any of the property for the time being belonging to the assessee. The letting of the property in this case must be held, according to the decision in the case cited, as part of the business of the assessee in this case also. Bound as I am by this decision, I am constrained to answer the question referred to us in the affirmative. According to the Full Bench decision, the question in each case will be whether the leasing of the property can be regarded as coming within the scope of the objects clause of the memorandum of association of the assessee company. In that case, as in this, the assessee was a limited company. I may perhaps add that there is no objection under the Act either to an individual or a company carrying on business and also owning property. The income from each of these sources will then be separately assessed under different provisions. In the first case, the Section to be applied will be S. 10 (2) (vi) and in the second case the proper Section applicable will be S. 9. The assessee will have to pay the aggregate of the taxes under both heads.

C.R.K./G.N. *Reference answered.*

---

* A. I. R. 1940 Madras 370

SPECIAL BENCH

LEACH C. J., GENTLE AND
KRISHNASWAMI AYYANGAR JJ.

In the matter of S., A First Grade Pleader, Coimbatore.

G. Thimmappa — Complainant.

Decided on 5th December 1939.

*** (a) Legal Practitioners' Act (1879), S. 13—Professional misconduct—Proceedings against practitioner cannot be allowed to be dropped as result of agreement between complainant and practitioner.**

Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter. [P 371 C 1]

*** (b) Legal Practitioners' Act (1879), S. 13—High Court cannot give approval ex post facto to enquiry conducted by tribunal not appointed for that purpose.**

The Act contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand the inquiry cannot be lawful. High Court is precluded from giving approval ex post facto to the inquiry conducted by the tribunal which was not appointed by the Court for the purpose. [P 371 C 2]

(c) Legal Practitioners' Act (1879), S. 13—Tribunal conducting enquiry not validly constituted—Acquiescence in proceedings would not make it lawful.

If the tribunal which conducted the inquiry was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain. [P 371 C 2]

*** (d) Legal Practitioners' Act (1879), S. 13—District Judge directed by High Court to hold enquiry in charge of professional misconduct cannot delegate it.**

There is nothing in the Legal Practitioners' Act which directs the District Judge to hold the inquiry. The Act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before a District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly, the Madras Civil Courts Act does not provide it. The District Judge having been directed by High Court to hold the inquiry has no power of delegation. [P 372 C 1]

Advocate-General in support of Notice.

T. R. Venkatarama Sastri for M. Krishna Bharathi — *for the Pleader.*

Leach C. J.—The respondent is a pleader practising in the Coimbatore District. In February 1937 one G. Thimmappa, a merchant residing and carrying on business in Bellary, presented a petition to this Court in which he charged the respondent with professional misconduct. The Court considered that the charges made called for inquiry and passed an order directing the District Judge of Coimbatore to hold the inquiry, the case falling within S. 13, Legal Practitioners' Act. When the matter came before the District Judge the petitioner filed a statement in which he said that he was satisfied that the respondent who had been his pleader for a considerable time, had not acted mala fide; and that his claim had been settled by the respondent, and he wished to withdraw the petition. In the circumstances the District Judge thought it unnecessary to proceed with the inquiry and submitted the record to this Court with his remarks. This Court considered that the District Judge should have proceeded with the inquiry, notwithstanding that the petitioner had expressed a desire to withdraw the petition. Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter.

By an order dated 7th March 1939 the Court remanded the case to the District Judge with direction to proceed. Without reference to this Court the District Judge directed the Additional District Judge to hold the inquiry, which he did, and his report is now before us. Mr. Venkatarama Sastri on behalf of the respondent has raised a preliminary objection. He says that inasmuch as the inquiry has been conducted not by the District Judge, who was directed to hold the inquiry, but by the Additional District Judge, it is unlawful and the Court cannot take action on it. In other words, he says that the District Judge, having been ordered to hold the inquiry, could not delegate his power to the Additional District Judge and that this Court is precluded from giving approval ex post facto to the inquiry conducted by the Additional District Judge. The learned Advocate-General has contended that if the Court is satisfied with the report it can take action on it. He has also contended that the District Judge had full power by reason of S. 3A, Madras Civil Courts Act, 1873 to transfer the matter to the Additional District Judge. Further he has said that inasmuch as the respondent did not take objection to the Additional District Judge holding the inquiry when the matter was in the District Court but appeared and took part in the proceedings throughout he cannot now be allowed to raise the objection. I will deal first with the argument advanced by the learned Advocate-General that the finding of a tribunal of inquiry can be accepted notwithstanding that the tribunal was not appointed by the Court for the purpose. The opening clause of S. 13, Legal Practitioners' Act, is in these words :

> The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid.

It is said that the words "after such inquiry as it thinks fit" leave it open to the Court to give approval ex post facto. I am unable to accept this argument. The Act contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand, the inquiry, in my opinion, cannot be lawful. I regard the suggestion that approval of a tribunal may be given ex post facto as being repugnant to the spirit of the Act and the wording of Section 13. The argument that because no objection was raised in the District Court to the Additional District Judge conducting the inquiry he cannot be allowed to raise the objection now is also one which I cannot accept. If the tribunal which conducted the inquiry was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain. The only argument which calls for serious consideration is the argument that S. 3A, Madras Civil Courts Act, gave the District Judge power to direct the Additional District Judge to conduct the inquiry. That Section reads as follows :

> When in the opinion of the High Court, the state of business pending before the Judge of any District Court (hereinafter called the District Judge) so requires, the Local Government may appoint one or more Additional District Judges to that Court for such period as they may deem necessary. The Additional District Judges so appointed shall discharge all or any of the functions of the District Judge, under this Act or any other law for the time being in force which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge.

Therefore an Additional District Judge may lawfully deal with matters which come within the province of the District Judge under the Act or any other law for the time being in force. The Civil Courts Act only refers to civil suits and appeals from Judges subordinate to the District Judge. The matter now before us is neither a suit nor an appeal. The learned Advocate-General has however said that the present case falls within the words "or any other law for the time being in force." I consider that the Legislature had here in mind Acts such as the Companies Act, the Divorce Act and the Succession Act, which confer upon a District Judge jurisdiction in specified matters. If there were a clause in the Legal Practitioners Act which directed the District Judge to hold the inquiry in a case like the present one he certainly would have power under S. 3A, Madras Civil

Courts Act, to assign the inquiry to the Additional District Judge, but there is nothing in the Legal Practitioners Act which directs the District Judge to hold the inquiry. The Act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore, when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before a District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly the Madras Civil Courts Act does not provide it. In my opinion, the District Judge having been directed by this Court to hold the inquiry he had no power of delegation. No doubt he thought that he had authority under S. 3A, Madras Civil Courts Act, to transfer the duty to the Additional District Judge, but I consider that in so doing he erred. It would have been a different matter if he had received the sanction of this Court beforehand, but he directed the Additional District Judge to hold the inquiry without making any reference to this Court.

It follows from what I have said that I am not prepared to read S. 3A, Madras Civil Courts Act, in the way suggested by the learned Advocate-General and I feel bound to uphold the preliminary objection raised on behalf of the respondent. The findings of the Additional District Judge will be set aside and the District Judge directed to hold a fresh inquiry into the allegations made against the respondent and present his own report to this Court in due course. In order to prevent any misunderstanding I would add that this Court has not considered the findings of the Additional District Judge and will deal with the charges against the respondent merely on the report of the District Judge when it is submitted.

Gentle J.—I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 372

BURN AND MOCKETT JJ.

In re Annamalai Mudali — Prisoner Accused.

Referred Trial No. 140 of 1939, Decided on 15th December 1939.

(a) Criminal P. C. (1898), Ss. 342 and 537— Omission to comply with S. 342 — Conviction cannot be set aside unless omission causes failure of justice within meaning of S. 537.

It is not every failure to comply strictly with the letter of S. 342 that renders the conviction of an accused illegal No omission to comply strictly with S. 342 can render a conviction liable to be set aside unless it has in fact occasioned a failure of justice within the meaning of S. 537 : *A I R 1933 P C 124, Expl. and Disting.* [P 374 C 2]

(b) Criminal P. C. (1898), S. 342 — Scope— Power of Court to put questions to accused explained.

When an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implication, and attempts to explain them, the Judge may be going beyond his province, if he questions him further in detail. He may be open to the criticizm of cross-examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel. But it is the duty of the Court to be satisfied either by his statement or by his answers to questions or by both, that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him : *A I R 1933 P C 124, Expl. and Disting.; A I R 1936 Mad 715, Disting.* [P 375 C 1, 2]

Nugent Grant for K. S. Jayarama Aiyar and G. Gopalaswami — *for Accused.*

Public Prosecutor — *for the Crown.*

Judgment. — The accused, Annamalai Mudali, has been convicted of murder by the learned Sessions Judge of South Arcot, and has been sentenced to death. The case against him was that he murdered his wife Dhanabagiam on 12th February 1939. With the exception of an extra-judicial confession which the accused is said to have made to his father-in law's brother (P. W. 20) the evidence against the accused was entirely circumstantial. The body of Dhanabagiam (wife of the accused) was found on the morning of 13th February in a field within the limits of the village of Eriyur in Kallakurichi Taluk. It was about one mile from the railway station of Pukkiravari on the Salem-Vridhachalam line. Information was given at first to the V. M. of Ulagianallur who was dead before the trial took place. He apparently discovered that the corpse was not lying within the limits of the village, and therefore he sent a yadast (Ex. F) to P. W. 19 the V. M. of Eriyur. P. W. 19 received Ex. F at about 2.30 P. M. and sent reports Exs. G and G-1 to the police at Varanjaram and the Sub-Magistrate of Kallakuruchi. The Inspector of Police (P. W. 22) heard of this case when he went to the police station at Varanjaram at 8 P. M. The Inspector went to Kallakuruchi the same night and next morning proceeded partly by road and partly by rail to Pukkiravari, taking with him the Assistant Surgeon from the hospital at Kallakuruchi and also a photographer. The Inspector reached Kukkiravari at 9-45 and proceeded on foot to the place where the body lay one mile south of the railway station. He held an inquest during the forenoon and it was concluded by 2 P. M. The body was photographed, and then the Assistant Surgeon made the post-mortem examination. This disclosed that the woman had been strangled to death. There is no dispute about the manner of her death, and the case is clearly one of murder. At the inquest it was not known who the deceased was. Enquiries were set on foot and the accused was arrested at Sathanur at 2-30 A. M. on 18th February. After he had been arrested he made a statement to the police and produced from the house of one Periasami Mudali where he was staying, three jewels (M. Os. 1, 2 and 4) which according to the prosecution belonged to the deceased Dhanabagiam, and which she was wearing when she was last seen alive.

A large number of witnesses were examined to prove that the accused was with his wife on 12th February from about morning meal time until shortly before sunset. (After examining the evidence, his Lordship proceeded.) All this evidence has been criticized on behalf of the appellant, but after carefully examining it, we find ourselves in agreement with the assessors and the learned Sessions Judge that it must be accepted. The story of P. W. 4 was confirmed by an item of circumstantial evidence. He said that when the accused took his wife away from his mother's house, the mother of the accused told him (P. W. 4) to run after them with their child aged 4, and a bundle of sarees which Dhanabagiam has left behind. P. W. 4 says that he did so and caught up with the accused and his wife and gave them the mother's message. Thereupon he says that Dhanabagiam told her husband to tear up and burn these old clothes, and the accused accordingly set fire to the clothes with a match and burnt them. He says that they also told him to take the little boy back and he did so. In confirmation of this story the Sub-Inspector of Athur (P. W. 18) says that P. W. 4 took him to the place where he said the clothes had been burnt, and the Sub-Inspector picked up there some ashes (M. O. 10) which are clearly the ashes of burnt clothing. The evidence of the witnesses who say that they saw the accused on the railway between Kattukottai and Pukkiravari and from the railway station at Pukkiravari to the place where the body was found, it was suggested, was not evidence that the Court could rely upon. The witnesses admitted that they had never seen the accused before, and the suggestion was that it would be very unsafe in such circumstances to rely upon their identification of him. Reference was made to the case of Adolph Beck. It is however to be borne in mind that all these witnesses picked out the accused at identification parades held by the Sub-Magistrate at Kallakuruchi on 19th February and subsequent dates. It has not been suggested that any of them has any motive to give false evidence against the accused.

Mr. Nugent Grant in criticising the evidence of P. W. 4 laid special stress upon that part of his evidence in which he describes the jewels of the deceased woman. The witness said :

> The sari in Court (M. O. 8) is the one which Dhanabagiam was wearing when she left home. She wore gold bangles on her hand (M. O. 4), silver bangles on her feet (M. O. 3), an adigai or saradu (M. O. 2). These are the jewels now in Court. I did not notice M O. 1 the ruby ear ornaments nor the nose screw (M. O. 5).

From the difference in tense which the learned Judge has used in referring to wearing of the sari and the wearing of the jewels, learned counsel wishes us to say that this boy was not testifying that Dhanabagiam on the morning of 12th February was wearing the gold bangles (M. O. 4) or the saradu (M. O. 2) which her husband produced from Periaswami Mudali's cowshed on 18th February. We do not think there is any justification for this distinction. We think the boy in his reference to the jewels was referring as far as he could remember to the jewels which she was wearing at that time. P. Ws. 9, 10, 11 and 13 were examined, as already mentioned, at the inquest; P. Ws. 6, 7 and 8 were examined by the inspector on 15th February, and P. Ws. 7, and 8 identified the accused on 19th February the day after he had been arrested. If this evidence of identification stood alone, it might be difficult to rely upon it but it does not stand alone. Taken in conjunction with the other evidence we think that it is reliable evidence.

Learned counsel for the accused is not able to contend that if this evidence is accepted as true the conviction of the accused is wrong. There was some evidence with regard to motive but we do not think it necessary to discuss it any further than to say that Dhanabagiam was not looked upon with favour by the accused's mother, and that her presence in the family as his wife was inconvenient. That, we think, is clearly established, to say the least. But evidence regarding the motive is not important. When it is shown that the accused took his wife away from his home on the morning of 12th February, that he took her by train from Kattukottai to Pukkiravari and afterwards was seen with her near the time of sunset on 12th at the place where her strangled body was found next morning, when it is proved that the accused on being questioned about his dead wife's jewels produced M. Os. 1, 2 and 4 which Dhanabagiam was wearing according to the evidence of P. W. 4 when she left Naduvalur with the accused, the only possible inference that can be drawn is that the accused is responsible for the murder of his wife.

Learned counsel has addressed to us a legal argument suggesting that the case must be sent back for re-trial. Learned counsel points out that practically the whole of the evidence is circumstantial and that the learned Sessions Judge did not explicitly put to the accused, when questioning him under S. 342, Criminal P. C., all the items of evidence leading up to the inference that he murdered his wife, and did not ask him to explain them. Learned counsel has drawn our attention to the case in 59 Mad 622[1] and the Privy Council case in 64 M L J 466.[2] In the case in 59 Mad 622[1] reference was made to three other cases in which re-trial was ordered because the Sessions Judge had not put to the accused under S. 342, Criminal P. C., the items of circumstantial evidence from which he had drawn the inference that the accused was guilty of murder. We think it is necessary to say that their Lordships of the Privy Council in 64 M L J 466[2] were dealing with very exceptional facts. The passage in the judgment of Lord Atkin in which S. 342, Criminal P. C., is referred to, is as follows :

> The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under S. 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation.

There was no reference in the statement of the accused to the absence of blood in the abdominal cavity and Lord Atkin was pointing out that S. 342 of the Code ought to be observed not only in the letter but also in the spirit. It is clearly very unfair to draw an inference of guilt from a fact which an accused person has not had an opportunity of explaining. There is however nothing in the judgment of their Lordships of the Privy Council to indicate that every failure to comply strictly with the letter of S. 342 renders the conviction of an accused person illegal. S. 537, Criminal P. C., has a bearing upon this point. No omission to comply strictly with S. 342 can render a conviction liable to be set aside unless it has in fact occasioned a failure of justice. In the present case learned counsel for the appellant has not attempted to suggest that the omission of the learned Sessions Judge to put every point to the accused in the form of questions, has led in this case to a failure of justice. He has not for instance suggested that the accused, if he had been questioned specifically on every point, would have been able to offer a satisfactory explanation, and the reason why learned counsel has not been able to make any suggestion of this kind is found in the statements made by the accused in answer to questions put to him by the learned Sessions Judge. In the Magistrate's Court he was simply asked the question : "You now heard it said that you murdered your wife Dhanabagiam. What do you say?" and his reply was "I have not committed any crime.' When asked by the learned Sessions Judge "Have you anything further to say ?" he replied with a very long and detailed statement in which he denied the facts alleged on behalf of the prosecution that were supposed to show his motive for murdering Dhanabagiam. With regard to the jewels he said that when the police asked him for his wife's jewels, he thought that they were referring to jewels belonging to second wife from whom he had been divorced. He went on to say :

> Kolandavelu (P. W. 20) is enjoying my father-in-law's property. I asked him for a share on behalf of my wife. Hence his enmity to me. I did not meet him nor did he come to Sathanur. I did not tell him anything.

He continues :

> I did not see Doraiswami Padayachi (P. W. 4). On my father's instigation he is giving evidence against me. I was in Sathanur on Sunday. I did not come here. I did not burn the saree.

---

1. In re Sangama Naicker, (1936) 23 AIR Mad 715=1936 Cr C 818=165 I C 743=38 Cr L J 45=59 Mad 622=71 M L J 138.
2. Dwarkanath Varma v. Emperor, (1933) 20 AIR P C 124 = 1933 Cr C 442 = 142 I C 335=64 MLJ 466=34 Cr L J 322=32 SLR 716 (PC).

The learned Sessions Judge then questioned him about Ex. J., a letter which he had written to P. W. 20 and which the learned Judge thought indicated that he was displeased with or had some grievance against his wife. He answered that by saying that he had no dissatisfaction with his wife. The learned Judge then questioned him about the jewels of his first wife (M. Os. 1, 2 and 4) and he again said :

> I thought that they were referring to my second wife's jewels, and informed them it was with Periaswami Mudali. I did not produce it myself. Periaswami Mudali produced it.

And finally when the learned Judge asked him "Do you want to say anything more ?" the accused said :

> The witnesses had opportunities of observing me at Kallakuruchi jail. My younger brother resembles me much. Possibly they saw him and are mistaking me for him.

It is clear therefore that either in answer to the general question put by the learned Judge, or in answer to specific questions, the accused has dealt in his statement with all the points appearing in evidence against him and has offered such explanation as he had to offer. This case therefore has no resemblance to the case in 64 M L J 466,[2] or the case reported in 59 Mad 622[1] (the record in which we have examined and which reveals that the accused gave no explanation of the circumstances hostile to them, nor were given an opportunity to do so), or the other cases mentioned in that judgment. In the case reported in 59 Mad 622[1] and in all the cases referred to in that judgment, it was particularly noticed that the facts unexplained by the accused were vital facts, i. e. facts from which an inference of guilt almost necessarily followed. We think it is clear that when an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel, and in this case the accused was represented by two experienced advocates. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him. We can find no ground whatever for sending back this case for a re-trial. There was no defect of any kind in the proceedings before the learned Sessions Judge.

Agreeing with the assessors and the learned Judge we confirm the conviction of the accused for the murder of his wife. There is no question of the appropriateness of the sentence. We confirm the sentence of death also.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 375

FULL BENCH

LEACH C. J. WADSWORTH AND PATANJALI SASTRI JJ.

P. R. S. A. R. Periakaruppan Chettiar —Petitioner.

v.

P. S. A. R. A. R. Arunachalam Chettiar and others — Respondents.

Civil Revn. Petns. Nos. 572, 573, 720, 721, 1005 and 1006 of 1936, Decided on 15th November 1939, to revise decree of Dist. Court Coimbatore, in C. M. A. No. 126 of 1935.

(a) Provincial Insolvency Act (1920), S. 35 —Adjudication order can be set aside any time when it is shown that adjudication ought not to have been made—Fact that debtor does not object to order of adjudication is no ground for refusing to set it aside.

Section 35 contains no restriction on the power of the Court to set aside the adjudication where it is shown that the debtor ought not to have been adjudged insolvent. If no act of insolvency is committed, the estate cannot be administered under the provisions of the Act and S. 35 has been inserted in the Act to give the Court power to set aside an adjudication which ought not to have been made. The power of the Court is not restricted to a case where it could be shown that on the materials before it at the time of the adjudication the order ought not to have been passed. Even at a later stage when it becomes apparent that the order of adjudication would not have been passed if the Court had been in possession of the whole of the facts, the Court has jurisdiction to set aside the adjudication. The fact that a debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application for an order setting aside the adjudication under S. 35: *(1879) 10 Ch D 3; (1889) 22 Q B D 632; (1883) 22 Ch D 436 and (1894) 69 L T 339, Rel. on; (1883) 47 L T 339 held overruled by (1883) 22 Ch D 436 and A I R 1940 Mad 151, Not approved.* [P 376 C 2; P 377 C 1]

(b) Provincial Insolvency Act (1920), S. 37 —Annulment does not necessarily entitle debtor to be placed in possession of property in hands of receiver—Directions are discretionary with Court depending on circumstances of each case.

Section 37 gives the Court a wide discretion. The annulment of adjudication does not mean that the debtor who is adjudicated is to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case: *A I R 1935 Mad 826 (F B), Rel. on.* [P 378 C 2]

(c) Provincial Insolvency Act (1920), S. 37 —Adjudication — Subsequent showing that no act of insolvency committed — Adjudication must be annulled.

When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed, the Court has no discretion in the matter. It must annul the adjudication. [P 377 C 2]

K. Rajah Ayyar, M. Krishna Bharathi and S. Ramachandra Ayyar — *for Petitioner.*

T. M. Krishnaswami Ayyar, N. Sivaramakrishna Ayyar, A. C. Sampath Ayyangar, K. Kuttikrishna Menon and P. Anandan Nair — *for Respondents.*

Leach C. J. — These six civil revision petitions deal with three different matters arising out of the adjudication in insolvency of one Palani Gounden and his son Kandaswami Gounden by the Subordinate Judge of Coimbatore, but they may all be conveniently dealt with in one judgment. The order of adjudication was passed on 26th September 1928 on a petition filed by P. S. A. R. A. R. Arunachalam Chettiar, who alleged that the insolvents had fraudulently preferred another Chettiar, Somasundaram by name, by executing in his favour on 2nd June 1927 a mortgage of immovable property. The insolvents did not enter an appearance and the order of adjudication was passed without opposition. On 14th October 1929 the petitioning creditor applied to the Court for an order under the provisions of S. 54, Provincial Insolvency Act, setting aside the mortgage in favour of Somasundaram. The Subordinate Judge held that the fraudulent preference alleged had been established and set aside the transaction. An appeal followed to the District Judge of Coimbatore, who allowed it. The petitioning creditor then asked this Court to restore the order of the Subordinate Judge in the exercise of its revisional powers. This Court, however, agreed with the District Judge that there was no fraudulent preference and consequently refused to interfere with his order. On 25th March 1935, as the result of this Court's decision the insolvents applied to the Subordinate Judge for the annulment of the adjudication and a similar application was filed by a creditor, P. R. S. A. R. Periakaruppan Chettiar. These petitions were allowed and the adjudication was set aside under the provisions of S. 35 of the Act. On appeal the District Judge reversed this decision and three of the petitions now before the Court, namely, Nos. 572, 720 and 721, ask this Court to revise the District Judge's order.

Section 35, Provincial Insolvency Act, says that where in the opinion of the Court a debtor ought not to have been adjudged insolvent the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The Subordinate Judge held that the Court had an unrestricted power to set aside the adjudication where it was established that the order of adjudication ought not to have been passed. The District Judge considered that the power of the Court was restricted to a case where it could be shown that on the materials before it at the time of the adjudication the order ought not to have been passed. Although at a later stage it becomes apparent that the order of adjudication would not have been passed if the Court had been in possession of the whole of the facts the Court has, in the opinion of the District Judge, no power to set aside the adjudication. The Section contains no restriction on the power of the Court to set aside the adjudication where it is shown that the debtor ought not to have been adjudged insolvent. The District Judge has read something in the Section, which is not there and moreover his decision is opposed to principle. In the words of James L. J. in (1879) 10 Ch D 3[1]

> a man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt.

If no act of insolvency has been committed the estate cannot be administered under the provisions of the Provincial Insolvency Act and S. 35 has been inserted in the Act to give the Court power to set aside an adjudication which ought not to have been made. S. 35 of the Provincial Insolvency Act corresponds to S. 35, Bankruptcy Act of 1883. In (1889) 22 Q B D 632[2] a case which was decided under the Bankruptcy Act of 1883, Charles J. said:

---

1. Ex parte Learoyd; In re Foulds, (1879) 10 Ch D 3=48 L J Bk 17= 39 L T 525 = 27 W R 277.
2. In re Hester; Ex parte Hester, (1889) 22 Q B D 632=60 L T 943=6 Morrell 85.

> Is it a case in which, if he had been adjudged a bankrupt the Court would say that he ought not to have been so adjudged? These words are undoubtedly very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt. For example, if there was no sufficient petitioning creditor's debt, or no act of bankruptcy, or if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose foreign to the administration of bankruptcy law; all these are grounds on which the Court might be of opinion that the debtor ought not to have been adjudged bankrupt.

There is here express authority for the statement that where it is shown that no act of insolvency has in fact been committed the Court can set the adjudication aside on the ground that the debtor "ought not to have been adjudged insolvent." In the Bankruptcy Act of 1869, which remained in force until the Bankruptcy Act of 1883 was passed, there was no corresponding Section to S. 35, but the Court of Appeal held that in a proper case the Court had power to annul an adjudication : *see* (1883) 22 Ch D 436.[3] In that case the petitioning creditor alleged that his debtor had committed an act of bankruptcy by departing from his dwelling house with intent to defeat and delay his creditors. He had failed to show that the debtor was alive in some other place at the time. An order of adjudication was passed, but it was set aside by the Court of Appeal on the ground that the Court was not satisfied that the man was alive at the time. Probate had in fact been granted of the alleged bankrupt's will. The fact that a debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application for an order setting aside the adjudication under the provisions of S. 35. In (1894) 69 L T 339,[4] a married woman was adjudged bankrupt on the ground that she was carrying on a business of her own with her own capital. She offered no opposition when the adjudication was made and she allowed it to stand until criminal proceedings for alleged offences against the bankrptcy law had been instituted against her and other members of her family. She then applied to have the adjudication set aside and it was held by the Divisional Court that she was entitled to the order asked for because it had become apparent that she was not carrying on a business of her own with her own capital.

In support of his contention that the order of the District Judge is right, Mr. T. M. Krishnaswami Iyer has quoted to us two cases, (1883) 47 L T 339[5] and (1939) 2 M L J 753.[6] In the first of these cases, a trader having committed an act of bankruptcy, a petition was presented against him by two creditors and an adjudication followed. Subsequently, the debtor moved the Court to annul the adjudication on the ground of the insufficiency of the petitioning creditors' debt. Bacon C. J. held that the debtor ought to have appealed against the order of adjudication within the 21 days limited for that purpose, and that not having done so, the publication in the Gazette, was under S. 10, Bankruptcy Act, 1869, conclusive evidence of the validity of the adjudication. The fact that the petitioning creditors' debt was not of the amount on which a petition could be based was not a sufficient reason for the annulment of the adjudication. The judgment in this case was delivered on 13th November 1882, four days before the judgment of the Court of Appeal in (1883) 22 Ch D 436[3] where it was held that S. 10, Bankruptcy Act, 1869, had no application and an adjudication could be annulled even after the time for appealing had elapsed. Therefore (1883) 47 L T 339[5] must be taken to have been overruled. It certainly has no application in the case before us. In (1939) 2 M L J 753,[6] a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one. Kunhi Raman J. said that there was no doubt that but for the petition the adjudication would not have taken place but he added :

> Once an adjudication takes place all the other creditors of the debtor become interested in the matter and unless the appellant here is able to show that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court, it is not open to him to contend that it is a case in which the order of adjudication ought not to have been made.

These observations cannot be accepted as a correct statement of the law. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and the Section in this respect differs from Section 21, Presidency Towns Insolvency Act, where the word "may" is used. In the present case the judgment of this Court upholding the decision of the District Judge that there was no fraudulent preference is conclusive on the question whether an act of insolvency had taken place. The decision was that there had been no fraudulent preference and this decision is binding on all the insolvents, the creditors, and the mortgagee. As there was no act of insolvency the Court is bound to annul the adjudication. Therefore the order of the District Judge will be discharged and the order of the Subordinate Judge restored with costs in favour of the petitioners in Petitions Nos. 572, 720 and 721 of 1936 (one set throughout). The costs will be paid by the petitioning creditor. Civil Revision Petition No. 573 of 1936 arises out of an application filed by the Official Receiver in these circumstances. After the adjudication but before its annulment, the insolvent paid to P. R. S. A. R. Periakaruppan Chettiar a total sum of Rs. 3600. There were five payments altogether and were made between 9th September 1928 and 22nd September 1931. There is no doubt here that the insolvents and Periakaruppan Chettiar were parties to a gross fraud. The Official Receiver applied to the Court to direct Periakaruppan Chettiar to refund a sum of Rs. 2700 which the Official Receiver understood was the total amount which had been paid by the insolvents to this creditor. The Subordinate Judge held that the creditor had received only Rs. 1200 during the period of adjudication, but as the order of adjudication had been annulled, he dismissed the Official Receiver's petition. An appeal followed to the District Judge, who held that Periakaruppan Chettiar had in fact received Rs. 3600 and directed him to pay it over to the Official Receiver, which he did. It is common ground that the total amount received by Periakaruppan Chettiar was the Rs. 3600 found by the District Judge. Periakaruppan Chettiar now asks this Court to revise the order of the District Judge and direct that the money be paid over to him. S. 37 (1), Provincial Insolvency Act, reads as follows:

---

[3] Ex parte Geisel; In re Stanger, (1883) 22 Ch D 436 = 48 L T 405 = 31 W R 264.

[4] In re Helsby, (1894) 69 L T 339.

[5] Ex parte French; In re Trim, (1883) 47 L T 339 = 52 L J Ch 48.

[6] Gopu China Jogayya v. Satyanarayana, (1940) 27 A I R Mad 151 = (1939) 2 M L J 753.

> **Where an adjudication is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his interest therein on such conditions (if any) as the Court may, by order in writing, declare.**

In 58 Mad 908,[7] a Full Bench of this Court held that under this Section the Insolvency Court retains full power to give directions as to the realization and disposal of the debtor's assets. The power ought not to be used arbitrarily but used in the interests of the general body of creditors, which meant that the proper order for the Court to pass was that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Act. The person appointed had not all the statutory powers of an Official Receiver but only such powers as the Court conferred upon him. S. 37 gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case. In this case it would not be proper to allow Periakaruppan Chettiar, who has been guilty of a gross fraud on the Court and on his fellow creditors, to enjoy the fruits of his fraud. When the money was in his hands it was not his. It was money which was vested in the Official Receiver and he only got possession of it as the result of the fraud. When the adjudication was set aside the Official Receiver was not as such entitled to the money. It then belonged to the insolvents, as Mr. Rajah Ayyar concedes. The money is now in the hands of the Official Receiver and is still the property of the debtors. In view of their participation in the fraud we consider that it would also be improper to direct the Official Receiver to pay it over to them. We are of the opinion that the proper course in the circumstances of this case is to direct that the money be vested in the Official Receiver, not as Official Receiver but as a person appointed by the Court under the Section, and we direct accordingly. The Official Receiver will in due course take steps to distribute the Rs. 3600 rateably amongst the creditors who have proved in the insolvency proceedings. He will be entitled to the usual commission and charges. This petition has been opposed by the petitioning creditor and the Official Receiver. They are entitled to their costs (one set throughout).

---

[7] **Veerayya v. Srinivasa Rao, (1935) 22 A I R Mad 826 = 158 I C 1060 = 58 Mad 908 = 69 M L J 364 (F B).**

The remaining petitions are Nos. 1005 and 1006. The petitioning creditor here asks that certain other assets in the hands of the Official Receiver should be distributed by him amongst the creditors. There are no special circumstances which justify an order of this nature. The Official Receiver will be directed to deliver the assets, other than the Rs. 3600, to the debtors two months hence. The properties will be handed over to them then, subject, of course, to any order of the Court which may be passed in the meantime. There will be no order as to costs in these petitions. The Official Receiver will be allowed one set of costs out of the estate throughout in respect of petitions Nos. 572, 720 and 721 and one set in petitions Nos. 1005 and 1006.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 379

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Raja Srimathu Muthu Vijia Raghunatha Duraisingam, Zamindar of Sivaganga — Appellant.

v.

Periasami Pillai and others — Respondents.

Second Appeals Nos. 146 to 175, 178 to 192, 194 and 195 of 1934, Decided on 20th November 1939, against decrees of Dist. Court, Ramnad at Madura, in A. S. Nos. 124, etc. of 1930.

(a) Stamp Act (1899), Art. 35—Undertaking by tenant to accept patta if drawn up in accordance with terms mentioned in statement signed by him does not require stamping or registration.

An undertaking by the tenant to accept a patta if a patta be drawn up in accordance with the terms mentioned in the statement signed by him, does not call for stamping or registration, being merely an offer, and the position is not altered by the presentation of a patta in accordance with the offer or the exchange of a patta for a muchilika. [P 382 C 1]

(b) Stamp Act (1899), Art. 35 — Agreement to pay rent in money instead of in grain requires stamping and registration.

An agreement which varies the rent payable by the lessee requires registration. Hence an agreement to pay rent in money instead of in grain and contemplating a permanent tenancy at a definite money rent requires stamping and registration : *25 Mad 608 ; 37 Cal 293 and 41 Cal 493 (P C), Rel. on.* [P 382 C 1]

(c) Registration Act (1908), S. 17 — Patta for one year only — Statement in it binding tenant if he remains in occupation for longer period will not make registration necessary.

Where a patta is for one year only the fact that patta contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the patta into a lease for more than one year so as to require registration. [P 382 C 2]

(d) Madras Estates Land Act (1 of 1908), S. 24 — Tenant is not bound to pay enhanced rent even if patta has been accepted and muchilika exchanged.

The Act does not permit of a standard rent being charged where it would mean an increase in the rent. If it is shown that in any particular case the rent fixed is higher than before, the tenant will not be bound to pay it, even where a patta has been accepted and a muchilika exchanged because the arrangement would be illegal under S. 24. [P 382 C 2]

(e) Madras Estates Land Act (1 of 1908), S. 187 (1) (e) — Permanent arrangement between landholder and tenant for commutation of grain rent into money rent is not rendered unlawful by S. 187 (1) (e).

The Act does not prohibit the landholder and the tenant agreeing to change the basis of the rent provided that it does not lead to an enhancement of the rent. S. 187 (1) (e) means that where rent is payable in kind a tenant shall not be bound by a contract which prevents his applying for an order under S. 40. He can agree to pay his rent in money and if he does so there is no need for an order of commutation. The position contemplated by S. 40 no longer exists. If the money rent agreed upon turns out to be unfair to the tenant he is not without his remedy. S. 55 and S. 57 provide ample safeguards. Hence, a permanent agreement between the landholder and a tenant for the commutation of a grain rent to money rent is not rendered unlawful by reason of S. 187 (1) (e). [P 383 C 1,2]

Advocate-General and K. Subramaniam — *for Appellants.*

V. Ramaswamy Iyer and K. Desikachari — *for Respondents.*

Judgment.—These appeals raise a number of questions of importance to landholders and ryots in the Madras Presidency. The appellant is the zamindar of Sivaganga, which is one of the important zamindaries of Southern India. Before 1922 it was the custom of the tenants to pay their rent in kind, but in that year the Court of Wards which was then in charge of the estate, formulated a scheme for the permanent commutation of rent in kind to rent in money. The scheme provided for the tenants signifying their acceptance in writing of the proposal and for the exchange of pattas and muchilikas drawn up on the new basis. At the time the scheme was viewed with favour by the tenants. Practically all of them signed consent statements and many of them accepted pattas which stipulated for the payment of the rent in money, but owing to the large number of tenants it was not possible to complete the arrangement by the issue of pattas to all of them while grain prices remained stable, and some tenants refused to accept the pattas tendered when their turns came, because prices had fallen. In 1928 the appellant filed a number of suits for the recovery of money rents on the footing that there had been a valid commutation. Some of the suits were defended on the ground that the appellant was not entitled in law to payment of rent in money. In other cases the appellant had distrained and had taken proceedings for the sale of the holdings for the non-payment of rent in money. The question of the legality of the demand for rent in money having been raised, some of the tenants filed suits contesting the right of the appellant to distrain or to sell.

In September 1930 there were pending in the Revenue Court 2310 suits in which the appellant or tenants were the plaintiffs. These suits were tried by three Deputy Collectors, but for the purposes of this appeal it is only necessary to refer to the judgment of one of them, namely that of Mr. Amiritasami Pillai, which was delivered on 15th September 1930. In 94 cases appeals were filed in the Court of the District Judge of Ramnad, who dealt with them in one judgment. Second Appeals were filed in 50 cases and 47 of these appeals are now before us. The learned counsel engaged in the appeals have agreed that this Court can also conveniently deal in one judgment with all the questions raised. Before referring to the judgments below, it is necessary to examine the terms of the consent statements signed by the tenants, the terms of the pattas which were issued in pursuance of those statements, and certain of the provisions of the Madras Estates Land Act, 1908. There were two forms of consent statements. These have been marked as Ex. A and Ex. A-1 respectively. Ex. A reads as follows:

> When the Settlement Officer inspected the said lands for the levying of cash theerva for the undermentioned nanjas and punjas relating to division by waram which pertain to my patta aforesaid and which are in my enjoyment in the said village, I was also present. As regards those lands I have agreed to the tharamwar division having regard to the nature of the lands set out below. I consent to the levying of compound theerva cash theerva per acre per annum for both crops inclusive of the winter and summer crops according to the rate fixed against them. As regards the bundle of sheaves kaipichai (alms) and mason and carpenter bundles to be given usually to the village servants, I shall give them personally. Besides these, I agree to pay the rate fixed per rupee in respect of the undermentioned cash theerva, magamai, swatantram, and road cess in connexion with the malwaram due to the zamindar. If cash theerva is fixed in that manner, I am willing to obtain patta.

The word 'magamai' means contribution for charity and the word 'swatantram' the charge made on tenants in respect of services rendered by village officers. While this statement clearly contemplates the fixing of rent on a cash basis it cannot, by reason of the concluding sentence, be read as being anything more than an undertaking by the tenant to accept a patta if a patta be drawn up in accordance with the terms mentioned in the statement signed by him. In other words, it is merely an offer by the tenant and not a completed agreement. The agreement could only be completed by the tender to the tenant of a patta drawn up in accordance with his offer. The consent statement in the form of Ex. A-1 is very differently worded. It says:

> In view of the advantage resulting from the conversion of waram, varisai, etc, taxes fixed for my lands in my holding and specified in the schedule below, into cash tax, the estate officer . . . . has inspected the said lands to fix a reasonable and proper cash theerva having regard to the nature of the land and the facilities and otherwise thereof and fixed the tharam and also the rate against each land; and I have agreed to the same being satisfied with the fairness thereof. Hence I agree to pay for ever from fasli 133 . . . . to the landholder the theerva due according to the same in each fasli.
>
> Further I agree to pay to the landholder, magamai, swatantram, etc, at . . . . pies per rupee and land cess and stone tax etc, and sheaves, alms, covil virappu, mason and carpenter bundles etc., usually due to the village servants. As regards the theerva due for each land now, I have hereby agreed to pay, for ever, the same in each fasli whatever kind of crop is raised and whatever may be the number of crops raised in each fasli. Exchange of pattas and muchilikas as soon as they are prepared as shown in the reverse hereof, is hereby agreed to.

This goes far beyond an offer. It constitutes a definite agreement to pay rent forever in accordance with the figures set out in the document. The Madras Estates Land Act, 1908, was amended in 1934 and again in 1936, but all these cases arose before the amendment in 1934, and with the possible exception of S. 187, regard can only be had to the Sections of the Act as they stood in 1908. Therefore unless otherwise mentioned in this judgment the statements of the various provisions of the Act do not embody the amendments. S. 50 (2) states that every ryot shall be entitled to call upon his land holder to grant him a patta for any current revenue year and every landholder shall be entitled to call upon his ryot to give him a muchilika for any current revenue year in exchange for a patta. S. 51 sets out what the patta and the muchilika shall contain. S. 52 says that pattas and muchilikas may be exchanged for periods of one or more revenue years, but no landholder shall be bound to tender, and no ryot to accept, a patta for a period of more than one revenue year. Pattas and muchilikas accepted, exchanged or decreed for any revenue year shall remain in force until the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed; provided that where a patta or muchilika has continued in force for more revenue years than one, no fresh patta or muchilika, for the same holding shall take effect until the commencement of the revenue year next succeeding that in which it is tendered, accepted, exchanged or decreed. Sec. 53 states that no landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable proprety or by sale of his holding unless he shall have exchanged a patta and muchilika with the ryot or tendered him such a patta as he was bound to accept or unless a valid patta or muchilika continues in force. S. 55 provides that when a landholder, for three months after demand, fails to grant a patta in such terms as the ryot is entitled to receive, it shall be lawful for the ryot to sue for a patta before the Collector. S. 56 gives the landholder the same right to sue for the acceptance of a patta by a ryot when the ryot for one month after tender fails to accept the patta tendered to him and to give a muchilika in exchange. In suits arising under S. 55 or Sec. 56 the Collector is given by S. 57 the power to settle the terms of the patta and the muchilika. Therefore where a patta has expired, the tenant, if he remains in occupation, continues to hold under the terms embodied in the expired patta unless a new patta is granted by the landholder or settled by the Collector under S. 57.

Section 40 of the Act provides that where a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash, either the ryot or the landholder may sue before the Collector to have the rent commuted to a definite money rent. S. 187 (1) (e) states that nothing in any contract between a landholder and a ryot made before or after the passing of the Act shall take away the right of a landholder or an occupancy ryot to sue for a commutation of rent under S. 40. By the Madras Estates Land (Amendment) Act, 1934, the word "apply" has been substituted for the word "sue" in S. 187 (1) (e). Inasmuch as this Section applies to a contract before and after the passing of the Act it has been suggested that the amended Section applies to the present appeals. But the question is not of importance because nothing really turns on whether the right is "to sue" or "to apply" for commutation of rent. The main question is whether an agreement between the appellant and a tenant for the commutation of a grain rent to a money rent is rendered unlawful by reason of S. 187 (1) (e). The appellant says that where a tenant has agreed to pay rent in money instead of in kind Sec. 40 has no application. For the tenants it is said that S. 187 (1) (e) renders the agreement void and the tenant is entitled to apply at any time under S. 40 for commutation of rent payable in grain to a definite money rent.

The Revenue Court's findings may be summarized as follows: (1) a consent statement whether in the form of Ex. A or of A-1 does not require to be stamped or registered, and this applies also where a patta and a muchilika have been exchanged; (2) the mere tender of a patta by the appellant to a tenant in pursuance of the terms of a consent statement does not amount to a completed agreement and the appellant is not entitled to sue for rent on the basis of a mere tender of patta; (3) where a patta has been accepted and a muchilika exchanged the arrangement for the payment of a money rent is binding on the tenant who is not entitled to apply for commutation of rent under S. 40; and (4) a patta which has been accepted, exchanged or decreed continues in force by virtue of S. 52 (3) notwithstanding that the period for which it was issued has expired. On these findings the Revenue Court held that the appellant was only entitled to file rent suits in cases where pattas and muchilikas were exchanged and that the tenants were entitled to have the proceedings by way of distraint or for sale of holdings set aside in all cases where the landholder had relied merely on the signing of consent statements or on the signing of such statements followed only by the presentation of pattas.

The findings of the District Judge were these: (1) there is a right to contract apart from the Act, but this right does not affect the force of S. 187 (1) (e) and in spite of a completed agreement for the payment of rent in money the tenant has the right of applying to the Revenue Court for the fixing of a money rent under Sec. 40; (2) the appellant had taken advantage of the trust of his tenants; he had created new tenancies under the new rates and upon new terms which were entirely unfavourable to the tenants and he had been guilty of "legal fraud;" (3) even where pattas and muchilikas had been exchanged the appellant had not regarded himself as being bound by their terms; and (4) inasmuch as the consent statements had not been stamped there could be no contract, even where a patta and a muchilika had been exchanged.

I will first deal with the questions of stamping and registration. A consent statement in the form of Ex. A obviously does not call for stamping or registration, being merely an offer, and the position is not altered by the presentation of a patta in accordance with the offer or the exchange of a patta for a muchilika. None of the pattas tendered was for more than one year. Agricultural leases which do not exceed the term of one year are exempt from stamp duty and registration (Art. 35, Stamp Act, and S. 17 of the Registration Act). A consent statement in the form of Ex. A-1 is however on a different footing, as it amounts to an agreement to pay rent in money instead of in grain and contemplates a permanent tenancy at a definite money rent. An agreement which varies the rent payable by the lessee requires registration: *see* 25 Mad 603[1] and 37 Cal 293[2] affirmed on appeal by the Privy Council in 41 Cal 493[3] at p. 506. Therefore in those cases in which the consent was in the form of Ex. A-1 stamping and registration were necessary before the statement could be put in evidence and as the requirements of the Stamp and Registration Acts were not complied with, the statement could not be proved. In such a case the appellant could not rely on the mere presentation of a patta and the agreement could only be proved if a patta and a muchilika were actually exchanged. If they were exchanged they could be put in evidence without stamping or registration because they did not purport to create a tenancy for more than one year. It has been contended that as the pattas actually issued stated that the rents were not liable to any alteration except for reasons contemplated in S. 41, Madras Estates Land Act, and as the pattas were intended to bind the tenants, their heirs and assigns registration was necessary. But this contention cannot be accepted. The governing factor is that each patta was for one year only. The fact that a patta contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the patta into a lease for more than one year.

There is no justification whatever for the findings of the District Judge that the new arrangement in all cases had resulted in enhancement of rent and that the landholder had acted unfairly. The District Judge based these sweeping statements upon an examination of one case. S. 24 of the Act provides that the rent shall not be enhanced except as provided by the Act, but on the printed record there is no indication that there has been general enhancement. The arrangement for the payment of rent in money was made while the estate was under the control of the Court of Wards. As a preliminary to the introduction of the system a survey was carried out by the Madras Survey Department. The lands were classified and the money rents were based on the average income for a number of years. While there is no reason to suppose that the calculations were not fairly made the Act does not permit of a standard rent being charged where it would mean an increase in the rent. Therefore, each case will have to be considered on its merits. If it is shown that in any particular case the rent fixed is higher than before, the tenant will not be bound to pay it, even where a patta has been accepted and a muchilika exchanged because the arrangement would be illegal under S. 24. The finding of the District Judge that the appellant has not regarded himself as being bound even where pattas and muchilikas have been exchanged also cannot be accepted. His finding here was based on his view of the evidence in two suits only. In each case the suit was for the waram because the pattas and muchilikas had been lost. There is no justification whatever for the District Judge's opinion that the appellant has resiled from agreements made by him or on his behalf.

---

1. Subramaniam Chettiar v. Arunachalam Chettiar, (1902) 25 Mad 603 = 29 I A 138 = 12 M L J 479=8 Sar 316 (P C).
2. Durga Prasad Singh v. Rajendra Narain Bagchi, (1910) 37 Cal 293=4 I C 713=10 C L J 570.
3. Durga Prasad Singh v. Rajendra Narain Bagchi, (1913) 41 Cal 493 = 21 I C 750 = 40 I A 223=18 C W N 66=19 C L J 95 (P C).

Turning now to the question whether S. 187 (1) (e) renders an agreement to pay rent in money instead of in kind unlawful it is to be observed that this Court has recognized the right of the landholder and the tenant to agree to the permanent commutation of a grain rent into a money rent. In 45 M L J 199[4] it was held that a landholder was entitled to revert to the waram system unless the tenants established that it had been superseded permanently as the result of a contract, express or implied, for the payment of rent in money. Similar decisions were given in 29 M L J 362[5] and 11 M L W 311.[6] In none of these cases however was the question of the effect of S. 187 (1) (e) considered. As I have pointed out, S. 40 gives the right to the landholder or the ryot to apply to the Collector to have rent payable in kind commuted to a money rent. Mr. Sitaram Rao has conceded that where a permanent arrangement for the payment of rent in money was entered into before the Act a tenant would not have the right to apply under S. 40, but he says that S. 187 (1) (e) prevents him from entering into any such contract after the passing of the Act. If before the Act a tenant could agree to change the waram for a money rent I fail to see how S. 187 (1) (e) alters the position. S. 187 expressly applies to contracts made before and after the passing of the Act. Therefore, if the Section has the effect which the respondents say it has it would render void any contract of this nature made before the Act came into force, but it is admitted that it does not apply to contracts entered into before the Act was placed on the statute book. The Act does not prohibit the landholder and the tenant agreeing to change the basis of the rent provided that it does not lead to an enhancement of the rent, and I consider that S. 187 (1) (e) means that where rent is payable in kind a tenant shall not be bound by a contract which prevents his applying for an order under S. 40. He can agree to pay his rent in money and if he does so there is no need for an order of commutation. The position contemplated by S. 40 no longer exists. If the money rent agreed upon turns out to be unfair to the tenants he is not without his remedy. Ss. 55 and 57 provide ample safeguards. The suits out of which the appeals have arisen and are now before us will be remanded to the Revenue Court for reconsideration and decision in accordance with the following directions:

Rent suits filed by the appellant.—The appellant will, subject to a qualification which follows, be entitled to decrees for rent in those cases in which the tenants have signed consent statements in the form of Ex. A and to whom pattas have been presented in accordance with such statements. The appellant will also be entitled to decrees in suits in which pattas and muchilikas have been exchanged and have remained in force. He will not be entitled to decrees in those suits in which consent statements in the form of Ex. A-1 have been signed unless pattas and muchilikas have been exchanged. But in no case will he be entitled to a decree where the money rent exceeds the value of the grain rent which applied before the new system was introduced. Where the appellant cannot claim rent in money he will be entitled to the grain rent provided he amends his plaint.

Suits by tenants for setting aside Distraints and proceedings for sales.—The tenants will be entitled to decrees in cases where there were no consent statements signed unless they accepted pattas. In cases where the consent statement was in the form of Ex. A and pattas were tendered the suits will not lie. Where pattas were accepted the tenants will still be entitled to succeed if the money rents exceeded the value of the grain rents ruling before the commutation. These directions will only apply to the suits in which decrees have been passed and are now under appeal. Where no appeal has been filed the decree of the Revenue Court or of the District Court as the case may be must stand. The appellant having succeeded in the main he is entitled to his costs, and we fix the advocate's fee in each case at Rs. 10. The appellant is entitled to the refund of the court-fee paid on the memoranda of second appeals under S. 13, Court-fees Act.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 383

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

In re Chidambaram Chettiar

Appellant.

Appeal No. 251 of 1939, Decided on 21st November 1939, against the decree of Court of Sub-Judge, Coimbatore, D/- 22nd November 1937.

---

[4] Varada Reddi v. Srinivasa Mudaliar, (1924) 11 A I R Mad 299=72 I C 683=45 M L J 199.

[5] Ayyamperumal Odayan v. Ramaswami, (1916) 3 A I R Mad 147=30 I C 983=29 M L J 362.

[6] Muthiah Chettiar v. Perian Kone, (1920) 7 A I R Mad 115=55 I C 78=11 M L W 311.

(a) Court-fees Act (1870), Sch. 2, Art. 17-A —Suit filed in District Munsif's Court transferred to Sub-Court—Appeal from decree of Sub-Court falls under Art. 17-A—Fact that suit was originally filed in District Munsif's Court does not make decree one of that Court.

Where a suit filed in the Court of the District Munsif is transferred to a Subordinate Court, an appeal from the decree of the Subordinate Court falls under Art. 17-A The fact that the suit was originally filed in the District Munsif's Court does not convert the decree of the Subordinate Court into one of the District Munsif. [P 384 C 2]

(b) Court-fees Act (1870), S. 12 (ii)— Scope —S. 12 (ii) empowers Appellate Court to correct mistake made below.

Section 12 (ii) gives an Appellate Court power when an appeal comes before it to correct a mistake in respect of court-fee made below and this mistake may be corrected at the direction of the Registrar. Therefore where the court-fee in respect of an appeal before the District Judge was not properly paid, the High Court has power to require the appellant to make up the deficiency. [P 384 C 2]

K. V. Ramachandra Aiyar — *for Appellant.*

T. Krishna Rao for Government Pleader — *for the Crown.*

Leach C. J. — This appeal has been placed before us to-day on a question raised with regard to the court-fee payable. The memorandum of appeal bears a court-fee stamp of Rs. 15 and the Deputy Registrar has called upon the appellant to pay an additional fee of Rs. 85 on the ground that the memorandum should be stamped with a fee of Rs. 100 under the provisions of Art. 17-A of Sch. 2, Court-fees Act. As the appellant questioned the validity of the Deputy Registrar's decision a notice was issued to the Government Pleader. The facts are these. The appellant filed a suit in the Court of the District Munsif of Dharapuram for a declaration that a certain alienation was a fraud on creditors. He filed a similar suit in respect of another alienation in the Court of the Subordinate Judge of Coimbatore. The suit filed in the Court of the District Munsif was subsequently transferred to the Court of the Subordinate Judge and tried along with the suit which the appellant had filed in that Court. By a common judgment the two suits were dismissed. The appellant then filed an appeal to this Court against the decision in the suit which he had filed in the Court of the Subordinate Judge and filed an appeal to the Court of the District Judge of Coimbatore, in respect of the decree of the Subordinate Judge in the suit which was originally filed in the Court of the District Munsif. This is the appeal which has given rise to the question of stamping.

The memorandum of appeal was stamped with a fee of Rs. 15 when it was presented to the Court of the District Judge and the District Judge accepted it as being correct. Art. 17-A provides that the court-fee on a memorandum of appeal in a suit for declaration without consequential relief in a District Munsif's Court shall be Rs. 15. The District Court however erred in accepting the memorandum as having been properly stamped. The decree which was challenged was a decree of the Court of the Subordinate Judge and not of the Court of the District Munsif and Art. 17-A clearly states that in the case of a memorandum of appeal against a decree of a District Court or a Sub-Court the fee shall be Rs. 100 if the value for purposes of jurisdiction is less than Rs. 10,000, as in this case. The argument of the appellant that the fact that the suit was originally filed in the Court of the District Munsif makes it a decree of that Court cannot be accepted. The decree was passed by the Court of the Subordinate Judge and is rightly declared to be a decree of that Court.

The learned advocate for the appellant has suggested that this Court has no jurisdiction to require payment of the difference between Rs. 15 and Rs. 100 by reason of S. 12, Court fees Act. He says that there was no question raised when the appeal was filed in the Court of the District Judge and not having been raised there it cannot be raised here. This argument ignores the facts and the wording of the Section. The District Court in accepting the memorandum of appeal at Rs. 15 did decide that that was the proper fee. S. 12 (ii) gives an Appellate Court power when an appeal comes before it to correct a mistake made below, and this mistake was corrected by the direction of the Deputy Registrar. There is no substance in the appellant's objections and they must be overruled. As he has insisted on these questions being argued and as the Government Pleader has been served the appellant must pay costs which we fix at Rs. 50. The appeal will not be accepted until both the court-fee and the costs which we have now awarded have been paid.

C.R.K./G.N. *Order accordingly.*

* * A. I. R. 1940 Madras 385

FULL BENCH

LEACH C. J., PANDRANG ROW, ABDUR RAHMAN, KRISHNASWAMI AYYANGAR AND PATANJALI SASTRI JJ.

B. Nana Rao — Appellant.

v.

M. U. Arunachalam Chettiar and others — Respondents.

Second Appeal No. 742 of 1935, Decided on 24th November 1939, against decree of Sub-Judge, Salem, in A. S. No. 82 of 1934.

(a) Interpretation of statutes — Court cannot ignore statutory definition (Per *Krishnaswami Ayyangar J.* in Order of Reference.)

It is not for the Court to ignore a statutory definition and proceed to try and extract the true meaning of an expression independently of it. [P 390 C 2]

(b) Interpretation of statutes—Later statute—Construction (Per *Krishnaswami Ayyangar J.*, in Order of Reference.)

If the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be to advance the policy underlying it. If the language fails to achieve the object in view, it can only be regretted but not helped. But the Court need not be astute to adopt a construction which would tend to bring about a frustration of the objective. If the words of a later statute differ from those of an earlier one, the Court in construing the later, is not bound by decisions under the earlier, even though it relates to the same subject-matter. [P 392 C 2]

* * **(c) Civil P. C. (1908), S. 64 — Private transfer during pendency of attachment in one suit — Attachment in execution of decree in another suit made after transfer but while decree in former suit remained unsatisfied and attachment therein subsisting — Auction-purchaser in sale effected in pursuance of second attachment will not obtain good title—Alienation would not be void as against him** (Per *Leach C. J., Pandrang Row and Patanjali Sastri JJ.; Abdur Rahman and Krishnaswami Ayyangar JJ., Dissenting.*)

(Per *Leach C. J., Pandrang Row and Patanjali Sastri JJ.*) — S. 64 provides that where property has been attached any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation, a person who buys the property at the court auction will not obtain a good title and the alienation would not be void as against his title. [P 399 C 2]

(Per *Abdur Rahman and Krishnaswami Ayyangar JJ.*)—S. 64 places both the attaching creditor and other decree-holders who have applied for execution in same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment it would be voidable not only against the attaching creditor but also against the other decree-holders. Hence a private transfer made after and during the pendency of an attachment in one suit, is void against the title of an auction purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting : *Case law discussed.* [P 393 C 2; P 403 C 2; P 404 C 1; P 407 C 2; P 410 C 1]

(d) Civil P. C. (1908), S. 64—It is not necessary that property should have been sold or that assets must have come into executing Court (Per *Abdur Rahman J.*)

It is not necessary for the purposes of S. 64 that the property should have been sold or that the assets must have come into the executing Court although this may be necessary for the purposes of Section 73. [P 407 C 2]

D. Ramaswami Ayyangar — *for Appellant.*

T. L. Venkatarama Ayyar — *for Respondents.*

ORDER OF REFERENCE

Krishnaswami Ayyangar J. — The decision of this second appeal turns on the effect of the Explanation added to S. 64, Civil P. C., 1908, which according to the appellant, has brought about a change in the rights of claimants to rateable distribution, as they were understood to be when the old Code of 1882 was in force. As a comparison of the language of the present S. 64 with that of S. 276 of the Code of 1882 is necessary for the decision of the question it will be advantageous to set out the provisions of both the Sections for the purpose of studying them together. S. 276 in the form in which it existed in the Code of 1882, had been enacted by the Code of 1877, with a change of language as compared with its predecessor, (S. 240 of the Code of 1859), made not with the object of changing the law but for better expressing the meaning underlying the Section as interpreted by the Privy Council in 14 M I A 543[1] at p. 549. S. 276 of the Code of 1882 is as follows:

> When an attachment has been made (by actual seizure or by written order duly intimated and made known in manner aforesaid), any private alienation of the property attached, (whether by sale, gift, mortgage or otherwise and any payment of the debt, or dividend, or a delivery of the share) to the judgment-debtor (during the continuance of the attachment) shall be void as against all claims enforceable under the attachment.

Section 64 of the present Code is as follows:

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the

---

[1] 1. Anund Loll v. Jullodhur, (1870-72) 14 M I A 543=10 Beng L R 134=17 W R 313 (P C).

judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purpose of this Section, claims enforceable under an attachment include claims for the rateable distribution of assets.

The suit out of which the second appeal has arisen was instituted to enforce a mortgage executed on 20th May 1926. The plaintiffs who or whose interests are now represented by respondents 1 to 4, were the undivided brothers of Thandavaraya Chetty, the mortgagee who had died before suit. There were four defendants impleaded in the suit of whom the first three were the mortgagor and his undivided brothers, respondents 5 to 7 in the second appeal. They did not contest the suit and have in fact remained throughout ex parte, neither opposing nor supporting the claim of the mortgagee. The opposition really came from the appellant who was defendant 4 in the suit. He derived his interest in the suit property under a court sale held in execution of a money decree obtained by a creditor of the mortgagor in O. S. No. 237 of 1925 on the file of the District Munsif of Krishnagiri. The court sale was on 16th December 1926, more than six months after the mortgage. He raised several defences to the suit but they were all overruled by the Courts below on substantially the same grounds, and a decree has been passed in favour of the mortgagees. Of the defences raised, one alone merits consideration as the others have all been satisfactorily disposed of, by concurrent findings of the Courts below. That defence was that at the date of the mortgage there was a pending attachment on the property, and that as he, the appellant, had purchased the property at a sale held in the process of enforcing what according to him should be regarded as a claim enforceable under the attachment within S. 64, his title prevailed over that of the mortgagee. In fact he claims that his purchase was the resultant of a claim enforceable under the pending attachment as defined by the Explanation to S. 64, Civil P. C. Not that the attachment itself resulted or could result in the sale at which he purchased, so that it could be aptly described as a claim enforceable under that attachment, but that the same efficacy is to be attributed by force of the statute to the later attachment under which he purchased. This is the question that arises for consideration and for appreciating it a few facts are necessary.

The attachment, on which the appellant relies in support of his attack on the mortgage, had been made, as already indicated, under a different decree from that in execution of which he purchased the property. His purchase was, as already mentioned, on 16th December 1926 in O. S. No. 237 of 1925 in pursuance of an attachment effected in it on 29th June 1926, that is more than a month after the suit mortgage. If regard be had to this attachment alone, it is clear that it cannot avail him to get rid of the suit mortgage which was earlier than the attachment, as S. 64 taken by itself and without the Explanation renders a private transfer void only if it is made subsequent to the attachment. What is however urged for the appellant is that there was an earlier attachment though in another suit against the same judgment-debtor and that he could take advantage of that attachment for avoiding the suit mortgage. That other suit was O. S. No. 497 of 1923 on the file of the Principal District Munsif of Salem, in which a money decree had been obtained by one Appu Chetty in October 1924. In it an attachment was effected on 14th April 1925. This attachment which was more than a month prior to the suit mortgage was pending during all the time the decree in O. S. No. 237 of 1925 was under execution and was in fact subsisting even at the time when the appellant purchased the property. It appears that on the very day of the appellant's purchase at the court sale, Appu Chetty, the decree-holder in the other suit, applied for and obtained an order for rateable distribution of the assets realized by that sale. The decree in O. S. No. 497 of 1923 was not however fully satisfied, and for aught we know the attachment made in it continued and was still alive even at the date of the present suit though it does not appear to have been pursued to a sale.

For attracting the operation of the Section, the first condition prescribed by it, is, that the transfer sought to be challenged must have been made after and pending an attachment. But this circumstance is not by itself sufficient. It must also appear that the transfer was contrary to the attachment in the sense that it must have the effect of prejudicially affecting rights brought into existence by the attachment, or likely to arise out of it. If both these conditions are satisfied the transfer will be disregarded, not wholly even then, but to the extent necessary to protect those rights. These are the rights which are comprehended by the expression 'claims' enforceable under the attachment in S. 64. Every transfer contrary to such a claim is contrary to the attachment itself according to the plain intendment of the Section. Normally, and in the absence of the Explanation, the protection afforded by the Section on an attachment being made will benefit the decree-holder directly and the auction-purchaser indirectly. They would be the only persons who could under the Section acquire rights if the attachment is duly enforced according to the procedure prescribed by the Code. Even then those rights depend on the particular attachment which preceded the private transfer, and which alone can be used as a weapon of attack against it. As the Privy Council has ruled in 44 Cal 662:[2]

> All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree holder's title (in this case the decree-holder was the court auction-purchaser) to the property . . . . rest.

The question whether a third class of persons, namely other decree-holders who had not attached but who had merely applied for the execution of their decrees within the time limited by S. 295 of the Code of 1882, were entitled to the protection of S. 276 corresponding to the present S. 64, was considered, but except in 23 Mad 478,[3] 15 Cal 771,[4] 7 All 702[5] and 25 All 431.[6] In Bombay, the decision was adverse to their pretensions. The reason for the decision was given in the following words by the Allahabad High Court in the latest of the cases cited:

> The words 'shall be void as against all claims enforceable under the attachment' in S. 276, Civil P. C., cannot, in our judgment, include the claims of a person who has not caused the property of the judgment-debtor to be attached, but has simply asked for a rateable distribution of the assets which might be realized by the sale of the property of the judgment-debtor. Those words have been, in our judgment, rightly interpreted to mean the claim of the person who has obtained an attachment. They were evidently added to the Section in order to remove the ambiguity which existed in the corresponding Section of Act 8 of 1859. The claim of a person who applied for a rateable distribution of the assets is, in our opinion, not a claim which is enforceable, under the attachment placed upon the property at the instance of another judgment creditor. It is manifest that if the claim of the attaching creditor be discharged, and his decree be recorded as satisfied, the attachment obtained by him must necessarily come to an end. In that case there would be no sale in pursuance of the attachment, and no assets would be realized which might be rateably distributed. Therefore the claim of a person who has applied for a rateable share in assets which might or might not be realized cannot be regarded as a claim enforceable under the attachment.

It will be observed that S. 295 contained no reference to an attachment, at any rate in express terms, but proceeded to give effect to claims for rateable distribution, whenever assets were realized by sale or otherwise in execution of a decree. Assets may be realized legally without an attachment, e. g. in respect of the balance of the sale proceeds under a mortgage decree after satisfying the mortgagee ; or even in other cases, by a sale without an attachment, which at the worst is only irregular and not wholly void: 51 M L J 172.[7] It can scarcely be contended that such assets were excluded from the operation of the Section. There seems to be little ground therefore for connecting S. 295 with an attachment so as to make its operation dependent on it. An attachment however is the all-important consideration for the application of S. 276. It is out of it, that the rights recognized by the Section spring up. On this point, the observations of Mitter J. in 2 Beng L R 49[8] throw useful light. Referring to S. 271 of the Code of 1859 by which rateable distribution was limited to the surplus alone remaining after satisfaction of the attaching decree-holder's claim, the learned Judge observed:

> That Section, it is to be observed, comes into operation when the property attached has already been sold, and when there is a surplus left in the hands of the Court after the demand of the attaching creditor is satisfied in full. The persons among whom this surplus is directed to be distributed are allowed to participate in it, not because of the previous attachment with which they had nothing to do, but because of a particular contingency which has brought into the hands of the Court a certain sum of money which the Court has been authorized to apply for their benefit. The efficacy of the attachment is exhausted for the benefit of the attaching creditor himself and if no surplus is left after full satisfaction of his decree, the other creditors must be left to execute their decrees as best as they can.

---

[2] Minakumari Bibi v. Bijoy Singh, (1916) 3 A I R P C 238=40 I C 242=44 I A 72=44 Cal 662 (PC).

[3] Kunhi Moosa v. Makki, (1900) 23 Mad 478=10 M L J 98.

[4] Durgacharan Rai v. Monmohini Dasi, (1888) 15 Cal 771.

[5] Ganga Din v. Khushali, (1885) 7 All 702=1885 A W N 179.

[6] Manohar Das v. Ram Autar Pande, (1903) 25 All 431=1903 A W N 92.

[7] Subramania Iyer v. Krishna Iyer, (1926) 13 A I R Mad 211=92 I C 833=51 M L J 172.

[8] Anandlal Das v. Radha Mohan Shaw, (1869) 2 Beng L R 49 (F B).

It follows that it is unnecessary for the application of S. 295 to show that the assets realized were realized as the result of an attachment. In fact the Section did not concern itself with an attachment or its absence but merely started with enquiring whether the assets had been realized by sale or otherwise in execution. The rights conferred by the Section were not made dependent on an attachment, and were not, we think, in fact dependent on such a circumstance. When the Section itself does not suggest the hypothesis of a prior attachment it is difficult to support the theory that the right given by it, is or can be regarded as a right or claim enforceable under an attachment. Such a right could ordinarily inhere only in the creditor who attached, and who alone could be said to have rights enforceable under the attachment, though after the sale takes place the benefit and the protection of S. 276 would accrue to the purchaser also. For, the protection of the purchaser is the protection of the attaching creditor, as it is only through the sale, that the creditor gets his decree satisfied. There was therefore little justification for the view that a claim for rateable distribution could be regarded as a claim enforceable under an attachment within the meaning of S. 276 of the old Code. It would have been perfectly legitimate to put the same construction on S. 64 of the Code of 1908 but for the Explanation newly added to the Section.

It is contended for the appellant that an important change has been introduced in the Code of 1908 by the addition of the Explanation in S. 64. Before dealing with this contention, it may be observed in passing that in other respects the Section is practically a repetition of the old S. 276. We doubt whether the substitution of the words 'contrary to such attachment' for the words 'during the continuance of the attachment' which occurred in the old Code has the effect of making S. 64 'less favourable' or more restrictive as Wallis C. J., was inclined to think in 41 Mad 265.[9] In the light of the decisions of the Privy Council in 29 Cal 154[10] and 14 M I A 543,[1] it could not have been the object of S. 276 to render all alienations during the continuance of the attachment void, irrespective of their effect on the rights of the attaching creditor. It avoided such of them only, as tended to prejudice rights arising and enforceable under the attachment. It is, we think, more reasonable therefore to hold that the change of language was merely verbal and intended to make the sense clearer, rather than to abridge previously existing rights.

Now coming to the Explanation newly added by the Code of 1908 the question is whether it has gone far enough to bring within the protection given by the Section, persons who at the date of the private transfer had not attached but had only applied for the execution of their decrees, that is applied for rateable distribution under S. 73. In other words, can such non-attaching decree-holders take advantage of an earlier attachment made at the instance of another decree-holder, and on its strength seek to avoid the transfer for their benefit also in spite of the fact that they had not attached the property at all or attached it only after the transfer? Or is it further necessary for these non-attaching decree-holders to entitle themselves to the benefit of S. 64 that assets should also have been or be realized under the earlier original attachment? The appellant contends that the further condition implied in the latter query is not required by the Section when read with the Explanation. This is really the point in controversy. That there are observations in the judgments of both of Wallis C. J. and Kumaraswami Sastri J. in the Full Bench decision in 41 Mad 265[9] contrary to the appellant's contention can scarcely admit of doubt. Wallis C. J. has observed:

> Section 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the *attached property is brought to sale* in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position.

Kumaraswami Sastri J. is more express. He said:

> There can be little doubt that S. 64, as it stands at present, can protect decree-holders entitled to rateable distribution against private alienation *only where assets have been realized*, in which case they will be entitled to share the proceeds in preference to the alienee.

The italics are ours. These observations which do militate against the appellant's contention are sought to be got over in two ways. In the first place it is argued that they must be regarded as unnecessary for the decision of the question, referred to the Full Bench, and were in fact outside the reference. Looking at the terms of the reference there is justification for this argument as the question referred to merely proceeded on an assumption of facts entirely absent in the present case. The question was this :

---

[9] Annamalai Chettiar v. Palamalai Pillai, (1918) 5 A I R Mad 127=48 I C 539=41 Mad 265=33 M L J 707 (F B).

[10] Dinobandhu Shaw Chowdhury v. Jagmaya Dasi, (1902) 29 Cal 154=29 I A 9=6 C W N 209 (P C).

> Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of *such attachment* ?

It is quite clear that the reference was made on the footing that the prior attachment had ceased to be operative, by the decree having been satisfied or otherwise, unlike in the present case where the prior attachment has been found to be subsisting at all material times, and not shown to have been ever withdrawn or terminated. But for this difference in the facts, we should be bound to give effect to what we think was an opinion adverse to the appellant expressed by the Full Bench. It is conceded on both sides, that there is no reported decision of this Court at any rate, which has dealt with the point in an authoritative manner, so as to furnish a precedent binding on us.

Secondly it is urged that the qualification suggested by the learned Judges is inconsistent with the language of the Explanation and opposed to the policy underlying the Section itself. It is to be observed that the crucial date with reference to which the validity of a private transfer has to be tested under S. 64 is the date of the transfer itself. If before that date rights had actually come into existence, or should, by force of the statute be deemed to have come into existence, they must be allowed to prevail against the mortgagee whose rights arise under and only on the date of the mortgage. Prima facie, such an overriding right can spring into existence only in favour of a decree-holder who has attached the property prior to the transfer. Even then, the attachment does not by itself and without more operate to put an end to the transfer, even as against himself. The rights flowing from an attachment are inchoate and imperfect, and requiring to be perfected by further process in execution to be pursued till the attached property is sold. In order to remove the impediment, it is essential that the creditor should follow out the remedial procedure prescribed by the Code to its end. This was the mode, and we think the only mode available to the attaching decree-holder under the old Code, to get rid of a private alienation. Nonetheless, the right, as an efficient, enforceable right came into existence simultaneously with the attachment, and would last as long as the attachment itself lasted. It might be that further action was necessary to achieve the overthrow of the private transfer, but the potentiality was there. The weapon had been forged and ready for use; it had only to be wielded. By whom could it be wielded? By the attaching decree-holder and the auction-purchaser alone under the old Code, and even under the present S. 64 without the Explanation. But does not the Explanation bring in a new class of persons who, at the date of the private transfer, had only put in claims for the rateable distribution of assets and had not attached the property? As we have already observed, this class of persons were held not entitled to the benefit of the protection under the old Code. But it is impossible to deny that it was the plain object of the Explanation to admit them to the protection of the Section, whether or not the words employed sufficed to achieve that object, so much we think is clear. It is only necessary to enquire what the nature of the claim is to be and subject to what limitations, if any, it is allowed to be recognized.

By claim is meant a demand, a right or title to something. A claim for rateable distribution of assets is accordingly a demand cognizable under S. 73 of the Code. S. 73 without its provisos which are immaterial for the present purpose runs as follows:

> Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.

It will be observed that in one important respect there is a change of language from the old Sec. 295. For the words 'whenever assets are realized by sale or otherwise in execution of a decree' which found place in it, the words 'where assets are held by a Court' have been substituted. For the words 'prior to the realization' have been substituted 'before the receipt of such assets.' These changes make it clear that it is wholly unnecessary under the present Code that the assets should have been brought into Court as the result of an attachment or by realization in execution. The method by which the assets reach the hands of the Court is now made perfectly immaterial;

all that is necessary is that the assets should be held by the Court irrespective of the means or the process which produced it: *vide* 49 Mad 38[11] and 41 Mad 616.[12] Realization in execution might perhaps suggest, though not necessarily a prior attachment. Even this possibility of a connexion to an attachment is now ruled out by the substituted words of the present Section. Neither the form in which execution has been had, nor the precise extent to which execution had been allowed to run nor the exact source or genesis of the fund in Court any longer forms part of the definition of assets: 47 Cal 515.[13] A claim for rateable distribution under the Section now stands entirely dissociated from any attachment and its efficacy as a claim is made to depend only upon its being made prior to the receipt of the assets by the Court. We are of opinion that immediately on the application being made, provided it is made in time, the applicant acquires a right to rateable distribution which is denied to all later applicants. The satisfaction of that right may have to await the receipt of the assets, but that is no reason for saying that there is no right or claim in existence until then. We are not able to persuade ourselves that the Privy Council decision in 44 Cal 662[2] has laid down the contrary proposition. In that case, their Lordships were interpreting S. 295 of the old Code for the purposes of S. 276. A claim under S. 295 had necessarily to function through an attachment in order to operate against a private transfer under S. 276. In fact, as we have said, the attachment by itself did not and could not displace the transfer, which could only be displaced by the attachment being worked out, and only by the results of such working out. The observations of the Privy Council must be understood with reference to the question before them, namely whether S. 276 put an end to the disputed transfer. The answer was "no", as a claim for rateable distribution had perforce to operate through an attachment which was an indispensable condition under the Section. But it does not follow from this observation that no claim arose under the Section until assets were received or came to be held by the Court. On the contrary we are inclined to think that the moment an application is made by persons of the description mentioned in the Section, and within the time limited by it, a claim straightway did arise which can be properly described as a claim for the rateable distribution of assets, within the meaning of the Explanation to S. 64. If the Explanation is incorporated into the Section itself, it would read as follows:

> Where an attachment has been made, any private transfer (of the property so attached) contrary to such attachment shall be void as against all claims for rateable distribution of assets.

It is not, be it noted, as against claims for rateable distribution of assets under the attachment, that the transfer is rendered void but as against claims for rateable distribution of assets simpliciter without reference so far as such claims are concerned, to the attachment. By the Explanation claims for the rateable distribution of assets—note that the words 'under an attachment' are not added so as to qualify such claims —are equated to claims enforceable under an attachment. True, an attachment must first be made and must also subsist at the time of the private transfer. But if a claim for rateable distribution has arisen while yet the attachment is pending, it is given the efficacy which is the peculiar attribute of a claim enforceable under the attachment, in the sense explained. It is, of course, necessary that the transfer should also be contrary to the claim for rateable distribution. So it will be, as the explanation makes it clear that it is to have and be given, without reference to an attachment, the same vitality as a claim based on the attachment. A claimant for rateable distribution is thus admitted to the protection which was till the introduction of the Explanation being shared by the prior attaching decree-holder, and a purchaser under that attachment. It is unnecessary under the present Code in view of the extended meaning given by the Explanation to 'claims enforceable under an attachment' to consider whether a claim for rateable distribution can strictly be regarded as a claim truly enforceable under the attachment. The statute has said so and there is an end of the matter. It is not for the Court to ignore a statutory definition and proceed to try and extract the true meaning of an expression independently of it.

We have said that the Bombay High Court took a view different from that adopted by the other High Courts on the meaning of S. 276 of the old Code. In the opinion of Telang J. expressed in the decision in 16 Bom 91,[14] as a result of the combined operation of that Section and S. 296 of the old Code, a claim for rateable distribution could be held to be a claim enforceable under an attachment. That view was, if we may say so with respect, based on a forced construction, and did not, we think, recommend itself to the Privy Council in 44 Cal 662,[2] where their Lordships merely assumed its correctness 'for the sake of argument' but yet found it unserviceable. Telang J.'s observation based on 5 All 86,[15] that,

---

[11] Siva Pratapa v. A. E. L. Mission, (1926) 13 A I R Mad 307=97 I C 496=49 Mad 38.

[12] Thiraviyam Pillai v. Lakshmana Pillai, (1919) 6 A I R Mad 647=47 I C 538=41 Mad 616=35 M L J 150.

[13] Noor Mohammad v. Bilasiram Thakursidas, (1920) 7 AIR Cal 785=59 I C 458=47 Cal 515.

> one cannot logically avoid the conclusion that the claim of the creditor who has applied for execution as mentioned in S. 295 is properly described as one 'enforceable under the attachment' of the creditor who may be called the principal creditor,

cannot, it seems to us, be supported in the light of later authority. However they may be, it is undeniable that the result achieved had the merit of advancing the beneficent objects underlying the Section. As observed by Strachey C. J. in 23 All 106,[16] those objects were twofold:

> The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree-holders each competent to execute the decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders upon the same footing and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first.

These being the salutary objects behind the Section, it scarcely admits of doubt that the extension given to S. 276 tended to advance the policy of the law. Telang J.'s opinion not having been shared by the other High Courts, it became necessary, and this was the chief reason, to amend the Section by adding the Explanation to S. 64. But it does not by any means follow that the Legislature intended to go no further than the decision. This is a question to be answered only on a true construction of the language of the Section to be understood no doubt in the light afforded by a historical retrospect of the antecedent case law but not to be controlled by it.

We have already adverted to the language of S.64, and to the effect on it of the Explanation. It is necessary for a proper appreciation of the point under consideration to emphasize an aspect of the matter, which has not received the importance it deserves. For the purpose of attracting the operation of S. 276, a claim for rateable distribution had to be a claim enforceable under the attachment. Its connexion as we have observed to a live subsisting attachment was a necessary condition of the protection. So it was we think that Telang J. had to lay emphasis on the fact that the first attachment in the case before him was in force at the date of the application. In fact he regarded this circumstance as the essential feature which distinguished the case before him from those reported in 7 All 702[5] and 15 Cal 771[4] as the following observation shows:

> But it is to be remarked that in both the cases referred to, the first attachment was either in fact withdrawn or had become inoperative by law, and that circumstance necessarily distinguishes both these cases from the one before me, in which the first attachment stands, and is admittedly to be fully operative.

It is difficult, we agree, to interpret S. 276, in a different sense, as the private alienation was declared by the Section to be void only against 'all claims enforceable *under the attachment*.' The words italicized enacted a paramount check and only subject to it the old clause could function. Where the link between the attachment and the claim did not exist, the protection also did not extend. This in fact was also the basic ground of the decision of the Privy Council in 44 Cal 662.[2] In that case, the respondent who was the decree-holder and had purchased under a later attachment was held not entitled to impugn an earlier private alienation, though it was made at a time when there was an attachment pending in a prior decree which had not been pursued to a sale. The effect of their Lordships' judgment as correctly stated in the headnote was this:

> The respondents' title rested entirely on the attachment in the execution case No. 16 of 1907 (the later attachment in pursuance of which he had purchased) and that alone was the attachment the continuance of which could avoid the appellants' private alienation; but on the facts it did not do so. The respondents could not invoke the attachment in execution case No. 8 of 1902 (the first attachment) to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on S. 295, Civil P. C., 1882, as entitling him to the benefit of Section 276.

We strongly feel that there is no warrant for holding that the same condition is to be imported into the interpretation of the new Section. Look at the result. In spite of the apparent purpose of the Explanation which was to throw open the protection of the Section to a claimant for rateable distribution it has finally ended, on this interpretation, by failing to give it to him or gives it when he cannot want it. For, to say that he qualifies himself for the protection only on assets being realized is to nullify the effect of the Explanation. When does he want the protection? Not when the assets have been realized. For, then he is in a position to obtain immediate satisfaction and his right cannot thereafter be taken away from him. It is, with all respect, meaningless to argue that he requires any protection when this stage is reached, as by then the private transfer had been struck at and destroyed by the sale which has fetched the assets. The protection if it is to be real is needed at an earlier stage and only to remove an impediment placed in the way of the execution, proceeding along normally and fructifying ultimately into a sale, in the proceeds of which, when once realized, his rights become crystallized and thereafter indisputable. It seems to us therefore that there is every reason why the Court should struggle against a construction which rendered the legislative effort entirely otiose. It was pointed out by the Calcutta High Court as early as 1888, in 15 Cal 771,[4] that

---

[14] Sorabji Edulji Warden v. Govind Ramji F. N. Wadia, (1892) 16 Bom 91.

[15] Mahadeo Dubey v. Bholanath Dichit, (1882) 5 All 86=1882 A W N 186 (F B).

[16] Bittal Das v. Nand Kishore, (1901) 23 All 106.

> to hold that claims under S. 295 are claims enforceable by attachment against which assignments made under S. 276 are void, would perhaps be carrying out the intention that may have been in the mind of the Legislature when the old Code (of 1859), which did not provide for a rateable distribution was suddenly modified by the introduction of that perfectly new principle. Unfortunately the Sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things, and it appears to us that in this respect S. 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295.

Where the Calcutta High Court had failed, Telang J. succeeded by a construction which has certainly the merit, if we may say so with respect, of originality and boldness, but all the same emphasized the need for an amelioration in favour of the claimant. In the Full Bench decision in 41 Mad 265[9] itself one of the referring Judges, Seshagiri Iyer, expressed a strong inclination in favour of the wider construction, but was only held back by the pressure of authority which he thought was against it. Bakewell J. was apparently of the opinion that the cases decided under the old Code ceased to be authoritative in the changed conditions brought about by the addition of the Explanation. We are also inclined to accept the same view. For in approaching the construction of the new Section, it is not without value to remember that the new Code as its Preamble shows, is both a consolidating and an amending Act. If the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be to advance the policy underlying it. We agree that if the language fails to achieve the object in view, it can only be regretted but not helped. But the Court need not be astute to adopt a construction which would tend to bring about a frustration of the objective. If the words of a later statute differ from those of an earlier one, the Court in construing the later, is not bound by decisions under the earlier, even though it relates to the same subject-matter (1883) 23 Ch D 118[17] at p. 127 though change of language may not by itself be conclusive on the question whether a change of interpretation was intended. We should in this connexion remember the principles of construction laid down by the House of Lords in (1891) A C 107[18] and followed by the Privy Council in 23 Cal 563[19]:

> The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion . . . . its utility will be almost entirely destroyed. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

We are conscious that Kumaraswami Sastri J. was for limiting the scope of the Section to very narrow limits, and expressed the view that:

> In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree holders entitled to rateable distribution. Assuming that

---

[17] Ex parte Willey; In re Wright, (1883) 23 Ch D 118=52 L J Ch 546=48 L T 380 = 31 W R 553.

[18] Bank of England v. Vagliano, (1891) A C 107= 60 L J Q B 145=64 L T 353=39 W R 657 = 55 J P 676.

[19] Norendranath Sircar v. Kamal Basini Debi, (1896) 23 Cal 563=23 I A 18=6 Sar 663 (PC).

the Legislature intended the attachment under S. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to S. 64 worded as it is, and made no provision for the continuation of the attachment in O. 21 in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the Legislature.

The idea contained in the last sentence in the passage cited has been shared by Fazl Ali J. in 13 Pat 446.[20] But we venture to think with the utmost respect, that the result has been achieved in fact. Kumaraswami Sastri J. has relied mainly on the Privy Council decision in 44 Cal 662[2] in support of the observations he has made. We do not think, as we have indicated already, that the decision was intended to cover cases arising under the present Code, at any rate on facts different from those which were present in the Full Bench case. He has also referred to O. 21, Rr. 55, 57, 89 and certain Forms appended to the Code of Civil Procedure. These Rules and Forms were, we think, intended to provide for ordinary cases, where the complications arising out of claims for rateable distribution do not come into play, and ought not to be used to cut down the effect of the Explanation to S. 64. He notices the provision contained in O. 21, R. 90, which does seem to affirm a present right in the claimant for rateable distribution without reference to the necessity for the realization of assets, but it is not clear why the pointing finger of this Rule, as well as R. 72 (2) should not be followed to reach the clue to the proper construction. The reasoning to be found in the decisions reported in 49 Mad 38,[11] 13 Bom L R 1189[21] and 10 Mad 57[22] seem to go some distance in favour of the appellant, whereas 7 M L W 573,[23] a decision of Wallis C. J. and Kumaraswami Sastri J. tends the other way. There are also other decisions of other High Courts to an opposite effect but in all of them, the first attachment had come to an end, as in the decisions of our own Court.

We find it difficult to understand why a subsequent lapsing of the original attachment, whether by satisfaction of the decree or otherwise should prejudice the right of the claimant for rateable distribution provided he had made the claim in time, that is, while that attachment was in force. If we are justified in thinking that the right comes into positive existence taking a definite shape the moment a proper application under S. 73 is made it stands to reason that it should not suffer annihilation by the act of a mere stranger. The right being in existence it may be necessary to enforce it by proceeding to reattach and sell the property in the execution already taken out in order that the private alienation may be got out of the way. In such a contingency the fact that the attachment so made is subsequent to the transfer should not matter, as otherwise the scope of the Explanation and the object behind it would stand unwarrantably restricted. Nor can we see why the claimant for rateable distribution should be denied the initiative in his own interest to work out his statutory right, instead of fastening his hopes to the off chance of the decree-holder who first attached proceeding with his execution and producing a result in which he could share. We are not unaware that the view expressed by us goes against some of the observations in the Full Bench decision but in all humility we feel that the point merits reconsideration.

We therefore think it eminently desirable that the question discussed above should be considered and decided by a Full Bench. We accordingly frame the question as follows:

"Is a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in former suit remained unsatisfied and the attachment therein was subsisting?"

OPINION

Leach C. J. — The question which has been referred for decision is this:

> **Is a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting?**

The circumstances which have given rise to this reference are these. On 25th October 1924 one Appu Chetty obtained a money decree in O. S. No. 497 of 1923 of the Court of the District Munsif of Salem. The decree was transferred to the Court of the District Munsif of Krishnagiri for execution. On

---

[20] Radha Mohan v. Mt. Wahideen, (1934) 21 A I R Pat 685 = 155 I C 918 = 13 Pat 446.

[21] Bibi Miyakhan v. Sulabhachand Ramchand, (1911) 13 Bom L R 1189 = 12 I C 923.

[22] Lakshmi v. Kuttunni, (1887) 10 Mad 57.

[23] Vighneswaradu v. Venkata Suryanarayanamurti, (1918) 5 A I R Mad 280=45 I C 782= 7 M L W 573.

5th March 1925 the decree-holder applied in Execution Proceedings No. 132 of 1925 for the attachment and sale of the property. There was then due under the decree a sum of Rs. 2399-4-6. An order of attachment was passed on the same day and the attachment was effected two days later, 7th March 1925. On 20th May 1926, the judgment-debtors mortgaged the attached property to respondents 1 to 4 to secure a loan of Rs. 1200. Appu Chetty had previously agreed with his judgment-debtors to accept payment of the amount due under his decree by instalments. On 22nd August 1925, Appu Chetty's petition for execution was dismissed in accordance with the agreement arrived at, but the attachment was continued pending the payment of the remaining instalments. On 15th August 1925 one Pedda Sambayya Chetty obtained a money decree against the same judgment-debtors in the Court of the District Munsif of Krishnagiri, and on 15th April 1926 Pedda Sambayya Chetty applied for the attachment of the same property in Execution Proceedings No. 322 of 1926 of that Court. Pedda Sambayya Chetty's application for attachment was granted on 10th June 1926 and the attachment was effected on the 29th of that month. On 12th December 1926 Appu Chetty, to whom there was still owing under his decree a sum of Rs. 568-4-0, applied in the execution proceedings of Pedda Sambayya Chetty for rateable distribution and his application was granted on 16th December 1926, the date on which the property was sold under Pedda Sambayya Chetty's attachment. Out of the sale proceeds, Appu Chetty received a sum of Rs. 105-14-9, being the amount payable to him on the rateable basis. The purchaser at the auction held in Pedda Sambayya Chetty's execution proceedings is the appellant in the appeal in which this reference has been made. On 11th November 1931, the mortgagee respondents filed a suit on their mortgage in the Court of the District Munsif of Krishnagiri. The suit was defended by the appellant and the question was whether the mortgagees or he had the better title. The appellant claimed that he had the better title by reason of the provisions of S. 64 and S. 73, Civil P. C. The District Munsif relying on the decision in 41 Mad 265[9] granted the respondents a mortgage decree and his decision was upheld by the Subordinate Judge of Salem. The correctness of these decisions was challenged in a second appeal, which came before Krishnaswami Ayyangar and Somayya JJ. who after hearing arguments made this reference.

From the narration of the facts it will be observed that the property was sold in Pedda Sambayya Chetty's execution proceedings, which were instituted after the mortgage had been created. The appellant says that the mortgage was invalid by reason of the provisions of S. 64 of the Code. The reasoning is this. The mortgage was created during the attachment obtained by Appu Chetty and S. 64 renders the mortgage void notwithstanding that this sale took place in Pedda Sambayya Chetty's execution proceedings. The answer to the question therefore depends on the effect to be given to the wording of S. 64, and this involves the consideration, not only the decision in 41 Mad 265,[9] but of numerous other authorities. Before proceeding to discuss the authorities which have bearing on the question before us I will set out the relevant statutory provisions. S. 64 reads as follows:

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.
>
> *Explanation.*—For the purposes of this Section, claims enforceable under an attachment include claims for the rateable distribution of assets.

This Section is the corresponding Section to S. 276 of the Code of 1882 which said:

> When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

The wording is somewhat different, but so far as this case is concerned there is no material change, unless it is effected by the explanation to the Section in the present Code. Both S. 276 of the Code of 1882 and S. 64 of the present Code rendered a private alienation void as against claims enforceable under the attachment. The Section which provides for rateable distribution is S. 73. Eliminating the provisos which have no bearing here S. 73 says:

> Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after

deducting the costs of realization, shall be rateably distributed among all such persons.

Therefore in order to entitle a creditor to rateable distribution all that is necessary is that he shall have made, before the Court executing the decree has received assets of the judgment-debtor, an application for the execution of his decree. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim. If he does not, distribution may be made by the executing Court without knowledge of the claim and he may find that the Court has parted with all the assets. The corresponding Section in the Code of 1882 to this Section was S. 295. Here again, the latter Code made verbal alterations, but these verbal alterations did not so far as the present case is concerned materially alter the Code of 1882.

The adding of the Explanation to S. 64 of the Code of 1908 appears to have been the result of conflicting High Court decisions. In 7 All 702,[5] the Allahabad High Court held that an application for rateable distribution was not a claim "enforceable under the attachment" within the meaning of S. 276 of the Code of 1882, but in 16 Bom 91,[14] Telang J. held that a claim for rateable distribution did come within the purview of S. 276. Telang J. said (p. 100 of the report):

> I cannot doubt that the claims of those execution creditors who under S. 295 are entitled to claim the benefit of a distribution of the fruits of the attachment ought to be treated as falling within the words 'all claims enforceable under the attachment.'

The wording of the Explanation follows the wording of Telang J.'s judgment and did put an end to the controversy. Whether on a true construction of the provisions of the Code of 1882 claims for rateable distribution should have been regarded as "claims enforceable under the attachment" it is not necessary to decide. In drafting the present Code, the Legislature considered that claims for rateable distribution should be included in this category and as the result added the Explanation to S. 64. The Court has to decide whether an attachment in proceedings which do not result in the sale of the attached property enures for the benefit of a person who sells in other execution proceedings as the result of an attachment effected after the property has been alienated privately.

In my opinion the judgment of the Privy Council in 44 Cal 662,[2] has great bearing on the question under discussion; in fact, in my opinion, it really decides it. It is true that there the Judicial Committee was considering a case under the Code of 1882, but the appeal was heard in 1916, eight years after the present Code had come into force and their Lordships referred to the judgment of Telang J. in 16 Bom 91,[14] which in effect read into S. 276 of the Code of 1882 what has now been added by the Explanation to S. 64 of the present Code. In 44 Cal 662[2] the appellant claimed under two deeds of sale executed in her favour on 15th July 1907 by a judgment-debtor. The respondent was the transferee of a money decree obtained against the judgment-debtor on 3rd January 1901. He was also the transferee of a money decree obtained against the judgment-debtor on 24th August 1896. On 13th June 1902 execution proceedings were instituted in respect of the decree passed in 1896. These proceedings were numbered as execution Case No. 8 of 1902. The property which was the subject-matter of the suit which gave rise to the appeal to the Privy Council was attached, but no further step in execution was taken here. In 1907 an application for execution of the decree of 3rd January 1901 was filed and this application led to the attachment of the same property on 16th July 1907, the day after the property had been sold privately to the appellant. The later execution proceedings, which were No. 16 of 1907, were persisted in and the property was sold to the respondent at a court auction held on 23rd August 1907. The question for decision was whether the title obtained by the appellant under the two sale deeds of 15th July 1907 prevailed over that obtained by the respondent at the court auction on 23rd August 1907. The execution proceedings of 1907 having been instituted after the alienation to the appellant the respondent was not able to say that the alienation was void as against that attachment, but he claimed that inasmuch as there was a subsisting attachment under the decree of 1896 that attachment enured to his benefit and rendered the alienation void. The Privy Council held that the respondent's title rested entirely on the attachment in the execution case No. 8 of 1907, but as the alienation to the appellant has taken place before that attachment was effected it was not void under S. 276. The respondent could not invoke S. 295 as there were no assets in Court when the alienation took place. At page 672 of the report Sir Lawrence Jenkins who delivered the judgment of the Board said :

> But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kabalas bear, are, nevertheless, void under S. 276, Civil P. C. That Section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. Ex hypothesi, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree holder was made. Therefore it cannot be avoided by that attachment.

Later in the judgment Sir Lawrence Jenkins said :

> He (the respondent) relies on S. 295, Civil P. C., as entitling him to the benefit of S. 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there was such assets and the indications in the record point the other way. But apart from this, S. 295 cannot help the decree-holder. Though the word "attachment" occurs three times in S. 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in 16 Bom 91[14] is correct, and that the conditions of S. 295 have been satisfied, it cannot advance the decree-holder's case.
>
> It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907 nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The Judicial Committee did not accept the decision of Telang J. in 16 Bom 91[14] as being correct, but assumed for the sake of argument that it was correct and went on to say that on this assumption the only weapon of attack was the attachment in execution case No. 8 of 1902. In other words, the private alienation could only be avoided in the execution proceedings which led to the sale. The execution proceedings which led to the sale in that case were the execution proceedings in which the attachment had been effected after the alienation had taken place. As the judgment of Telang J. in 16 Bom 91[14] was to the effect that the words "all claims enforceable under the attachment" in S. 276 of the old Code included claims for rateable distribution and as the judgment of the Privy Council in 44 Cal 662[2] proceeded on assumption that 16 Bom 91[14] had been correctly decided it seems to me that 44 Cal 662[2] must be regarded as having direct application in the matter now before us.

The decision in 44 Cal 662[2] was considered by a Full Bench of this Court (Wallis C. J., Ayling and Kumaraswami Sastri JJ.,) in 41 Mad 265[9] and, as I read, the judgments of the Full Bench regarded 44 Cal 662[2] as applying to the present Code. In 41 Mad 265[9] a decree-holder attached land in execution of his decree. Other persons had obtained decrees against the judgment-debtor and they applied for rateable distribution without attaching the land in execution of their decrees. Subsequently the judgment-debtor alienated the land and paid off the decree-holder who had attached. It was held by the Full Bench that the other decree-holders who had applied for rateable distribution were not entitled to question the alienation under S. 64. In the course of his judgment, in which Ayling J. concurred, Wallis C. J. said :

> Section 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree holders who have applied for execution cannot be in any better position.

Kumaraswami Sastri J. who delivered a separate but concurring judgment after quoting from the judgment in 44 Cal 662[2] said :

> There can be little doubt that S. 64 as, it stands at present, can protect decree-holders entitled to rateable distribution against private alienation only where assets have been realized, in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e. g. where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree holders entitled to rateable distribution. Assuming that the Legislature intended the attachment under S. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to S. 64 worded as it is and made no provision for the continuance of the attachment in O. 21, in cases where the attaching creditor was paid off.

> The result is not very happy, but the remedy is in the hands of the Legislature.

These observations are clearly based on 44 Cal 662[2] and they were made on a case under the present Code. We have been asked to disregard the decision in 44 Cal 662[2] because in 45 M L J 770,[24] the Judicial Committee did not decide whether the former case had bearing on the latter. The facts in 45 M L J 770[24] were that on 19th August 1911, the property of the judgment-debtor was attached in execution proceedings, and in June of the following year it was sold in those proceedings. On 9th August 1912, the judgment-debtor, defendant 1, paid in the whole of the decretal amount and costs and as the result the sale was not confirmed and the execution proceedings were struck off on 1st October 1912. Before the payment of the decretal amount, another application for execution was filed by another decree-holder and on 10th August 1912 the property was attached in those proceedings. On 12th August 1912, an application for rateable distribution was filed by the decree-holder who had instituted the latter execution proceedings but it was refused on the ground that the money which had been lodged in Court was not money realized in execution. Thereupon the second decree-holder applied for the sale of the attached property. The sale was carried out on 25th April 1913 and the property was purchased by defendant 2 in the suit. On 17th July 1912, the judgment-debtor entered into a contract with the plaintiff for the sale of the same property. The suit out of which the appeal arose was a suit by the plaintiff for specific performance of the contract. Their Lordships did not think it necessary to consider whether 44 Cal 662[2] had any bearing on the question or whether that case was rendered inapplicable owing to the difference of phraseology of S. 64 of the present Code from S. 276 of the old Code under which that case was determined. The remarks of their Lordships in 45 M L J 770[24] cannot however, be read as casting doubt on the effect in 44 Cal 662.[2] They can only be read as expressing their Lordships' opinion that it was not necessary to consider the question of the application in 44 Cal 662[2] to the case then before them. For the purpose of answering the present reference the question of its application to the present Code has to be considered and I have stated my reasons for holding that it does apply.

The question has also been considered by the Calcutta, Bombay, Allahabad, Patna and Nagpur High Courts and they have all applied 44 Cal 662[2] to cases under the present Code and they have all accepted as being correct, the decision of the Full Bench of this Court in 41 Mad 265.[9] In 39 C W N 1076,[25] a Division Bench of the Calcutta High Court, (S. K. Ghose and McNair JJ.) had to consider a case in which the facts were these. One Monomoy Banerjee in March 1933 obtained an attachment in execution of his money decree. On 28th August 1933 one Provosh Chandra Mullick, another judgment-creditor of the judgment-debtor, applied for rateable distribution. On 7th September 1933, during the pendency of Monomoy Banerjee's attachment, the judgment-debtor sold the property privately to Debendra Nath Dutta. Out of the sale proceeds Monomoy Banerjee was paid part of his decretal amount whereupon his petition in execution was dismissed and the attachment came to an end. On 16th September 1933 Provosh Chandra Mullick himself applied for attachment and sale of the property. The question which the Court was called upon to consider was whether the private alienation to Debendra Nath Datta was valid. It was held that it was. Ghose J. who delivered the judgment of the Court, said:

> Now 44 Cal 662,[2] assumes that the view taken in 16 Bom 91[14] is correct and on that assumption it points out that, in order that the claims of non-attaching decree-holders for rateable distribution might be enforceable, it was necessary to bring S. 295 (now S. 73) into play, but that certain conditions should be fulfilled and one of them was that there should be assets in the hands of the Court. I fail to see how this decision can be effected by the fact that the explanation to S. 64 was not then in existence. Bakewell J. who was one of the referring Judges in the Madras case, took the view that the Privy Council case in the decision under the old Code was no authority on the question which was raised under the new Code with the explanation added. But the learned Judges who heard the reference all took the view that the question was governed by the decision in 44 Cal 662[2] on the principle that a claim in order to be enforceable must comply with the conditions laid down in S. 73 and that certainly is the import of the decision in 44 Cal 662.[2] In that view we see no reason to differ from the decision of the Full Bench in the Madras case.

The Bombay decision is 30 Bom L R 1488.[26] In that case one Bhila obtained on

---

24. Nur Mohammad Peerbhoy v. Dinshaw Hormasji Motiwalla, (1922) 9 A I R P C 393=71 I C 625=45 M L J 770 (P C).

25. Provosh Chandra v. Debendra Nath, (1935) 39 C W N 1076.

26. Chindha Rupla v. Chhanganlala Shivalal, (1928) 15 AIR Bom 545 = 30Bom L R 1488.

13th April 1920 an attachment before judgment. Changanlal, the respondent in the appeal, obtained an attachment before judgment of the same property on 28th May 1920. On 8th June 1920 the judgment-debtor sold the property to the respondent. Out of the amount of the consideration the respondent paid himself the amount due under his decree and also paid to Bhila the amount payable to him. Consequently, on 15th June 1920 the respondent's suit was dismissed and on the 22nd of that month, Bhila's suit was dismissed. On 19th June 1920, that is four days after the dissolution of the respondent's attachment by reason of the dismissal of his suit and three days before the dissolution of Bhila's attachment, Chindha Rupla Patel, the appellant, also attached the property and in the execution proceedings instituted by him the property was sold on 1st July 1921 at a court-auction. The respondent filed the suit out of which the appeal arose for a declaration that the property could not be sold in execution of the appellant's decree. It was held that the appellant could not claim the benefit of either of the two earlier attachments. After referring to 41 Mad 265[9] and 44 Cal 662,[2] Patkar J. said :

> The attachment before judgment in the defendant's suit in execution of which the sale was held was subsequent to the alienation of the plaintiff. There were not, therefore, any claims enforceable under the previous attachments under S. 64, Civil P. C. It is also clear that the claim of the present defendant does not fall under the explanation to S. 64, for there were no assets held by the Court in order to entitle him to the benefit of S. 73, Civil P. C. It follows, therefore, that the claim of the present defendant was not a claim falling under Sec. 73, Civil P. C., and, therefore, not a claim enforceable under the attachment within the meaning of S. 64, Civil P. C. We think, therefore, that the contention of the appellant that the sale deed is void under S. 64 is not sustainable.
>
> It is urged on behalf of the appellant that though his case might not fall strictly within S. 64, the principle of S. 64 might be applied in considering his claim under the attachment of 19th June 1920. The argument cannot be accepted. According to the decisions in 37 Bom 138[27] and 44 Cal 662,[2] the sale deed in favour of the present plaintiffs cannot be affected by the attachment of the defendant which was levied eleven days after the sale deed. The previous attachments must be considered to have been withdrawn on account of satisfaction of the claims in respect of which the attachments were effected. The moment the attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment cease to be enforceable: *See* 35 Bom 516.[28]

Baker J. concurred in the judgment of Patker J. The Allahabad High Court considered 44 Cal 66[22] and 41 Mad 265[9] in 33 All L J 4.[29] There one Roop Chand obtained a money decree and attached the immovable property of the judgment-debtor in March 1927. On 8th June 1927 Joti Prasad who had also obtained a money decree against the judgment-debtor applied for rateable distribution. On 21st January 1928 the property was sold in pursuance of Roop Chand's attachment. On 21st February 1928 the judgment-debtor sold the property privately to one Lala Mehar Chand and out of the sale proceeds paid off the amount due to Roop Chand under his decree. The sale in execution was consequently set aside. On 28th February 1928 Joti Prasad without filing a separate application for execution, but merely relying on his application for rateable distribution asked the Court to sell the property which the Court did and confirmed the sale on 31st July 1928. Lala Mehar Chand then filed a suit for a declaration of his title and succeeded. Rachpal Singh J. in the course of his judgment referred to 44 Cal 662[2] and 41 Mad 265[9] and quoted with approval from the judgment of Wallis C. J. in the latter case. Sulaiman C. J. who concurred in the judgment of Rachhpal Singh J. considered that the explanation to S. 64 emphasizes that the private alienation which has to be void must be "contrary to such attachment." The Patna High Court applied 44 Cal 662[2] and approved 41 Mad 265[9] in 13 Pat 446[30] and the decision of the Nagpur High Court to the same effect was given in I L R (1937) Nag 291.[30]

The learned Judges who have made this reference have indicated that in their opinion S. 64 is sufficiently widely worded to give Pedda Sambayya Chetty the benefit of Appu Chetty's attachment. They have read S. 64 as operating to protect all judgment-creditors who have applied for execution before any assets of the judgment-debtor are brought into Court, irrespective of the fact that the attachment which results in the sale has been effected after the private alienation. If it were the intention of the Legislature to embody in the Code this broad principle, the language used has not effected it and the Court can only have regard to the language used. I am unable,

---

27. Jetha Bhima and Co. v. Lady Janbai, (1913) 37 Bom 138=17 I C 625 = 14 Bom L R 904.
28. Khushalchand v. Nandram Sahebram, (1911) 35 Bom 516=12 I C 572 = 13 Bom L R 977.
29. Mehar Chand v. Joti Prasad, (1934) 21 A I R All 1057=154 I C 350=(1935) 33 A L J 4.
30. Kastur Chand v. Mt. Wazir Begum, (1937) 24 A I R Nag 1=167 I C 48=I L R (1937) Nag 291.

however, to accept the proposition that the Legislature had in mind what the learned Judges consider it had in mind. The principle which they say is expressed in S. 64 is a principle which runs contrary to the common law and contrary to the provisions of the Code of Civil Procedure of 1859. Under S. 270 of that Code the creditor who attached first was given priority. He was entitled to be paid in full. S. 271 provided merely for the rateable distribution of the balance. It seems to me more probable that the Legislature has said what it intended to say. The learned Judges, while they have considered the decisions in 44 Cal 662[3] and 41 Mad 265[9] have not examined the decisions of the other High Courts which have applied the judgment in the former case to the present Code and have approved of the judgments in the latter case. The learned Judges were impressed by the decision in 15 Cal 771.[4] In that case the Calcutta High Court accepted the view of the Allahabad High Court in 7 All 702[5] and observed that to hold that claims under S. 295 of the Code of 1882 were claims enforceable by attachment against which assignments made under S. 276 were void, would perhaps be carrying out the intention that might have been in the mind of the Legislature when the old Code, which did not provide for a rateable distribution, was suddenly modified by the introduction of that perfectly new principle, but the Sections of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things, and it appeared to the learned Judges who decided 15 Cal 771,[4] that in this respect S. 276 had not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295. With the addition of the Explanation to S. 64 of the present Code the learned Judges who have referred the present question have indicated that in their opinion the Section has been framed in such a way that all claimants for rateable distribution have been protected, notwithstanding that the proceedings leading to the sale of the judgment-debtor's property have been instituted after the private alienation. They say that otherwise the protection which the Legislature intended to afford to claimants for rateable distribution would be meaningless. Their argument however overlooks the fact that were it not for the explanation the controversy which led to conflicting decisions would remain unsettled. With great respect I am unable to share the opinion expressed in the Order of Reference.

The answer that I would give to the reference is this. S. 64 provides that where a property has been attached any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the court-auction will not obtain a good title. I would make the costs of this reference costs in the appeal.

Pandrang Row J. — I agree with my Lord.

Patanjali Sastri J. — I agree with the answer given by my Lord the Chief Justice.

Abdur Rahman J. — The question to decide is whether the mortgage executed by the judgment-debtors was, in the circumstances mentioned, valid as against the appellant who had purchased the property in court-sale in course of execution (E. P. No. 322 of 1926). It has been contended on behalf of the appellant that inasmuch as the mortgage deed was executed by the judgment-debtors in favour of the respondent during the subsistence of the attachment effected in April 1925 and by making his application for execution (E. P. No. 322 of 1926) the second decree-holder's claim had become enforceable under the said attachment, the mortgage must be held to be void as against the appellant. This necessitates an examination of the provisions contained in Ss. 64 and 73, Civil P. C. To take up S. 73 first. It provides that

> where assets are held by a Court and more persons than one have, before the receipt of such assets, applied to the Court for the execution of decrees against the same judgment-debtor, the assets shall be rateably distributed amongst all such persons.

In other words, it provides for rateable distribution of assets held by a Court amongst those unsatisfied holders of decrees for money who have applied to the Court for execution before the assets have been received by the Court. It may be observed that this Section was amended by the Code of 1908 and is not confined in its operation to the assets which are realized by sale or any other process in execution. It is immaterial now how the assets are received by a Court so long as they are held by it although the Court may have done nothing to realize them. Whatever argument might have been advanced before the amendment of this Section in regard to the assets realized by sale or otherwise in execution of a decree being distributable between the creditors rateably, it cannot now be contended that it is only the assets which have been realized in that manner that are capable of being distributed under S. 73, Civil P. C. This would suggest that the connexion existing between an attachment and sale of the property by Court before 1908 was done away with by the amendment made in the present Section. A perusal of the language of this Section would also show that it does not require a decree-holder to make an application for a rateable share in the assets. Indeed it has been held that a simple application for rateable distribution is not enough and would not entitle the petitioner to get the same. "The duty of distribution," as observed by Varadachariar J. in 1937 M W N 480,[31]

> is cast on the Court whenever "more persons than one" have applied for execution of decrees passed against the same judgment-debtor.

No assets can, it is true, be distributed before they are received by the Court and that is how the Section has been drafted, but the claim to receive a rateable share must have been in existence and made before they are so received and it is the claim made before the receipt of assets by putting in an application for execution which entitles a decree-holder, who has a money decree against the judgment-debtor, to receive his share. If a decree-holder does not apply for execution before the receipt of assets by the Court, he cannot obviously get a rateable share of the assets under this Section, although they could be actually distributed only after they had been received by Court.

A judgment-debtor loses the power of alienating his rights in the property on its attachment to the extent of the claims enforceable under the attachment. This is a legal consequence of the attachment and should have been provided, as it is in fact provided by the Code, before an application for execution entitling a person to a rateable share could be thought of. That is why in the scheme of the Code S. 64 precedes Section 73.

So far as this case is concerned, an attachment of the property in dispute was effected on 14th April 1925 in the first instance in E. P. No. 132 of 1925 and an application for execution was made by the decree-holder in O. S. No. 237 of 1925 to the same Court during the subsistence of the above attachment and before the receipt of any assets by that Court. The question is if the second application for execution (E. P. No. 322 of 1926) must be held to be inconsequential or useless for the purposes of S. 64, Civil P. C., simply because the execution Court did not proceed to sell the property in pursuance of the attachment effected in April 1925 but did so under the later attachment made in June 1926. This takes me to S. 64, Civil P. C., which reads as follows :

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.
>
> *Explanation* :—For the purposes of this Section, claims enforceable under an attachment include claims for the rateable distribution of assets.

This Section renders a private transfer of a property or of any interests therein during the continuance of an attachment ineffectual as against all claims enforceable under the attachment if the transfer was contrary to such attachment. Without taking the decided cases into consideration and placing a purely grammatical construction on the words of the Section my answer to the question whether an alienation is hit by this Section would depend on the reply to the following questions: (a) Was there an attachment? (b) Was the alienation contrary to (such) attachment or did it affect any claim enforceable under such attachment?

If the answers to the above questions happen to be in the affirmative, I would say that the transfer was invalid as against the persons whose claims were enforceable under the attachment. It cannot be disputed that a transfer by a judgment-debtor after an attachment at the instance of an attaching creditor would be contrary to the attachment effected at his instance, and to use the language of the Section, 'void' as against him. The question is if it would also be 'void' as against the claims of the persons who did not attach but had merely applied for execution after the first attachment although before the receipt of assets and had thus become claimants for a share in the rateable distribution of the assets under S. 73, Civil P. C. There is no doubt that if they had asked for attachments in their applications they would have got them and any alienation contrary to such attachments would not have affected these decree-holders. This would have caused multiplicity of proceedings and meant unnecessary duplication of legal machinery in issuing several attachments. Are the claimants for rateable distribution then to be debarred from getting the protection which attachments in their own applications for execution would have afforded them, and do they not by making an application for execution get an additional advantage of going back to the date of the first attachment effected at the application of another decree-holder and saying that any alienation by the judgment-debtor after the first attachment would not be voidable at the instance of the first decree-holder alone but at their instance as well?

---

[31] Somasundaram Chettiar v. Alamelu Achi, (1937) M W N 480.

In adding the Explanation to S. 64, I feel that the Legislature has, instead of confining the benefit of the attachment to the attaching creditor only, extended it to such other creditors also whose claims were "enforceable" under the attachment. The use of the word "enforceable" in S. 64 is very significant. It means "capable of being enforced" and has to be distinguished with the word "enforced." As soon as an application for execution is made by a person holding a decree for the payment of money against a judgment-debtor to the Court which had already attached the property of the same judgment-debtor, the person making the application for execution would be entitled to rateable distribution if the application was made before the receipt of assets and his claim or decree would be enforceable under the attachment although it would not be enforced until the assets were actually received in Court. But we are not considering any question of actual distribution of assets, for which their receipt is naturally a condition but the effect of such an application under S. 64, Civil P. C. A claim for rateable distribution has now been included, by the Explanation to S. 64 in the claims enforceable under an attachment. It would therefore follow that as soon as an application for execution is made by a person in circumstances which would entitle him to claim rateable distribution, his claim would fall within the category of claims enforceable under the attachment. He would then be entitled to claim the benefit of S. 64 and to treat the alienation of the property by his judgment-debtor as "void" not only against the attaching creditor but also as against himself. In other words, if the alienation by his judgment-debtor was contrary to the attachment effected at the instance of the attaching creditor, it would be void as against his claim which has by virtue of the Explanation become enforceable under the attachment. For ascertaining the effect of S. 64, it appears to be unnecessary to consider whether the assets were actually realized by the Court subsequently or not. This may be vital when the Court wishes to dispose of the various applications and distribute the assets but has, to my mind, no bearing on the validity or otherwise of the alienation made pending an attachment.

But it has been contended that unless the attachment effected on the property results in a sale, the application for execution which would entitle a party to rateable distribution could not be brought within S. 73, Civil P. C., and would not therefore entitle him to take advantage of the attachment effected at the instance of the attaching creditor. S. 73 provides how the assets are to be actually distributed and has thus to define persons who are entitled to share in the rateable distribution but it is beyond the province of that Section to say as to what the effect of an attachment would be on an alienation not only in regard to the attaching creditor but also in regard to the claims of persons who are entitled to a share in the rateable distribution. For this purpose we will have to go to S. 64; but there is nothing in that Section which makes the sale of property or even the receipt of assets as a condition precedent for either the validity of the attachment or for voidability of the alienation effected during its pendency. The Explanation to S. 64 makes it clear that for the purpose of that Section, there would be no difference between an attaching creditor and an applicant for rateable distribution. The claims of both have been declared now to be enforceable under the attachment. If that be so, where is the justification for adding a condition that the first attachment should necessarily have resulted in a sale failing which another decree-holder, who was not the attaching creditor, could not take advantage of the attachment effected before he made his application for execution and could not impugn the transfer of property made by the judgment-debtor during the subsistence of that attachment?

It was argued on behalf of the respondent that their Lordships of the Privy Council take the view in 44 Cal 662,[2] that such a sale in the first attachment is essential and hold that

> to bring S. 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court.

On these assumptions it was contended that since the property was not sold in E. P. No. 132 of 1925 and there were not assets held by the Court in that execution, the decree-holder cannot be said to have complied with one of the essential conditions of S. 73 of the present Code and cannot take advantage of the provisions contained in that Section. I shall consider the question whether the sale of the property under attachment is a condition precedent before a subsequent decree-holder can take advantage of S. 64 of the Code when I am examining the Full Bench decision in 41 Mad 265,[9] but should like to observe at this stage that a claim for rateable distribution was not included in the claims enforceable under an attachment in the Code of Civil Procedure of 1882, under which the decision was given by their Lordships and in the absence of such a provision the applicability of S. 295 of the old Code was made to depend on the condition that the assets were held by the Court. S. 295 of the old Code provided and its successor, S. 73 in the present Code, now provides for the actual distribution of assets amongst the various decree-holders under certain conditions, and one of these conditions was held by their Lordships to be the actual presence of assets in Court. But the effect of the decree-holder being a claimant of a share for rateable distribution was not considered by their Lordships as on the date, (i. e. 16th June 1907) on which he had in that case made an application for execution No. 16 of 1907, the attachment effected in Execution Case No. 8 of 1902 had come to an end by virtue of an order passed on 29th March 1905 and the private alienation of the property had been effected by the judgment-debtor more than two years after, i. e. on 15th July 1907. How could the decree-holder call in aid then his application for attachment in Execution Case No. 8 of 1902 when the attachment had ceased to exist in 1905 and the other application for execution of another decree was not made by him prior to the alienation of the property by the judgment-debtor? The prior attachment was not taken into consideration as it had ceased to exist in 1905 and the subsequent attachment was considered to be of no avail as the alienation by the judgment-debtor was before the second application for execution was made.

It cannot therefore be said that their Lordships were called upon to decide or decided that an application for execution would or would not entitle a person to take advantage of a subsisting prior attachment effected on the property, although it may be conceded that in the absence of the Explanation the argument that on a subsequent application for execution a decree-holder would have been able to claim that advantage was in spite of Telang J.'s decision in 16 Bom 91,[14] a little far fetched. It will also be observed that although a reference was made to S. 64 of the present Code by one of the counsel in his arguments, their Lordships appear to have scrupulously avoided any reference to that Section apparently because the law applicable to the facts of that case was what existed before 1908 and they must have evidently considered it unnecessary to consider the effect of the addition of the explanation to S. 64, Civil P. C., in that case. It is needless to add that the Privy Council decision is no authority on the facts of the present case where the first attachment was in force both when the alienation was made by the judgment-debtor and when the application for execution was made by the second decree-holder. In these circumstances it is impossible to ignore the addition of the Explanation to S. 64 of the present Code. In fact when a similar question came up for consideration before their Lordships in 45 M L J 770,[24] they happen to observe:

> The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have to be considered whether what was said in 44 Cal 662[2] has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology in S. 64, Civil P. C. of 1908 from S. 276, Civil P. C. of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the plaintiff's case fails on another ground.

The next case on which reliance was placed by the learned counsel for the respondent is a Full Bench decision of this Court in 41 Mad 265[9] which was on a difference between Seshagiri Iyer J. and Bakewell J. referred to a Bench of three learned Judges. This case has been followed by various High Courts and it was with the object of re-considering this decision that the present Bench was constituted. The question for reference in that case was:

> Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuation of such attachment?

The answer to this question was given by the Full Bench in the negative and in view of the fact that the attachment was raised by the satisfaction of the decree, learned counsel for the appellant appeared to concede that the decision might have been justified on its own facts but he asked us to reconsider the reasons given by the learned Chief Justice and another learned Judge of this Court. Coming now to the Full Bench case, we find that starting with proposition that the decree-holders other than the attaching decree-holders acquired no right to rateable distribution under S. 295 (now S. 73) of the Code until assets had been realized, or as it might now be said received—a statement to which no exception could be taken—the learned Chief Justice observed that the Judicial Committee seemed to have held in 44 Cal 652,[2]

> that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached.

Now if I may say so with great respect to the learned Chief Justice, the relevant observation made by Sir Lawrence Jenkins at p. 672 towards the end of the following passage was not correctly appreciated:

> But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are nevertheless void under S. 276, Civil P. C. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. Ex hypothesi, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

If I understand the observation correctly, Sir Lawrence Jenkins, after describing the provisions of S. 276 of the old Code, applied the same to the facts before him and said that the alienation to the plaintiff could not ex hypothesi be affected as it was not made "during the continuance of the attachment in Execution Case No. 16 of 1907." Had he stayed here, his observations could not have been misunderstood, but in order to make himself clearer in regard to the attachment to which he was referring, he added, "or in other words the attachment under which the execution sale to the decree-holder was made." I cannot understand Sir Lawrence Jenkins to be laying down what the learned Chief Justice felt he was. The expression "or in other words" is important and was undoubtedly employed by his Lordship to avoid any possibility of mistake in regard to the attachment to which a reference was made just before. It must not be overlooked that in that case the alienation had been effected on 15th July 1907 while the application for execution No. 16 of 1907 was presented a day later, i. e. on 16th July 1907 and the attachment under which the sale to the decree-holder was made must have been effected subsequently. Again the learned Chief Justice's observation in the next sentence that,

> the decree-holder was held not to be entitled to defend his title as against the alienee from the judgment-debtor under S. 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree *without bringing the property to sale in execution of that decree*,

does not seem to be correct. The italicized words do not appear in the Privy Council decision and the decree-holder was held not to be entitled to defend his title as against the alienee by relying on the previous attachment simply because it had ceased to exist in March 1905 and not because the property was not brought to sale in execution of that decree. The observation in the next paragraph that,

> Section 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code and if he cannot protect himself against an alienation after attachment *unless the attached property is brought to sale in execution of* the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in a better position,

is based upon the same misconception in regard to the actual sale of the property, which is nowhere to be found in the Privy Council decision. It is not contended that S. 64 places the decree-holders who have applied for execution subsequently in any better position than that of the attaching creditor. The Section places both the attaching creditor and other decree-holders who have applied for execution in the same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment it would be voidable not only against the attaching creditor but also against the other decree-holders. It appears to me, although it is not quite necessary to decide it in this case, that the attaching creditor cannot after the addition of this Explanation steal a march over the other decree-holders and the judgment-debtor cannot, by paying to the attaching creditor alone, free the property from the claims of those who have already applied for execution during the subsistence of the first attachment. Anyhow, even if one may not go to that length, it is at least clear that by adding the Explanation to S. 64 the Legislature has succeeded in sufficiently expressing itself and declaring the alienations to be ineffectual not only against the attaching creditors but even against those who were entitled to rateable distribution under S. 73, Civil P. C. It is true that the words "contrary to attachment" used in S. 64 in the present Code are narrower, hence more exact, than the words "during the continuance of attachment" occurring in S. 276 of the old Code and were taken from the judgment of their Lordships of the Privy Council in 29 Cal 154,[10] but this does not mean that S. 64 is less favourable now than its corresponding provision in the previous Code in other respects.

The Explanation to this Section has, indeed, by bringing the decree-holders other than the attaching creditors in the category of persons whose claims are enforceable under the attachment made it more difficult for the judgment-debtor to alienate the attached property without paying his debts for which decrees have been obtained and applications for execution presented. It may be that as a result of payment by the judgment-debtor to the attaching creditor or on the latter's certifying the satisfaction of his decree in accordance with the provisions of O. 21, R. 55 or on account of a default of the decree-holder as mentioned in O. 21, R. 59, Civil P. C., the attachment may cease or be deemed to have been withdrawn, but this does not mean that it is not capable of being revived at the instance of the other decree-holder and even if it is held to be incapable of being brought to life — a point which does not arise for determination in this case as the attachment was never withdrawn here and still stands—there appears to be no reason to hold that the alienation would not be void as against those who had become by making applications for execution entitled to rateable distribution. This is the plain language of the Section when it is read with the Explanation and there appears to be no reason why a grammatical construction should not be placed on the words of that Section, particularly when by placing that interpretation the apparent intention of the Legislature in adopting the suggestion made in 15 Cal 771[4] and giving effect to it by adding the Explanation to S. 64 is fulfilled.

Let me consider the case by giving an illustration from a slightly different point of view. *A* obtains a decree against *B* in the Court of a District Munsif on 1st March 1930 and the decree-holder in execution of that decree attaches *B's* property in April 1930. But before the property is brought to sale, *C* gets a decree on 1st July 1930 against *B* in the Court of a subordinate Judge and attaches it a fortnight later. There is no doubt that under the provisions of S. 63, Civil P. C., it will be the Court of the Subordinate Judge out of the two Courts which would be entitled to realize *B's* property or determine any claim thereto. Let us also suppose that *B* had alienated the attached property in May 1930 to a third party. It cannot be disputed that the alienation would not be binding on *A*. *C* then applies to the Subordinate Judge for the sale of the property in July 1930. It is clear from the provisions of S. 63, Civil P. C., that it is the Subordinate Judge who would be entitled to bring the property to sale and realize the sale proceeds. The District Munsif would have to stay his hand and cannot, after knowing of the attachment by a higher Court, proceed to bring the property to sale. Is the alienation voidable against *A* only in the circumstances or against *C* as well ? Obviously against both and that only because *A* who was the first attachment creditor has now been placed in the position of a claimant for rateable distribution, and the sale must be held in accordance with the provisions of S. 63, Civil P. C., by the Subordinate Judge in the decree obtained by *C* although for the benefit of both *A* and *C*. It was held by a Division Bench of this Court in 26 M L J 406,[33] to which Wallis J. as he then was, was a party that when a property was attached by different Courts and money was realized in

---

32. Narasimhachariar v. Krishnamachariar, (1914) 1 A I R Mad 454=23 I C 909=26 M L J 406.

accordance with S. 63, Civil P. C., by the Court of the highest grade, the attaching creditors would be entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court. In delivering the judgment of the Court he put the following question to himself:

> What however when the attachments are in different Courts and the property is received or realized by the Court of the highest grade under Section 63.

He then gave the following answer:

> In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well. In my opinion this is the correct view;

and added later,

> the difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this in my opinion is the true construction of S. 63 . . . .

If the payment as held in the above case is to be regarded as payment in the illustration given by me in the decrees passed in favour of *A* and *B*, both of them will share rateably and will stand exactly in the same position. It was in the latter execution (E. P. No. 322 of 1926) that the property was sold. The first decree-holder in O. S. No. 497 of 1923 actually applied for rateable distribution in E. P. No. 322 of 1926 and got a share of the sale proceeds. It was exactly what the decree-holder of the District Munsif's Court would have done in the illustration given above. The position would have been the same even if the property was sold, in the illustration by the District Munsif. The Subordinate Judge could have chosen to accept the sale and asked the District Munsif to transfer the sale proceeds to his Court. The alienation not being binding on *A*, the whole property would have been sold by the District Munsif. Once the sale proceeds were received by the Subordinate Judge, they would have been distributed by him amongst the various holders of decree in accordance with the provisions contained in S. 73, Civil P. C. But the point is that *A*, the holder of the decree in the District Munsif's Court, would have come to the Subordinate Judge's Court as a claimant for rateable distribution and the alienation which was effected by his judgment-debtor after his attachment would have been avoidable not only against him but also against *C*.

A number of cases were cited during the course of arguments by the learned counsel for the respondent in support of his contention that the appellant could not assail the alienation by the judgment-debtor during the continuance of the first attachment successfully (*vide* 43 All 399,[33] 1935 A L J 4,[29] 39 C W N 1076,[25] 30 Bom L R 1488[26] 13 Pat 446[20] and I L R 1937 Nag 291[30]) and they have to be examined to ascertain the extent to which they help him. Having gone through them carefully, however, I am of opinion that they cannot be regarded as authorities in the present case where attachment has continued to subsist on all material dates and has not been removed really upto this day. In all the cases on which the reliance was placed by the learned counsel for the respondent, the alienations were not found to be contrary to the attachments which had ceased to exist either by orders of Court or by operation of law under O. 21, R. 55, Civil P. C., on the dates on which the alienations were made or on the dates on which the applications were presented by other decree-holders who but for such cessation would have been entitled to rateable distribution. Let me now examine these cases.

In 43 All 399,[33] the decree in favour of the attaching creditor was satisfied on 2nd April 1913, and under the provisions of O. 21, R. 55, the attachment must be deemed to have come to an end on that date. The private alienation was made on 26th May 1913 while the second attachment in which the property was sold was made on 20th June 1913. In a case like this, it could not be urged that the alienation was made during the subsistence of the first attachment and there was no scope for the application of the Explanation to S. 64. In 1935 A L J 4,[29] the attaching decree-holder was paid privately on 21st February 1928 by the sale of the property. Although the subsequent decree-holder had applied for rateable distribution in June 1927, yet on the decree being satisfied the attachment came to an end and the subsequent decree-holder who purchased the property in July 1928 without any further attachment was held not to be entitled to defeat the title of the purchaser who had bought the property in February 1928. This case might have been of use to the respondent if the attachment had in the present one ceased to exist but cannot help him when the attachment was in existence at the time the property was purchased by him. This case is an authority against the extreme contention that a claimant for rateable distribution, who would have been entitled to get a share if the assets had come into Court, is still entitled to contest the alienation either on the ground that the attachment has not in spite of the attaching creditor's satisfaction come to an end or that his claim had become enforceable under the attachment at the time when it was existing and cannot be defeated by paying the attaching creditor out of Court. It is unnecessary to say anything about this position in this case but the view taken in the Allahabad case[29] may be capable of being defended on the ground that the existence of an attachment is *sine qua non* for the claimant for rateable distribution to attack the alienation successfully. The learned Chief Justice, it may be noted, agrees that if a private alienation is contrary to an attachment, claimants for rateable distribution of the assets would be equally protected. He then proceeds to say at page 11:

---

[33] 33. Bhupal v. Kundan Lal, (1921) 8 A I R All 45 =60 I C 846=43 All 399=19 A L J 221.

> It would follow therefore that where the attachment has not fallen to the ground but subsists and property has been sold in pursuance of it, the assets which are realized are liable to be distributed among the decree-holder as well as the claimants for rateable distribution, in spite of the fact that a private alienation has previously taken place.

This is all right so far as it goes but he does not take into consideration the case where the property has not been sold in spite of the subsistence of the attachment. The next sentence in his judgment deals with a case where the attachment has fallen to the ground. The result is that a case such as the present one was not considered by him. But the only sentence in his judgment to which one may with great deference take exception appears in the next paragraph. He says:

> It would be impossible therefore to hold that there are claimants for rateable distribution of assets before any assets have been received.

The only reason which he gives for this conclusion is that S. 73 does not make it necessary for a decree-holder to make any formal application for a rateable share in the assets and an application for execution is all that is required. He therefore states that there may be cases where no formal application for rateable distribution may have been made. I concede that there would be. But then follows the conclusion which has been noted above. With great deference to the learned Chief Justice, I am not prepared to agree that this conclusion follows from the premises enunciated by him. The relief of rateable distribution need not have been asked for but has to be granted if an application for execution has been given by a decree-holder before the assets are received by the Court. The result of his being a claimant for rateable distribution would follow from the application for execution which he has made and not from the fact that the relief has been eventually granted to him or that the Court has been, on the receipt of assets, placed in a position to grant the relief to him. The distinction between a claimant and a recipient should not be lost sight of. In 39 C W N 1076[25] the application for execution by the subsequent decree-holder was made on 28th August 1933 but the previous attachment came to an end on 7th September 1933 as the decree-holder at whose instance the attachment was effected was paid privately. It is therefore similar to the case in 1935 A L J 4[29] and does not advance the position any further. In 30 Bom L R 1488[26] two attachments before judgment were obtained by two persons. The judgment-debtor sold the property on 8th June 1920 to pay off these two persons. A third creditor brought a suit and obtained attachment before judgment on 19th June 1920 and after obtaining his decree got the property sold through Court and purchased it himself. It was held that he could not avail the title of the purchaser who had purchased the property for payment to the first two attaching creditors and in any case before the third person had applied for attachment. It was also observed in the case that

> under O. 38, R. 10, Civil P. C., the attachment before judgment could not affect the rights existing prior to the attachment, of persons not parties to the suit.

The plaintiffs were not parties to the third suit and the private sale in their favour could not be said to have been contrary to the attachment before judgment in the defendant's suit. In 13 Pat 446,[20] a property was attached by a decree-holder on 17th December 1930. The property was sold privately by the judgment-debtor on 29th January 1931 while the attachment was subsisting. The same decree-holder got another decree against the same judgment-debtor subsequently and applied for rateable distribution on 11th May 1931. But before the sale the purchaser applied to the Court offering to pay the decretal amount and costs in the first execution case and to have the property released from attachment. The decree-holder agreed to this course and the first execution case was struck off on full satisfaction and the attachment was released. The decree-holder contended (1) that the amount deposited must be considered to be 'assets' held by the Court and liable to rateable distribution and that therefore neither the first nor the second decree could be said to have been satisfied and (2) that the private sale of the property was void as against the claim under both the decrees. This case was decided on the question of consent given by the decree-holder to the deposit of the decretal amount and on his failure to raise any objection in the execution proceeding. But, on principle, it does not go further than the Allahabad or the Calcutta cases cited above. In view of the fact that the attachment had come to an end, the same decree-holder who was asking for rateable distribution could not assail the alienation. What would have been the result if the attachment had not ceased, this case does not decide.

The last case was the one reported in I L R 1937 Nag 291.[30] The facts in this case were that a property was attached on 14th June 1926. The judgment-debtor made a gift of the same on 19th May 1927 although it was not registered till 13th July 1927. In the meantime however another decree-holder attached the same property on 11th July 1927. It was held in that case that the gift of the property was completed in May 1927. It is not stated in this case when the first attachment was removed although it is stated at the top of p. 297 that it continued after July 1927. Relying on the decision in 41 Mad 265,[9] the learned Chief Justice observed that,

> according to that decision a person in a position similar to the decree-holders here is not entitled to rely on a third party attachment even where the proceeding has reached the stage of an application for rateable distribution.

He adds:

> Here there is no application for rateable distribution, so that there are two links at least missing in the chain: (1) the attaching creditor under the attachment made in 1926 never got the assets into the executing Court; and (2) the present attaching creditor under the attachment in 1927 never applied for rateable distribution. That earlier attachment was subsequently raised and passes out of the story.

From what has been stated above, it would appear that the earlier attachment was not raised until after July 1927, but it was raised subsequently. If it was raised, the decision could be justified on the ground that the subsequent decree-holder could not object to the alienation made prior to his attachment when the first attachment was raised and had passed out of the story. The reasons given by the learned Chief Justice however are not convincing. The subsequent decree-holder under whose decree the property was attached in 1927 need not have applied for rateable distribution at all. This matter has been dealt with in an earlier portion of this judgment. As for the other reason given by the learned Chief Justice that the attaching creditor under the attachment made in 1926 never got the assets into the executing Court, I have already expressed my opinion that it is not necessary for the purposes of S. 64 that the property should have been sold or that the assets must have come into the executing Court although this may be necessary for the purposes of S. 73.

In almost every case cited above, a reference has been made to 41 Mad 265[9] but the Full Bench ruling has not been closely examined and with due respect to the learned Judges who decided that case or who followed it, I am of opinion that even if the actual decision in that case might have been correct, the reasoning given in that judgment is not supported either on principle or by the language employed in Ss. 64 and 73, Civil P. C., or even by the decision of their Lordships of the Judicial Committee in 44 Cal 662.[2]

My answer to the reference must for the above reasons be in the affirmative. I agree that the costs of this reference be made costs in the appeal.

Krishnaswami Ayyangar J.—It is not without regret that I feel myself obliged to express my dissent from the view accepted by a majority of my learned brothers on this reference. That view which is essentially different from mine has indeed made it necessary that I should go over the ground once again, and test the soundness of every link in the chain, every step in the reasoning by which I was persuaded to accept the opinion expressed in the order of reference. Having done that, and having given my careful and anxious attention to all that has been urged at the bar since, I regret to say that I still remain of the same opinion. In the order of reference, I have endeavoured to explain at some length the considerations which influenced me in forming my opinion. A briefer and a more pointed statement is all that is now necessary and may perhaps be more to the purpose to explain the reason why I have felt obliged to differ from my learned brethren.

That the Legislature had an object in adding the Explanation in S. 64 is undeniable. Whether that object was to introduce a change, or remove a doubt, it is bootless to enquire. Whichever it was, it is manifest that it concerned claims to rateable distribution, a subject on which the Code of 1908 has made at least one important change. Under the old Code, such claims were linked up with execution, and were recognized only when made in respect of assets realized in execution. That link has been removed under the new Code, and the right is no longer dependent on the mode by which the assets reach the hands of the Court. In whichever way now the assets are received, whether by execution or otherwise, it makes no difference. Look at the consequence, which necessarily follows from this change. Rateable distribution is entirely dissociated from attachment in execution. True, the claim to rateable distribution may arise, as it often does even now, in respect of assets realized in execution. But the necessity which had existed for the assets being realized by the process of execution has definitely ceased under the new Code. The claim may now arise in respect of assets brought into Court in either of two ways: (i) by attachment in execution, or (ii) by other means without any connexion with execution. The right to rateable distribution in S. 64 must comprehend both varieties, and there can be no warrant for limiting it to only one of the two.

I have said that the purpose behind the Explanation to S. 64 was either to effect a change, or remove a doubt, in respect of claims to rateable distribution. The plain object of the Section was to prevent the successful perpetration of fraud by the debtor against the just claims of a diligent creditor even after adjudication by Court. The law favours equal distribution of a debtor's assets among his creditors provided they exhibit some degree of diligence and sets its face against an unnecessary multiplicity of proceedings so far as it can be avoided. When the creditor properly moves the Court, it helps him by attaching the debtor's property, that is, it takes the property into its own custody. Thereafter the attaching creditors' rights are safe and cannot be defeated by any subsequent dealing by the debtor with the property attached. In this respect, the present S. 64 does not differ from the old S. 276, the object of both being to throw a protection round the creditor who had attached. Under the old Section however the protection was a more limited one and was confined to claims truly enforceable under the attachment which must also be one placed on the property at his instance, and not at the instance of any other creditor. In the referring order I have attempted an explanation of the expression, "claims enforceable under an attachment." It is now enough to say that only such claims fulfil the description as are necessarily traceable to and integrally connected with the attachment relied on for avoiding the alienation. A prior attachment, and enforceability under it were thus the two essentials on which the old Code insisted before it extended its protection. If these conditions were satisfied, S. 276 of the old Code stepped in and annexed to such claims, a power and potency, of sufficient strength to avoid a subsequent private alienation. So far the position remains unchanged even under the new Code.

To explain the matter still further, a bare claim for rateable distribution arising out of an application for execution which had not got to the stage of an attachment was under the old Code ineffectual against a private alienation. Until an attachment was made by the claimant, he could not prevent the debtor from dealing with his property to his (the claimant's) prejudice. That there was a subsisting attachment at the date of the alienation, at the instance of another creditor, was a circumstance from which the claimant could derive no benefit, as his claim was not one which could properly be regarded as enforceable under that attachment. Not possessing this quality, his claim could not affect the alienation, in spite of its taking its origin in an execution application of a prior date.

An application for execution was and is all that is necessary to entitle a decree-holder to rateable distribution (1937 M W N 480 [31] at p. 486 and 52 Mad 760[34]) provided the application is made in time. But under the old Code the capacity to avoid a later alienation, was the peculiar attribute only of a prior attachment, and not that of a bare application for execution, which though prior in date, did not carry with it, anything more than what may be called a limited and contingent right. If the prior attachment progressed to a sale, the alienation was destroyed. But the destruction was wrought not by the naked claim for rateable distribution founded on a mere execution application but by a prior attachment taking effect according to the positive provisions of S. 276. It is the sale alone following the attachment that produced this result. In the resulting proceeds, the claimant who had put in his application in time had no doubt the right to share given to him by S. 295. But until the sale actually took place, he had to wait in patience and had but a mere contingency in his favour. For it was the right solely of the prior attaching decree-holder to proceed further with the execution or abandon the attachment. If he was minded to do the latter, nobody could prevent it, though that step would put an end to the expectations of the bare claimant for rateable distribution. The latter could not help such a culmination coming to pass, as he had no sort of control over the attaching decree-holder who had the right at his will to determine what he would do, regardless of the consequence of his action or inaction on the expectations of other decree-holders. This, I consider, was the state of the law under the old Code and was recognized by the Privy Council as such in 44 Cal 662.[2] Their Lordships emphasized the position first by saying that the prior attachment was alone the weapon of attack, and secondly by indicating the necessity for the contingency being converted into an actuality by the assets being actually realized by the sale.

---

[34] **Abdul Salam v. Veerabhadra, (1929) 16 A I R Mad 703=118 I C 72=52 Mad 760=57 M L J 97 (FB).**

The position then under the old Code, of a decree-holder who had not attached, but who had merely qualified himself for rateable distribution by an execution application was thus attended with risk. He had a chance, but not a certainty of getting even a partial satisfaction, and his doubtful position seems to have evoked the ineffective sympathy of the Calcutta High Court in 15 Cal 771[4] whereas Telang J. in 16 Bom 91,[14] managed by, if I may say so without meaning the slightest offence, a fallacious reasoning to give him a protection where the other Courts with stricter adherence to the language of the old Code found themselves powerless to give. He argued, wrongly, as I think, that there was such a necessary connexion between the attachment of one decree-holder and the bare claim for rateable distribution of another, that the claim of that other could be regarded as a claim enforceable under the attachment. The connexion could not however be maintained unless the attachment fructified in a sale and led to the actual receipt of assets by the Court. It is this handicap that has been sought to be removed by the Explanation added to S. 64 under the Code of 1908.

The Explanation has, it seems to me, extended the protection of the Section to bare claims for rateable distribution also, by the inclusive definition newly introduced by it. I read the words "for the purpose of the Section" as meaning for the purposes of avoiding a private alienation which is the obvious object of the Section. Indeed, I cannot think of any other. Claims for rateable distribution whether or not they are in fact or in law claims really enforceable under an attachment are by force of the new definition notionally to be regarded as such for the purpose of avoiding a private transfer. This remarkable improvement in the status of these claims has been effected by including such claims by statutory definition within the expression "claims enforceable under an attachment." The claims for rateable distribution simpliciter without the support of an anterior attachment are now as powerful and potent as claims enforceable under an attachment. The qualification considered essential by all other Courts except Bombay, namely a prior attachment, was dropped, as I think deliberately, in view of what had been said in 15 Cal 771.[4] That a change was intended is perfectly plain to my mind from a further circumstance. The word 'include' used in the Explanation, has the legal significance attached to it by Lord Esher, M. R. in (1893) 1 Q B D 161[35] at p. 167 :

> The word 'interpreted' (in the present case claims enforceable under an attachment) has its ordinary meaning. That meaning it still has in the Act. But then there are other meanings that the Legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to matters expressly mentioned in such definition.

In the light of this explanation of the word 'include', there is sufficient warrant for holding that the scope of S. 64 has been enlarged. In what other direction, I respectfully ask, is effect to be given to this, to be plain, enlargement unless it be in regard to the rights of claimants for rateable distribution? And how else is that to be, except by removing the handicap, the necessity for a prior attachment? To my mind, it is clear that the substratum of a prior attachment is no longer to be considered necessary to turn a bare claim for rateable distribution into a weapon of attack. The pendency of an earlier attachment is still a requisite but it is enough if it had been placed by some other creditor and was still subsisting when the claim was made. That necessary integral connexion which was under the old Code such a supreme and essential prerequisite is no longer required under the new Code. As I read the Explanation, its effect seems to be that claims truly enforceable under the attachment equally with claims for rateable distribution devoid of that characteristic, are placed on an equal footing and both have under the new Code the power of overriding a subsequent private alienation, 'provided of course the claimant for rateable distribution has made his application in time and while the attachment is yet pending.

---

[35] Rodger v. Harrison, (1893) 1 Q B D 161 = 62 L J Q B 213=4 R 171=68 L T 66 = 41 W R 291.

I have given my best consideration to the decision of the Privy Council in 44 Cal 662,[2] but regret to find myself unable to agree that it is or was intended to be an authoritative ruling on the construction of S. 64 with the Explanation newly added to it, more especially in view of what their Lordships have thought fit to observe in 45 M L J 770.[24] I am also quite alive, I may add, to the volume and weight of judicial opinion which has accumulated in this country ever since the Full Bench decision of the Court in 41 Mad 265.[9] But sitting now as a member of a fuller Bench, I have felt myself at liberty to examine the foundations on which that opinion rests. It is enough to say that I have most carefully considered that case and every other case, cited at the bar or referred to in the judgment just now delivered, but I still remain unconvinced.

My answer to the question referred is accordingly in the affirmative. I agree that the costs of this reference should be costs in the cause. [In view of the answer of the Full Bench, the appeal was dismissed.]

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 410

PATANJALI SASTRI J.

Nanjappa Goundan — Appellant.

v.

Rangaswami Goundan—Respondent.

Second Appeal No. 232 of 1936, Decided on 3rd November 1939, against decree of District Court, Coimbatore, in A. S. No. 66 of 1935.

(a) Transfer of Property Act (1882), S. 108 (j) — Sub-lease for residue of term does not operate as assignment.

A sub-lease for the entire residue of the term cannot under S. 108 (j) be regarded as an absolute assignment of the lease, though the rent reserved by it may be the same as the rent reserved in that lease : *A I R 1930 P C 59, Rel. on.* [P 411 C 1]

(b) Transfer of Property Act (1882), S. 108 (g) —Sub-lease of property subject to maintenance charge — Sub-lease containing covenant for quiet enjoyment — Sub-lessor failing to pay amount of maintenance — Sub-lessee is entitled to pay the same and recover it from sub-lessor.

In the case of a sub-lease of the property which is subject to a maintenance charge, and the sub-lease contains a covenant for quiet enjoyment on the sub-lessor failing to pay the amount of the maintenance, the sub-lessee is entitled to pay the same in order to secure quiet enjoyment of the property and to recover the same from the sub-lessor : *A I R 1934 Mad 658, Rel. on.* [P 411 C 2]

(c) Transfer of Property Act (1882), S. 117 and Ch. 5 — Ch. 5 applies to agricultural leases in absence of any special usage or custom.

In the absence of any special usage or custom affecting an agricultural lease, the principles of Sections in Ch. 5 which merely reproduce the well established rules of the English law are applicable to agricultural leases also as rules of justice, equity and good conscience notwithstanding S. 117 : *AIR 1919 Mad 12, Rel. on.* [P 412 C 1]

T. E. Ramabadhrachariar — *for Appellant.*

M. Murugappa Chettiar — *for Respondent.*

Judgment. — The main question for determination in this second appeal is a short one and it arises on the following facts. The property in suit originally belonged to the respondent and his brother. It was sold to one Ramaswami Goundan subject to a charge for Rs. 100 per annum for the maintenance of one Minakshi, the widow of a deceased coparcener of the family. Ramaswami subsequently leased the property for an annual rent of Rs. 125 to the respondent for a term of five years commencing from 13th May 1926, Ramaswami himself undertaking to pay the maintenance due to Minakshi. On 4th August 1928, the respondent sub-leased the property to the appellant herein under Ex. A for the remainder of the term. Ramaswami was adjudicated insolvent sometime in 1928 and his interest in the property having been brought to sale by the Official Receiver in public auction, it was knocked down to the appellant as the highest bidder on 1st March 1930 but the sale was completed by the Official Receiver executing the necessary conveyance (Ex. 4) only on 2nd December 1930. In the meantime, however, Minakshi demanded payment of the arrears of maintenance due to her upto 21st January 1930, i. e., in respect of a period prior to the auction sale held by the Official Receiver and the appellant paid Rs. 215 to her on 27th April 1930 in satisfaction of that claim. Similarly, he paid her another sum of Rs. 100 on 27th May 1931 for maintenance which fell due on 21st January 1931. To the respondent's claim in this suit for the rents due under the sub-lease Ex. A, the appellant pleaded that he made these payments under the instructions and on account of the respondent and that, if these amounts and the admitted payment of Rs. 125 as advance rent for the first year of the sub-lease were given credit to, nothing would be found payable to the respondent by way of rent under Ex. A.

The learned District Munsif upheld this plea and dismissed the suit. On appeal however, the learned District Judge held that it was not proved that the respondent had authorised or required the appellant to pay the maintenance due to Minakshi, and that the payments by the appellant must be regarded as having been made to protect his own interest as purchaser of the property and not qua tenant of the respondent. He therefore decreed the suit. The appellant's learned counsel assailed this decision on two grounds. First he contended that though Ex. A, purports to be a sub-lease, it must in law be regarded as an absolute assignment of the lease to the respondent, as the rent reserved by it was the same as the rent reserved in that lease and it was for the entire residue of the term. It was therefore urged that the question must be viewed as one arising between the original lessor Ramaswami and the appellant and as the former was undoubtedly bound to pay the maintenance allowance to Minakshi but neglected to pay, the appellant was entitled to pay it to her and to deduct it from the rent due. This contention is clearly untenable. It is no doubt true that in English law an underlease for the whole residue of the term operates as an assignment but as pointed out by their Lordships of the Privy Council in 57 Cal 1176,[1] the law in India is different in this respect, having regard to the provisions of the Transfer of Property Act. No question of assignment can therefore arise.

It was next contended that under S. 108 (c), T. P. Act, the respondent was bound to secure quiet enjoyment of the leased property for the appellant and as Minakshi demanded the arrears of maintenance due to her which, in default of payment, might have been collected by the sale of the leased property on which such arrears were charged, the appellant was entitled to protect himself from the threatened interruption to his enjoyment by paying the amounts due to her and deducting such payments with interest from the rents due to the respondent under S. 108 (g) of that Act. I am of opinion that this contention, so far as it relates to the payment of Rs. 215, is correct and must be accepted. It will be seen from the relevant dates already mentioned that the sum of Rs. 215 represented arrears of maintenance due in respect of a period prior to the auction-sale held by the Official Receiver, and when the amount was paid to Minakshi, the appellant had not obtained title to the property from the Official Receiver but held it only as a sub-lessee with about a year of the term still to run. That being the position, the respondent, though as between himself and his lessor Ramaswami he was not bound to pay the maintenance due to Minakshi, was, by reason of the covenant for quiet enjoyment under the sub-lease Ex. A, bound to pay the arrears due to her in a question with the appellant, as otherwise the property would have been brought to sale in enforcement of the charge held by her and the appellant's enjoyment would have been interrupted. I am therefore of opinion that as between the appellant and the respondent, the latter was bound to make the payments due to Minakshi within the meaning of S. 108 (g), T. P. Act, and that such payments not having been made by him, the appellant was entitled to make the payments himself as he did and to deduct it with interest from the rents claimed by the respondent in this suit. This does not however apply to the payment of Rs. 100 which was made by the appellant after the sub-lease had expired and he had become the owner of the property.

The appellant's learned counsel cited a decision of Pandalai J. reported in 40 M L W 545[2] as supporting this view. At first sight, it might appear that the case is distinguishable as the lessor there was under a liability as mortgagor to pay the claim of a third party, whereas here, as already observed, the respondent was not bound to pay either as between himself and

---

[1] Hunsraj v. Bijoyalal Seal, (1930) 17 A I R P C 59=122 I C 20=57 I A 110=57 Cal 1176 (PC).

[2] Ishwara Shetty v. Ramappa Shetty, (1934) 21 A I R Mad 658=152 I C 201=40 M L W 545.

Ramaswami or direct to Minakshi the amount of the maintenance due to the latter. But on a closer examination of the facts which are somewhat complicated, it will be seen that the lessee who paid off the mortgage payable by the lessor brought the suit to recover the money paid from the assignee of the reversion, and the ground of decision apparently was that, as between him and the lessee, he was bound to pay the mortgage amount by reason of the burden of the lessor's covenant for quiet enjoyment having passed to him with the reversion under S. 109, and the lessee was therefore entitled to recover the amount from him under S. 108 (g). So read, the decision can be regarded as an authority in support of the appellant's contention.

The learned counsel for the respondent argued that the lease in question here being a lease for agricultural purposes, the provisions of Chap. 5 including S. 108 are not applicable as provided in S. 117. But the reason underlying this exemption of agricultural leases is explained in 42 Mad 654[3] where it is pointed out that in the absence of any special usage or custom affecting an agricultural lease, the principle of the Sections which merely reproduce the well established rules of English law are applicable to agricultural leases also as rules of justice, equity and good conscience. The appeal therefore succeeds to the extent of the sum of Rs. 215 paid by the appellant to Minakshi on 27th April 1930 and the decree of the lower Appellate Court will be modified by the said sum being deducted from the respondent's claim as on that date. The parties will pay and receive proportionate costs throughout. Leave granted.

C.R.K./G.N. *Order accordingly.*

---

[3] Krishna Shetti v. Gilbert Pinto, (1919) 6 A I R Mad 12=50 I C 898=42 Mad 654=36 M L J 367.

A. I. R. 1940 Madras 412

ABDUR RAHMAN J.

Sornammal — Plaintiff — Appellant.

v.

Thangavelu Mudaliar and others — Defendants — Respondents.

Second Appeal No. 250 of 1936, Decided on 18th August 1939, against decree of Dist. Court, East Tanjore at Negapatam, in A. S. No. 128 of 1933.

(a) Evidence—Burden of proof—Right to sue devolving on plaintiff jointly with other—Plaintiff establishing prima facie his right to sue alone—Burden of rebutting that evidence is on defendant.

Where the right to sue devolves on the plaintiff jointly with other, it is incumbent upon him to show that he is entitled to sue alone. Once he succeeds in showing consent or authority or any other fact which would entitle him to bring the action alone, the onus would shift to the other side to rebut the evidence. [P 414 C 2]

Therefore where the plaintiff by producing a partition decree establishes prima facie his right to sue alone by showing that the other person had renounced his claim, it is for the defendant to show that the decree is inadmissible in evidence for want of registration when ordinarily all decrees and orders passed by Courts are, under S. 17 (2), Registration Act, exempt from registration. [P 414 C 2]

(b) Civil P. C. (1908), O. 1, R. 9—Applicability—Right to sue devolving jointly on two persons—Only one of them bringing action—Death of other person pendente lite before trial—Court cannot refuse decree to plaintiff under O. 1, R. 9.

The provisions contained in O. 1, R. 9 are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that the Court may in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject matter of the suit have not been impleaded, but this rule can have no application where the plaintiff alone brings an action in spite of the right to sue having devolved on him jointly with the other and on account of the death of the other person during the pendency of the suit, the plaintiff is the only person, when the case is taken up for trial, who is entitled to recover the entire amount under the claim. [P 415 C 2]

(c) Limitation Act (1908), S. 22—Applicability — Right to sue on mortgage devolving on two sisters—Only one suing—Other dying pending suit—S. 22 does not apply.

Section 22 does not apply to a case where the right to sue on a mortgage devolves on two sisters jointly and only one of them brings an action and the other dies during the pendency of the suit before the case is taken up for trial by the Court. The plaintiff's share in the mortgage is simply augmented on account of her sister's death and the plaintiff's title to the whole of the mortgage amount, even if incomplete when the suit was instituted by her, is completed by the rule of survivorship. [P 416 C 1]

(d) Practice — Subsequent events — When should be considered illustrated.

Court should take notice of the events which happen after the institution of a suit. This at times is essential for the Courts to do. The Court need not be hypertechnical in these matters and ought to take such events as have occurred after the institution of a suit into consideration in order to avoid further unnecessary litigation and do complete justice between the parties. [P 416 C 2]

Therefore in a case where one of two persons jointly entitled to sue, only one brings an action and the other dies pendente lite before the case is taken up for trial, the Court is justified in taking note of the death of the other person jointly interested in the institution of the suit and awarding a decree to the plaintiff: *A I R 1926 Mad 6 and 6 C L J 74, Rel. on.* [P 416 C 2]

K. Rajah Iyer, Arumugham and Arunachalam — *for Appellant.*

T. V. Muthukrishna Iyer — *for Respondents.*

Judgment.—The facts out of which this appeal has arisen are not in dispute and lie in a narrow compass. A mortgage was executed on 24th April 1915 by one Kandaswamy, father of defendants 1 and 2, in favour of Muthukumaraswami Pillai who died in 1918 leaving him surviving a widow and two daughters. The widow appears to have died shortly after her husband and we are not concerned with her in the present litigation. The money due under the mortgage was not paid and one of Muthukumaraswami's daughters brought the present suit in 1932 for the sale of mortgaged property but she did not implead the other daughter as a party. This led defendant 3, who had purchased the mortgaged property from Kandaswami and undertaken to discharge the mortgage debt, to raise the objection that the plaintiff was "not entitled solely and exclusively to sue on the mortgage bond." Various other defences were also raised by defendant 3 and his minor son defendant 4; but they were decided against them. The plea that the plaintiff was not entitled to sue alone was overruled by the trial Court but was upheld in appeal by the learned District Judge of East Tanjore and the suit was ordered to be dismissed. The plaintiff consequently appeals and the only question to be determined is whether the plaintiff was entitled to sue alone on the basis of the mortgage deed executed in her father's favour or rather whether the decree passed in her favour by the trial Court had been wrongly set aside by the lower Appellate Court. It might be stated here that the second daughter of Muthukumaraswami died during the pendency of the suit and it was not disputed that the two daughters of Muthukumaraswami had taken their father's property as joint tenants with rights of survivorship although their interests were limited to their lives only.

The determination of the question whether the plaintiff was entitled to sue depends mainly on a compromise arrived at between her and her sister on 8th October 1930 in a suit for partition instituted by the latter in the Court of the District Munsif of Mayavaram (O. S. No. 5 of 1930) and embodied in a decree (Ex. D). The lower Appellate Court was of opinion that the decree embodying the compromise was inadmissible in evidence for want of registration as the mortgage in suit had not formed the subject-matter of that litigation and did not therefore fall within the category of decrees which were exempt from registration. This decision has been challenged on three or four grounds: firstly that the suit (O. S. No. 5 of 1930) was for general partition and the mortgage deed must be, in the absence of any evidence to the contrary, presumed to have formed the subject-matter of that suit; secondly because no rights in the mortgage were created in the plaintiff for the first time and the decree or the compromise on which the decree was based only recorded or recited an event which had happened in the past. Mr. Rajah Iyer has, in the alternative, submitted that even if the decree were held to be inadmissible in evidence, the decree passed by the trial Court should not have been set aside as the event of the plaintiff's sister's death which occurred during the pendency of the suit could not have been ignored and the plaintiff's capacity to sue, even if defective at the time when the suit was instituted, could not be held to have remained so at the time when the suit came up for trial. In the end it was urged that the suit could not have been dismissed for non-joinder of the plaintiff's sister and it was incumbent on the lower Appellate Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Mr. Ramaswami Iyer on the other hand contends that in the face of a concurrent finding by both the lower Courts to the effect that the mortgage did not form the subject-matter of the suit for partition, it would not be possible for this Court to hold otherwise. He also contended that cl. 7 of the decree could not be construed so as to contain a record merely of a past event. The present suit was not, according to him, dismissed on account of non-joinder but really on a question of limitation as it was instituted shortly before the expiry of the period of limitation provided for such suits and would have met the same fate even if the plaintiff's sister had remained alive. He also submitted that the plaintiff's status on the date of the suit could not be improved by the sister's subsequent death and it is only with the date on which the suit was instituted that we are now concerned. In order to appreciate the various contentions raised by the parties it would be better to have a clear idea as to what this clause in the decree actually stated. It reads as follows:

> As regards the recovery by the deed for Rs. 1500 executed on 24th April 1915 by Kandaswami Mudaliar in favour of the said Muthukumaraswami Pillai as aforesaid, the plaintiff has no objection whatsoever.

Learned counsel for the respondent contends that the translation printed on the records is not quite correct and suggests it should have been as follows: The plaintiff has no objection to defendant 1 solely collecting the mortgage deed dated 24th April 1915 executed in favour of the aforesaid Muthukumaraswami Pillai by Kandaswami Mudaliar for Rs. 1500. It would be quite sufficient for the purpose of this appeal to accept the translation given by Mr. Ramaswami Iyer and proceed to examine the clause on that basis. A careful reading of this document would show that whatever the arrangement between the parties might have been, and without going into the question whether it did or did not form the subject-matter of the partition suit, the words only convey the idea that the plaintiff's sister had no objection to the plaintiff collecting the amount of the mortgage in suit herself. In other words, they amount really to a consent or authority given by her sister to the plaintiff to recover the mortgage amount. Clause 7 of the decree is preceded by another clause in which the plaintiff had given a similar authority in almost identical words to her sister in regard to another mortgage, although it was for a much smaller amount. It is true that the plaintiff has in para. 5 of her plaint alleged that her sister had renounced her claim to this mortgage, "by virtue of the decree in O. S. No. 5 of 1930," but are the Courts bound as seems to have been stated by the Courts below, to hold a document to be inadmissible in evidence only because a party has tried to put an interpretation on it, although favourable to himself or herself, which is not borne out by its words and when the Court finds that interpretation to be wrong and the document admissible in evidence on a correct interpretation? I am of opinion that the interpretation placed by a party on the document would not prevent the Court from coming to another conclusion and giving effect to the finding to which it may arrive. But since in view of certain observations made by me in Court when the case was being argued this question was not fully discussed by Mr. Rajah Iyer and the learned counsel for the respondent did not apparently for the same reason think it necessary to refer to it in his reply. I have decided not to pursue this part of the matter any further and would refrain from expressing any opinion on it.

This brings me to the first contention raised by Mr. Rajah Iyer. He contends that it has not been proved on the record that the mortgage in suit was not included in the suit for partition or in other words that it had not formed the subject-matter of that suit, and since it was for the defendant, who had raised the objection to show that the mortgage in suit had not formed the subject-matter of that suit, he ought to be, in the absence of any evidence on the record, held to have failed to establish his objection. He also complains that the pleas raised by defendant 3 in paras. 12 and 13 and on behalf of defendant 4 in paras. 7 and 9 of their written statements were vague and they should not have been allowed to take the objection as to the inadmissibility of the decree for want of registration in the lower Appellate Court. I do not feel impressed however by this complaint. The objection that the plaintiff was not entitled to sue alone was specifically raised by defendant 3 and it was unnecessary for either of these defendants to anticipate, even if they are supposed to have knowledge of the fact, the line of action to be adopted by the plaintiff in maintaining her locus standi to bring or continue the suit. It was incumbent on the plaintiff to show how she was entitled to sue in spite of the right having devolved on her and her sister jointly. Once she succeeded in showing consent or authority or any other fact which would entitle her to bring the action alone, the onus would shift to the other side to rebut the evidence adduced on behalf of the plaintiff. By producing the decree in the partition suit the plaintiff had at least prima facie discharged the onus, and it was thus for the defendant to show that the decree was inadmissible in evidence for want of registration when we find that ordinarily all decrees or orders passed by Courts are stated in S. 17 (2) (vi) to be exempt from registration. The learned counsel for the respondent urges that the respondent has succeeded in establishing that the mortgage in suit did not form the subject-matter of the partition suit and tried to take shelter under what he calls a concurrent finding of both the lower Courts.

I have gone through paras. 14-15 of the trial Court's judgment and paras. 3 to 7 of the lower Appellate Court's judgment and am of the view that although there is reference to this question in para. 14 of the trial Court's judgment, yet I cannot say if there is a definite finding on that point in favour of the respondent. Nor can I trace a finding on this question in the judgment of the lower Appellate Court. My attention has been drawn however by the learned counsel for the respondent to the decree and to the schedules which were annexed to the decree and it has been argued that if the mortgage deed mentioned in cls. 6 and 7 of the decree had formed the subject-matter of the partition suit, they would have been mentioned in the schedules. This was the only evidence to which reference was made by the trial Court and in the absence of a copy of the plaint in the partition suit it came to a finding that it was "difficult to say that the suit mortgage formed part of the subject-matter of the suit." How that inference could have been drawn by the trial Court, I find it difficult to say myself unless it was of opinion that it was for the plaintiff to produce the copy of the plaint and to show that the mortgage in suit did form the subject-matter of the suit. The same contention was put forward once again before me ; but I find myself unable to assent to the proposition that it was for the plaintiff to show that the decree was admissible in evidence when she was not even aware of the ground on which the validity of the decree or of the proceedings was impugned. It may be said that to expect the defendant in this case to prove a negative would come into conflict with the rule of evidence that the onus of proof lies on the party who asserts the affirmative of a fact. But a negative allegation must not be confused with the denial of an affirmative one. If a party wishes the Court to believe in the non-existence of a fact, it would be his duty to prove that it did not exist. A reference to the schedules attached to the decree is inconclusive and one cannot say if any arrangement or other facts had not been pleaded in that plaint in regard to the mortgage deeds referred to in cls. 6 and 7 of the decree which would not bring them within the ambit or the subject-matter of that suit. In the absence of any definite evidence on the record I must hold that the decree embodying the compromise was not inadmissible in evidence and could have been looked at to show whether the plaintiff was entitled to sue alone on the basis of the mortgage deed. As already stated there is no finding by the lower Appellate Court that the mortgage in suit had not formed the subject-matter of the partition suit; but had there been one, I would have been, in the absence of any evidence of that fact on the record, compelled to disregard it.

In view of the conclusions to which I have arrived in regard to the first contention it seems to be unnecessary to decide the second objection that cl. 7 of the decree was merely a record of a past action and did not in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property for the first time. There is no doubt that if, as stated in para. 5 of the plaint, the plaintiff's sister Sivabagyam renounced her claim to the mortgage for the first time by means of the compromise which was embodied in the decree and if the mortgage did not form the subject-matter of the partition suit, the decree could not be said to contain a recital of a past event and would not be without registration admissible in evidence. But since it has not been established that the mortgage in suit did not form the subject-matter of the first litigation, it is unnecessary to examine the matter any further.

Assuming however that the decree was inadmissible in evidence and conceding for the sake of argument that my decision on the first point was not correct, the last contention put forward by Mr. Rajah Iyer has, in my opinion, considerable force. The provisions contained in O. 1, R. 9, Civil P. C., are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that a Court would, in certain exceptional cases, refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded but this rule can have no possible application when on account of the death of her sister although it occurred during the pendency of the suit the plaintiff was the only person, when the case was taken up for trial, who was entitled to recover the entire mortgage amount.

It is unnecessary to consider here cases where an effective decree could not have been passed on account of a non-joinder of a necessary party or to cases to joint trustees where a trust had vested in them as a body or even those where a plaintiff co-mortgagee was suing for his share of the mortgage although authority is not wanting both of this and other Courts where a portion of the mortgage amount has been decreed in favour of one co-mortgagee without impleading other co-mortgagees: *see* 59 M L J 928,[1] 52 All 134[2] and A I R 1937 Mad 136.[3] Nor is it necessary here to consider cases where the provisions of S. 22, Limitation Act, have been held to apply only when a defendant, against whom a relief was sought in the suit, was attempted to be added and not to apply when merely formal defendants were asked to be added after the expiry of the period of limitation more or less to safeguard the rights of the original contesting defendants: *see* A I R 1937 All 502[4] and A 1 R 1937 Lah 193.[5] In a case like the present S. 22, Limitation Act, has no application at all. No new plaintiff or defendant was being substituted or added in this case. Nor could the plaintiff have been said to be claiming her title through her sister Sivabaghyam but must be held to be doing so through her deceased father. The plaintiff's share in the mortgage was simply augmented on account of her sister's death and the plaintiff's title to the whole of the mortgage amount, even if incomplete when the suit was instituted by her was completed by the rule of survivorship.

The learned District Judge overruled this contention on the ground that the plaintiff's sister's claim was barred by limitation when she died and the right of survivorship did not accrue to the plaintiff until after that date but it lost sight of the obvious fact that the plaintiff had not sued for half of the mortgage amount but was suing for the whole of the money decree under the mortgage deed which she was, according to her allegations, entitled to recover herself. The defect of the want of registration of the decree, even if there was one, was thus cured by Sivabaghyam's death. The contention therefore that she was not entitled to the decree passed in her favour by the trial Court must be repelled. The only thing that could possibly be urged, and which was rightly not urged by the learned counsel for the respondent, was that the Court should not have taken notice of the events which happened after the institution of the suit. That this can be done, and at times it is essential for the Courts to do, goes without saying. One need not be hypertechnical in these matters and ought to take such events as have occurred after the institution of a suit into consideration in order to avoid further unnecessary litigation and to do complete justice between the parties. Instances where learned Judges have taken notice of such facts are very large but it would be sufficient to cite only two here: 49 M L J 479[6] at p. 489 and 6 C L J 74.[7] I am therefore of opinion that the trial Court was fully justified in taking notice of Sivabaghyam's death and granting a decree to the plaintiff. The appeal must for the above reasons succeed and is allowed. The decree of the lower Appellate Court is reversed and that of the trial Court is restored except that it seems to be unnecessary in the circumstances to order the plaintiff to furnish security to the extent of half the mortgage amount. Time for payment, two months. The plaintiff will have her costs both here and in the lower Appellate Court.

C.R.K./G.N. *Appeal allowed.*

---

[1] Bansiram Jashamal v. G. Naga Ayyar, (1930) 17 A I R Mad 985=129 I C 45=59 M L J 928.

[2] Baldeo Prasad v. Bhola Nath, (1929) 16 A I R All 941=121 I C 106=52 All 134.

[3] Peria Karuppa Pillai v. Satyanarayanamurthi, (1937) 24 A I R Mad 136=168 I C 899.

[4] Jamna Kunwar v. Kunj Behari Lal, (1937) 24 A I R All 502=170 I C 743=1937 A L J 571.

[5] Bishen Singh v. Pirthichand, (1937) 24 A I R Lah 193=172 I C 596=39 P L R 408.

[6] Appalasuri v. Kannamma Nayuralu, (1926) 13 A I R Mad 6=90 I C 881=49 M L J 479.

[7] Ram Ratan Sahu v. Bishun Chand, (1907) 6 C L J 74=11 C W N 732.

A. I. R. 1940 Madras 416

SPECIAL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras— Petitioner.

v.

S. KM. SP. Meyyappa Chettiar, Karaikudi — Respondent.

O. P. No. 290 of 1938, Decided on 23rd October 1939; reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 4 (2)—Remittance held remittance of profits.

The assessee, a Nattukottai Chettiar, who had headquarters at Karaikudi, was a partner with two other people in a money lending business carried on in T. A. and K. in Federated Malay States. The business at K. had resulted in considerable profits before the T. A. business was started. The partners borrowed from another Chettiar firm in T. A. Rs. 27,500 and the assessee for his share got Rs. 7500 which was remitted to Karaikudi. The lender at T. A. was paid off and the loan fully discharged out of the profits from the K. business remitted to T. A. The income-tax authorities treated the remittance of Rs. 7500 to Karaikudi as remittance of profits :

Held on reference that under proper construction of S. 4 (2) of the Act the remittance of Rs. 7500 was rightly included in the assessment as remittance of profits because the profits of the business at K. having been used in paying for the remittance, the remittance must necessarily represent the profits : *(1934) 18 Tax Cas 148 and A I R 1931 Cal 727 (S B), Disting.* [P 417 C 1, 2]

K. V. Sesha Ayyangar — *for Petitioner.*
M. Subbaraya Ayyar — *for Respondent.*

Leach C. J. — The assessee is a Nattukottai Chettiar whose headquarters are in Karaikudi. He is a partner with two other Chettiars in a money-lending business carried on in Teluk Anson and at Kambar in the Federated Malay States. The Kambar business had resulted in considerable profits before the Teluk Anson business was started on 12th December 1936. On 14th December 1936 the partners borrowed from another Chettiar firm doing business in Teluk Anson the sum of Rs. 27,500. This money was divided between the partners and the assessee received as his share, Rs. 7500 which his agent in Teluk Anson then remitted to Karaikudi. To pay off the lender, the assessee and his partners transferred profits from the Kambar branch to the Teluk Anson branch, and out of the remittance of profits, they fully discharged the loan. In the circumstances the income-tax authorities have treated this remittance of Rs. 7500 by the assessee as a remittance of profits in respect of the year of assessment, 1937-38. The assessee contended that the order of the income-tax authorities was wrong and asked the Commissioner of Income-tax to refer for the decision of this Court the following question :

> Whether under a proper construction of S. 4 (2) of the Act, the sum of Rs. 7500 was rightly included in the petitioner's assessment as a remittance of profits.

The Commissioner of Income-tax complied with the assessee's request for a reference, and the Court is now called upon to give the answer. The answer must be in the affirmative. If it were otherwise, it would mean that a person who had made profits abroad could evade the provisions of S. 4 (2), Income-tax Act, by simply borrowing and repaying the loan out of the profits immediately he had remitted the proceeds of the loan to India. In such circumstances the remittance to India can only be regarded as a remittance of profits. The profits having been used in paying for the remittance, the remittance must necessarily represent the profits. On the facts of this case, there can be no doubt that the Rs. 7500 did represent a remittance of profits.

The learned advocate for the assessee has contended that this case is governed by the decisions in (1934) 18 Tax Cas 148[1] and 5 I T C 154.[2] The former case was considered by a Bench of this Court in 59 Mad 171[3] where it was pointed out that it had no application in a situation like the present one. In 5 I T C 154,[2] the Calcutta High Court was dealing with a case where the assessee had a branch in Calcutta and one in Cooch Behar. It was not a question of bringing profits from Cooch Behar to Calcutta. The facts were altogether different. The answer to the reference, as I have indicated, will be in the affirmative, and the assessee having lost, must pay the usual costs, Rs. 250.

C.R.K./D.S. *Answer in affirmative.*

---

1. Hall v. Marians, (1934) 18 Tax Cas 148.
2. Multan Chand Johurmull v. Commissioner of Income-tax, Bengal, (1931) 18 A I R Cal 727 =184 I C 937=58 Cal 999=5 I T C 154 (S B).
3. Subramaniam Chettiar v. Commissioner of Income-tax, Madras, (1936) 23 A I R Mad 282 =159 I C 787 = 59 Mad 171 = 69 M L J 844 (S B).

A. I. R. 1940 Madras 417

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Chidambaram Chettiar — Petitioner.

v.

Muthukumaraswami Chettiar — Respondent.

Civil Revn. Petn. No. 1129 of 1939, Decided on 11th December 1939, to revise order of Dist. Munsif, Cuddalore, D/- 4th May 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 19 and S. 28 (1) (2) (c), Rules under, R. 8— R. 8 is not retrospective.

There is nothing in the Act or in the rules to suggest that retrospective effect should be given to the amended rules. The amendments to the rules are not of a declaratory nature. R. 8 makes an entirely new provision. This being the case, it cannot have retrospective effect in the absence of a provision to that effect. Where the rules were amended long after the revision petition under S. 19 had been filed and long after the period of limitation for an appeal had expired, the objection that the petition does not lie by reason of the amendment of the rules must be rejected. [P 418 C 1, 2]

A. C. Sampath Ayyangar — *for Petitioner.*

T. E. Ramabadhra Chariar — *for Respondent.*

Leach C. J. — The petitioner claims to be an agriculturist within the meaning of the Madras Agriculturists' Relief Act, 1938. On 8th October 1938 he filed an application in the Court of the District Munsif of Cuddalore asking for the amendment under S. 19 of the Act of a money decree which had been passed against him. By an order dated 4th May 1939 the District Munsif dismissed the application. The petitioner then filed the application now before us asking this Court to reverse the District Munsif's decision under the powers of revision conferred by S. 115, Civil P. C. The respondent says that the petition does not lie because the Government has amended the rules framed under the Act and by the amendment has provided for an appeal against an order passed under S. 19. The petitioner contends that the new rules cannot have retrospective effect. This question calls for decision before the Court examines the reasons advanced by the petitioner for the order which he seeks.

The amendment of the rules framed under the Act was made by an order of the Government dated 27th October 1939. The amendment is said to have been made in exercise of the powers conferred by sub-s. (1) and cl. (c) of sub-s. (2) of S. 28 of the Act. By the order R. 8 was added to the rules and this rule inter alia provides that an appeal shall lie from an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree, as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil P. C., 1908. Sub-s. (1) of S. 28 of the Act states that the Provincial Government may make rules for carrying into effect the purposes of the Act. Sub-s. (2) (c) says that in particular and without prejudice to the generality of the power conferred by sub-s. (1) the Provincial Government may make rules for removing any difficulty in giving effect to the provisions of the Act. The Court is not called upon in this case to decide whether under S. 28 the Government has power to make provision for appeals by amendment of the rules, because it is quite clear that the amended rules cannot have retrospective effect, and therefore they do not govern the present case. There is nothing in the Act or in the rules which supports the respondent's contention that retrospective effect should be given to the amended rules. The amendments to the rules are not of a declaratory nature. R. 8 makes an entirely new provision. This being the case it cannot have retrospective effect in the absence of a provision to that effect. The rules were amended long after this petition had been filed and long after the period of limitation for an appeal had expired. Therefore the objection that the petition does not lie by reason of the amendment of the rules must be rejected. (Their Lordships then dealt with the merits of the case and concluded.) The petition will be allowed and the case remitted to the District Munsif to deal with it in accordance with law. The petitioner is entitled to his costs.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1940 Madras 418

BURN AND LAKSHMANA RAO JJ.

Fakkiri Muhammad Tharaganar — Appellant.

v.

U. T. Syed Sahib — Respondent.

Appeal No. 588 of 1938, Decided on 7th February 1940, against order of Sub-Judge, Tinnevelly, D/- 30th September 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19—Rules providing for appeals from orders under S. 19 have no retrospective effect.

The rules framed by Government providing for appeals from orders passed under S. 19 have no retrospective effect: *A I R 1940 Mad* 417, *Foll.* [P 418 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19—Order under S. 19 dismissing application of judgment-debtor — Appeal does not lie even if execution petition is pending.

Orders under S. 19 cannot be deemed to be orders under S. 47, Civil P. C. No appeal lies from an order under S. 19 dismissing the application of a judgment-debtor. The fact that an execution petition is pending makes no difference nor does it make any difference that the executing Court happens to be the Court which passed the decree: *(1939) 2 M L J 609, Rel. on*; *A I R 1940 Mad 131, Expl.* [P 419 C 1]

R. S. Srinivasacharya and K. V. Rajagopalan — *for Appellant.*

S. Ramaswami Aiyar — *for Respondent.*

Judgment.—Mr. S. Ramaswami Aiyar for the respondent raises a preliminary objection that no appeal lies in this case. It is true that in the Madras Agriculturists' Relief Act no appeal has been provided from orders passed under S. 19. Subsequently (in October 1939) the Government have issued rules providing for appeals in such cases, but those rules have no retrospective effect, (1940) 1 M L J 317,[1] and therefore those rules do not help the appellant. It has been held (*vide* (1939) 2 M L J 609)[2] that no appeal lies from an order under S. 19 dismissing the application of a judgment-debtor when no execution petition is pending in any Court. We are asked to say that it follows from this decision that if an execution petition is pending an appeal will lie, but the fallacy involved in that contention is obvious. We have been referred to the decision in C. R. P. No. 224, etc. of 1939, reported in 50 M L W 851,[3] where it has been observed (at p. 855) that all the petitions in that case,

---

[1] Chidambaram Chettiar v. Muthukumaraswami Chettiar, (1940) 27 A I R Mad 417=(1940) 1 M L J 317.

> must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within the matters covered by S. 47, Civil P. C.

That observation is however merely an obiter dictum since the learned Judges in that case were dealing with revision petitions which were in the end allowed. If the orders were passed on matters arising under S. 47, Civil P. C., appeals would lie and revision would be inadmissible. We think Mr. Ramasami Aiyar is right in contending that orders under S. 19 of the Act cannot be deemed to be orders under S. 47, Civil P. C. The application under S. 19 of the Act is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view the fact that an execution petition is pending makes no difference, nor does it make any difference that the executing Court happens to be the Court which passed the decree. The application under S. 19 has to be made to the Court which passed the decree and it is not a matter relating to the execution of the decree in any sense. If the decree is scaled down, an appeal will lie from the new decree, but if the application is dismissed, no appeal can lie. This appeal is accordingly dismissed with costs. We have been asked to allow this appeal to be converted into a civil revision petition but we think there is no question of jurisdiction here. The learned Sub-Judge has exercised his jurisdiction and has decided that this debt is not one in respect of which relief can be granted. We decline to allow conversion.

C.R.K./D.S. *Appeal dismissed.*

---

[2] Subbaraidu In re, (1939) 2 M L J 609.

[3] Venkatappadu v. Ramamurti, (1940) 27 A I R Mad 131 = (1939) 2 M L J 853 = 50 M L W 851.

A. I. R. 1940 Madras 419

HORWILL J.

Narayanaswami Naidu and another —Petitioners.

v.

Rajamanickam Pillai — Respondent.

Civil Revn. Petn. No. 1216 of 1939, Decided on 20th October 1939, to revise order of Sub-Judge, Mayavaram, D/- 20th January 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 8 and 9—Application under S. 8 for scaling down debt — Compromise decree — Payment towards amount due under decree — Decree-holder can appropriate it first towards interest and costs and then towards principal — New debt cannot be said to be incurred on date of compromise decree.

The decree-holder is entitled to appropriate the payment first towards interest and costs and the balance towards the principal, in proceedings under S. 8 for scaling down debt. Where a compromise decree is passed it cannot be said that a new debt is incurred on the date of the compromise decree and therefore it is S. 8 and not S. 9 which applies to the debt due under the compromise decree: *8 Beng L R 110 (P C), Rel. on; C. R. P. No. 86 of 1939, Expl.* [P 420 C 1]

Ch. Raghava Rao and S. Rajaraman — *for Petitioners.*

M. S. Venkatarama Ayyar and K. V. Venkataseshadhiri —*for Respondent.*

Order. —The respondent brought a suit on a mortgage bond against the petitioner; and a compromise decree was obtained on 17-10-1936. A final decree was passed on 14-8-1937 and three days later on 17-8-1937, the petitioner paid Rupees 1400 in part discharge of the debt. On 14-12-1937 the respondent filed E. P. No. 77 of 1938 in which he stated that he had appropriated Rs. 1400 first towards interest and costs and the balance towards principal. The petitioner has since put in an application to scale down the debt under Sec. 8, Madras Act 4 of 1938, and the only question that arises in this petition is whether the respondent can be allowed to appropriate that sum of Rs. 1400 first towards costs and interest and afterwards towards principal. Both the Courts below have held that he could. The argument of the petitioner is that the appropriation took place only on 14-12-1937, the date on which E. P. No. 77 of 1938 was filed but it does not follow that because that was the first mention of the appropriation, it took place only on that date. The payment of Rs. 1400 was presumably immediately applied in reduction of the debt. It is not as if (taking the figures in para. 7 of the first Court's judgment) that Rs. 2139-15-5 remained outstanding after the date of payment and on the other side there was a credit of Rs. 1400. That payment of Rupees 1400 was not carried on in *anamoth* to be credited at some future date; the money was at once applied to the reduction of the debt. So it cannot be said that the interest due on 17-8-1937 remained outstanding after the payment was made. In a Privy Council case, 8 Beng L R 110,[1] it was held that if the debtor did not himself make a specific appropriation when he made the payment, the creditor had a right to consider it as a payment towards interest. So that on the date of the payment it must be deemed to have gone in discharge firstly of interest and secondly of principal.

Mr. Raghava Rao has put forward a rather ingenious alternative argument that we must consider the debt to have arisen on 17-10-1936, the date of the compromise decree, so that it is S. 9 of the Act and not S. 8, that has to be applied. It seems clear that the Legislature intended to draw a definite distinction between the treatment of debts that first arose before the 1st October 1932 and those that arose after that date; and although in some ways the compromise decree may be considered to have given rise to a new debt, yet I think it would be contrary to the spirit of the Act and even to the literal meaning of these two Sections to interpret this as meaning that, for purposes of Ss. 8 and 9, the debt was incurred after 1st October 1932. The decision of Pandrang Row J. in C. R. P. No. 86 of 1939 is quoted as an authority for the contention that a debt was incurred on the date of the compromise decree; but I do not find that Pandrang Row J. went so far. There seems to have been an argument before him in which an attempt was made to split up the compromise decree and to say that a certain part must be deemed to be interest and a certain part principal. Pandrang Row J. repelled that argument and held that a compromise decree must be taken as a whole, that it is not permissible to split up a compromise decree in the manner suggested and that the amount due under the compromise decree must be taken as principal. I agree with the finding of the Courts below and accordingly dismiss this petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 420

KUNHI RAMAN J.

Athiyappa Goundan — Petitioner.

v.

Ramanathan Chettiar — Respondent.

Civil Revn. Petn. No. 1657 of 1938, Decided on 17th November 1939, to revise order of Sub-Judge, Salem, D/- 24th August 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 10 (2)—Mortgage debt being price payable by mortgagor for land purchased from mortgagee—Debt cannot be scaled down.

Where a mortgage is executed for the price payable by mortgagor for land purchased from the mortgagee the debt comes under the category of S. 10 (2), cl. (2) and hence the debt cannot be scaled down. [P 420 C 2; P 421 C 1]

K. P. Ramakrishna Ayyar — *for Petitioner.*

K. S. Ramabhadra Ayyar — *for Respondent.*

Order. — This is an application to revise the order made by the learned Subordinate Judge of Salem in Execution Application No. 261 of 1938 in Original Suit No. 52 of 1932. The application before the lower Court was presented under S. 19, Madras Agriculturists' Relief Act, 4 of 1938, to scale down the amount of a mortgage decree. It is admitted that the original mortgage was executed for Rs. 7000 on 4th November 1914, the whole of the mortgage debt being the price payable by the mortgagors for lands purchased by them from the mortgagees. Subsequent to this mortgage and before the debt was discharged, there was a partition among the mortgagors and after that partition, by consent of parties, the mortgage debt was split up with the result that under a fresh mortgage deed, Ex. C, security was given only for Rs. 2500 which was the portion of the debt that fell to the mortgagors under that document. This was executed on 22nd January 1925. Under this mortgage deed, the properties that were given as security were not the lands that were originally purchased in 1914 but some of the ancestral properties of the mortgagors under this deed. The decree debt that was sought to be scaled down under S. 19 of the Act was under the decree passed to enforce this mortgage. The application for scaling down was resisted in the Court below under S. 10, sub-s. 2, cl. 2 of the Act by the decree-holders. According to this clause nothing contained in Ss. 8 and 9 of the Act shall affect any liability for which a charge is provided under S. 55, cl. 4, sub-cl. (b), T. P. Act. The objection raised on behalf of the decree-holders was upheld by the learned Subordinate Judge who found that the exemption provided for in this clause clearly indicated that the Act was not intended to benefit debtors whose debts could be under the category of debts referred to in it.

---

[1] Luchmeswar Sing Bahadur v. Syud Lutf Ali Khan, (1872) 8 Beng L R 110=2 Sar 700 = 2 Suther 461 (P C).

Mr. Ramakrishna Ayyar, the learned advocate for the petitioner, argues that since under the fresh mortgage deed, Ex. C, the lands originally purchased by the mortgagors, in respect of which alone the charge provided for in S. 55, T. P. Act, can operate were not given as security and since fresh properties were given as security, the lower Court erred in holding that the clause of S. 10 relied on by the respondents was applicable to the case. In view of the scheme of the Act and in view of the wording of the clause, I am not able to accept this contention as well-founded. The clause describes a particular category of debts in respect of which the debtor should not be given relief under the Act and it cannot be denied that the debt in the present case is included in that category. It is only equitable that a person who purchases property should pay the price that he agreed to pay. In these circumstances I hold that the view taken by the Court below that the clause is a sufficient answer to the petition for scaling down the debt is correct. The civil revision petition must therefore be dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 421

WADSWORTH AND PATAJALI SASTRI JJ.

Ramaswami Reddi — Petitioner.

v.

Alagayammal — Respondent.

Civil Revn. Petn. No. 1112 of 1939, Decided on 30th January 1940, to revise order of District Munsif, Sankaridrug at Salem, D/- 28th January 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 4 (h)—Words "other property" refer to property other than debts due to woman from agriculturists.

The words "other property" must be taken to refer to property other than the debt or debts due to the woman from agriculturists. In other words, debts due from agriculturists to a woman on 1st October 1937 are not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3000 and the woman did not own any property other than such debts apart from her personal belongings: *C. R. P. 1072 of 1938, Disapproved.* [P 421 C 2 ; P 422 C 1]

K. Narasimha Ayyangar and D. Ramaswami Ayyangar — *for Petitioner.*

T. M. Krishnaswamy Aiyar and A. Balasubramania Ayer — *for Respondent.*

Patanjali Sastri J. — The question for determination in this revision petition relates to the construction of S. 4 (h), Madras Agriculturists' Relief Act, 1938. The petitioner claiming to be an "agriculturist" applied under the provisions of the Act for the scaling down of the debt due by him under a decree obtained by the respondent. It was not denied that the petitioner was an agriculturist within the meaning of the Act, but the respondent being a woman claimed the benefit of the exemption under S. 4 (h) of the Act, and the question is whether, on a proper construction of that provision, her claim is sustainable.

It is not in dispute that, besides the decree-debt now sought to be scaled down, the respondent is entitled to a half share in a mortgage debt due from another person but has no other property, and that the principal amount of these debts both of which were due on 1st October 1937 did not exceed Rs. 3000. On these facts, it is argued for the petitioner that the respondent is not entitled to the exemption claimed, as she owned on the material date "other property" i. e. her half share in the mortgage debt referred to above, besides the debt sought to be scaled down; while the respondent contends that the words "other property" must be taken to refer to property other than not the debt or debts sought to be scaled down but any debt or debts due to the woman from agriculturists: see the definition in S. 3 (iii). The provision is not happily worded and is not free from ambiguity, but on the whole we are of opinion that the contention of the respondent is correct. There is nothing to indicate that the words "any debt or debts" in cl. (h) refer to the debt or debts in respect of which the application for scaling down has been made. On the other hand the opening words of the Section "nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads" show that the exemption relates to certain classes of debts and has no particular reference to the debt sought to be scaled down. The exemption under S. 4 (h), as we understand the provision, covers a particular category of debts, limited in regard to their nature and extent, while insisting as a condition of its application that the creditor woman should not have owned on the date specified any other property, that is to say, property not falling under that category apart from property excluded by the explanation. In other words, debts due from agriculturists to a woman on 1st October 1937 are not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3000 and the woman did not own any property other than such debts apart from her personal belongings.

Learned counsel for the petitioner objects that on the above construction, the inquiry on an application under the Act would have to relate not only to the character of the applicant as an agriculturist but also to the similar character of the various debtors from whom debts might be due to the creditor woman and such a "roving" inquiry extending beyond the subject-matter of the proceeding could not have been contemplated by the Legislature. The objection is not without force, but, on the other hand, it is to be observed that if the provision were to be construed in the manner suggested for the petitioner, the exemption under it would become practically illusory. For example, if a woman having no other property had two claims, each for a small sum, say Rs. 100, and an application was made to scale down one of the debts, the existence of the other debt would exclude her from the benefit of the exemption; while if she had only one claim for just under Rs. 3000, the exemption would apply. A construction which leads to such startling and anomalous results cannot be accepted unless the language used by the Legislature is so clear and unambiguous as to compel its acceptance. It is no doubt true that even on the construction indicated by us above, there would be the anomaly that while a woman owning jewellery or other personal belongings worth a large sum could claim the benefit of the exemption for a debt of, say, Rs. 2500 due to her, a woman having a claim for a smaller sum but owning one or two cents of land yielding what may be next to nothing would be excluded from such benefit. This result is no doubt regrettable and was perhaps not intended, but it is unavoidable on the present wording of the provision. That however is no reason for adopting the petitioner's construction which would render the exemption more illusory and the anomalies involved in its application more glaring, especially when there is nothing in the language employed to support such construction. Learned counsel for the petitioner relied on the decision of Krishnaswami Ayyangar J. in C. R. P. No. 1072 of 1938 (not yet reported), where the learned Judge appears to have construed S. 4 (h) in the manner suggested for the petitioner. The question does not appear to have been fully considered and the learned Judge gives no reasons in support of his conclusion, and, with due respect, we are unable to agree with it.

As it has not been ascertained whether the mortgage debt due to the respondent and another is a debt due from an agriculturist, the case will have to go back for an inquiry on that matter. If it is found that the debt is also a debt due from an agriculturist, the respondent will be entitled to the benefit of the exemption; if not, such debt must be regarded as "other property" within the meaning of the provision and the respondent will be excluded from it. Costs throughout will abide and follow the result.

C.R.K./D.S. *Case remanded.*

A. I. R. 1940 Madras 422

ABDUR RAHMAN J.

Madura, etc. Devasthanam through Executive Officer, R. S. Naidu — Petitioner.

v.

Masanam Pillai — Respondent.

Civil Revn. Petn. No. 481 of 1939, Decided on 19th January 1940, to revise order of Dist. Munsif, Madura, D/- 14th November 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 15 and R. 6 (1) — Suit by major inamdar against minor inamdar for recovery of water charges—S. 15 or R. 6 (1) does not apply.

The relationship between the major and minor inamdars cannot be held to be that of a landlord and tenant, even if it is assumed that the grants were made to both the inamdars by the same personage or authority. The minor inamdar cannot be said to be under a liability to pay any rent to a major inamdar, hence S. 15 or R. 6(1) would have no application to a suit by major inamdar against minor inamdar for recovery of water charges. [P 423 C 2]

K. Rajah Ayyar and T. A. Ramaswamy Reddiar — *for Petitioner.*

K. Rajasekharan — *for Respondent.*

Order. — The whole village of Bodinaickenpatti was granted to devasthanams at Madura as a sarva inam by the Carnatic rulers. This was a major inam; but at the time when this inam was brought into existence certain minor inams had already been granted in this village. One of these minor inams was purchased by the defendants' predecessors-in-title. A suit was instituted on behalf of the devasthanams against the defendants for the recovery of certain water charges, land cess, etc. the former of which were claimed on the ground that the water had been taken by the defendants for the second crop which they were not entitled to use without paying for it, and the latter for what the plaintiff was alleged to have paid to the Government on behalf of the defendants. It is unnecessary to decide in this case whether the claim was made in respect of a tort committed by the defendants or as held by my learned brother Somayya J. in 49 M L W 765[1] in regard to the breach of an implied engagement. It is however necessary to remember that the suit was not instituted by a landlord against his tenant which would have been cognizable by a Revenue Court but by a major inamdar in a Civil Court against a minor inamdar. The plaintiff's suit was decreed, although the decree was not satisfied before the Madras Agriculturists' Debt Relief Act (Act 4 of 1938) came into operation. The judgment-debtors consequently made an application for stay of execution under S. 20 and under R. 6 (1) framed under the Act. The District Munsif of Madura granted the application and stayed execution. This has led the decree-holder to come up to this Court in revision.

The only question to decide in this revision is whether the amount decreed in favour of the devasthanams falls within the definition of rent. If it did, it would fall within the ambit of R. 6 (1) framed under the Act. This rule refers to S. 15 and the Section lays down the conditions under which rent due to landholders is to be deemed to be discharged. Relying on the Full Bench decision of this Court in 74 M L J 256 = I L R (1938) Mad 381,[2] the District Munsif was of opinion that the amount decreed came within the purview of the definition of rent. But he apparently overlooked the most important fact that the Full Bench decision was given in a case where an action was brought by a landholder to recover rent from his ryot while the relationship between the major and minor inamdars could not be held to be that of a landlord and tenant, even if it was assumed that the grants were made to both the inamdars by the same personage or authority. Since the relationship of landlord and tenant did not subsist between the parties, the suit was instituted in a Civil Court and not before the Deputy Collector as in the case decided by the Full Bench. If the jural relationship between the parties is not that of landlord and tenant, S. 15, Madras Agriculturists' Debt Relief Act, or R. 6 (1) would have no application. Rent has been defined by the Madras Estates Land Act to include

> whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture and includes whatever is payable on account of the use and enjoyment of water supplied or taken for cultivation of land, where the charge for such water has not been consolidated with the rent payable for the land.

The above definition implies that the payment to the landholder must be by a person who is bound to pay rent for the land. The minor inamdar cannot be said to be under a liability to pay any rent to a major inamdar. For the above reasons R. 6 (1) could not be said to apply to the minor inamdars who made the application for stay and the application should not have been accepted by the Court below. The revision is therefore accepted and the order passed by the District Munsif set aside. The petitioner will have his costs in this Court.

C.R.K./D.S. *Revision allowed.*

---

[1] Venkatarayudu v. President, District Board. East Godavari, (1939) 26 A I R Mad 689 = (1939) 2 M L J 93=49 M L W 765.

[2] Venkataraju Garu v. Maharajah of Pithapuram, (1938) 25 A I R Mad 342=174 I C 434 =I L R (1938) Mad 381=(1938) 1 M L J 256 (F B).

A. I. R. 1940 Madras 423

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Visalakshi Ammal — Appellant.

v.

Gokuldas Dayal Sait and another — Respondents.

Second Appeal No. 1082 of 1934, Decided on 27th September 1939, against decree of Dist. Court, Salem, in A. S. No. 89 of 1932.

Madras District Municipalities Act (5 of 1920), S. 61—Interpretation—Drain alongside public street means drain for purpose of draining street—Drain on private property for purpose of draining it and which has nothing to do with drainage of street does not vest in Municipal Council under S. 61 (1).

· Under S. 61 (1) all drains which are alongside a public street vest in the municipal authority. But this must mean that a drain which is alongside a public street is a drain which is there for the purpose of draining the street. It could never have been the intention of the Legislature to vest in the Municipal Council a drain on private property which has nothing to do with the drainage of the street. If a drain on private property, constructed merely for the purpose of draining the private property, were to vest in the Municipal Council by reason of S. 61 (1) it would mean the confiscation of private property without compensation. Where private property is taken away from the owner there must be words used in the enactment which clearly express the intention of the Legislature to give the power. The wording used in S. 61 (1) is certainly not appropriate for this purpose : *A I R 1920 Mad 193, Rel. on*; *A I R 1917 Cal 95, Disting.* [P 424 C 2 ; P 425 C 1]

V. N. Venkatavaradachariar — *for Appellant.*

K. Sankara Aiyer — *for Respondents.*

Leach C. J.—This appeal arises out of a suit filed by the appellant in the Court of the District Munsif of Salem for a declaration that a drain adjoining the eastern wall of her house was her private property and that the defendant-respondent was not entitled to let into the drain sewage from his house. The appellant is the owner of a house which fronts a main road within the municipal area of Salem. The respondent has also built a house fronting the same road. His property is separated from the appellant's property by a public lane. The respondent applied to the Municipal Council for permission to carry two channels across this public lane and connect them with the drain on the appellant's property. Permission was granted and as the result connexions with the appellant's drain were made. The appellant objected, but the work having been carried out she instituted the present suit. The respondent filed a written statement in which he averred that the drain on the appellant's property was a public drain and that the Municipal Council had acted within its powers in sanctioning the connexions.

The District Munsif held that the drain was the private property of the appellant and that the respondent had no right to discharge into it the sewage from his house. Consequently, the District Munsif granted the appellant the relief which she sought. The respondent appealed to the District Court of Salem. The District Judge concurred in the finding of the District Munsif that the drain was the private property of the appellant and that finding is now conclusive. But even if it were not, there is no doubt that the drain lies entirely on the appellant's property, except to the extent of a connexion which has been made with the public drain running in front of the two houses. Before the respondent made the connexions complained of the appellant's drain was used entirely for the purpose of draining the appellant's property. The District Judge allowed the appeal on the construction which he placed on S. 61 (1), Madras District Municipalities Act, 1920. He considered that the Section operated to vest the drain in the Municipal Council and consequently the Council had the power to allow the respondent or other neighbouring house-holders to conduct the sewage from their houses to this drain. The District Judge however thought that it was necessary to ascertain whether the flow of sewage from the respondent's house into this drain constituted a nuisance. This question has not been canvassed in the trial Court, but holding the view that it was necessary to decide this matter, the District Judge called for a finding from the District Munsif. The District Munsif recorded further evidence and reported to the District Court that no nuisance would be created. This finding was accepted by the District Judge, who thereupon allowed the appeal. The appellant contends that the District Judge has misread S. 61 and that on a proper construction of it and other relevant Sections of the Act the decision of the District Munsif was correct. S. 61 (1) reads as follows:

> All public streets in any Municipality, with the pavements, stones and other materials thereof and all works materials and other things provided for such streets, all sewers, drains, drainage works, tunnels and culverts, whether made at the cost of the municipal fund or otherwise, in, alongside or under any street, whether public or private, and all works, materials and things appertaining thereto shall vest in the Municipal Council.

Therefore all drains which are alongside a public street vest in the municipal authority. But this must mean that a drain which is alongside a public street is a drain which is there for the purpose of draining the street. It could never have been the intention of the Legislature to vest in the Municipal Council a drain on private property which has nothing to do with the drainage of the street. If a drain on private property, constructed merely for the purpose of draining the private property, were to vest in Municipal Council by reason of S. 61 (1) it would mean the confiscation of private property without compensation. Where private property is taken away from the owner there must be words used in the enactment which clearly express the intention of the Legislature to give the power. The wording used in S. 61 (1) is certainly not appropriate for this purpose. The definition of "public street" is to be found in S. 3 (21). The expression "public street" means a street, road, square, Court, alley, passage, or riding path, over which the public have a right of way whether a thoroughfare or not, and includes (a) the roadway over a public bridge or causeway; (b) the footway attached to a street, public bridge or causeway; and (c) the drains attached to a street, public bridge, or causeway and the land, whether covered or not by any pavement, verandah, or other structure, which lies on either side of the roadway "upto the boundaries of the adjacent property whether that property is private property or property belonging to the Government." Therefore drains which are attached to a public street are included in the definition, but the Legislature has been careful not to include land on either side of the roadway which lies beyond the boundary of private property.

Provisions regarding private drains are contained in Ss. 138 to 144. It is unnecessary to refer to them in detail. It is sufficient to say that S. 138 gives the Municipality the control over house drains within or without the premises to which they belong for the purposes of alteration, repair, cleansing and maintenance in proper order and provides for the charging of the expenses incurred in such matters to the owner of the property. There is no provision in the Act for vesting private drains in the Municipal Council although the Council can insist on private drains being used by others when the provisions of S. 141 of the Act apply. That Section states that when the executive authority is of opinion that a group or block of premises, a part of which is situate within 100 feet of a municipal drain already existing, or about to be constructed, may be drained more economically or advantageously in combination than separately, the executive authority may, with the approval of the Council, cause the group or block of premises to be drained by the method which appears to the executive authority to be the best suited. But before any steps can be taken to carry out such a scheme of drainage, not less than 15 days notice shall be given to the owners of the property, of the nature of the intended work, the estimated expenses and the proportion of the expenses payable by each owner. When such a scheme has been carried out the owners for the time being of the premises constituting a group or block are to be the owners of the drains and are responsible for the expense of maintaining the drains in good repair and efficient condition. The learned advocate for the respondent has in the course of the argument referred to the Section and has suggested that it has application here. The short answer is that the Municipal Council did not purport to act under this Section and the notice required by the Section was not given. It was never suggested in the Courts below that this Section had any application and it is quite obvious that it has not.

Section 61 does not give the Municipal Council the right to connect or sanction the connexion of the respondent's drainage system with that of the appellant. The appellant's drain is her own private property. While the Municipal Council has the right to insist that it shall be kept in proper repair and order it has no power to impose any burden upon the appellant unless it be in circumstances which come within the purview of S. 141. This case does not come within the purview of that Section. There is support for the view expressed in this judgment in the observations of Sadasiva Ayyar and Burn JJ. in 38 M L J 222.[1] There the Court had to consider whether certain drains attached to a public street and intended to carry off water falling on the street vested in the Mayavaram Municipality under S. 24, Madras Act, 4 of 1884, even though the site of the drains belonged to private individuals. The Court held that the drains did vest and pointed out that S. 3 (27) (c), Madras City Municipal Act 1904, made it clear that the drains should be attached to the street in order to vest them in the Municipality. S. 3 (27) (c) provided that the term "public street" should include drains attached to the street and the lands which lay on either side of the roadway up to the boundaries of the adjacent property, language similar to the language used in S. 3 (21) (c) of the Act which governs this appeal.

The learned Advocate for the respondent has drawn our attention to the decision of the Calcutta High Court in 44 Cal 689[2] and

---

1. Arunachella Chettiar v. Municipal Council of Mayavaram, (1920) 7 AIR Mad 193 = 55 I C 493=38 M L J 222.
2. Gunendra Mohan Ghosh v. Corporation of Calcutta, (1917) 4 AIR Cal 95 = 37 I C 96 = 24 C L J 358=44 Cal 689=21 C W N 234.

has suggested that the case is on all fours with the one now before us. The Calcutta case was decided on the provisions of the Calcutta Municipal Act of 1899 which differs in important respects from the Madras District Municipalities Act and the case lends no support for the respondents' argument. For the reasons indicated the decision of the District Judge must be held to be erroneous and the decision of the District Munsif restored. The appeal will consequently be allowed and the decree of the District Munsif's Court will stand. The appellant is entitled to her costs here and in both the Courts below.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 426

WADSWORTH J.

Chidambara Thevar — Appellant.

v.

R. Swaminatha Rao Peshwa and others — Respondents.

Second Appeal No. 70 of 1936, Decided on 28th September 1939, against decree of Court of Sub-Judge, Thiruvarur, D/- 12th July 1935.

(a) Transfer of Property Act (1882), S. 119 before amendment of 1929 — Exchange deed — Transferee from one of parties to exchange cannot raise plea of bona fide purchase for value under S. 119 — Transferee can get no better title than that of transferor.

Under S. 119 it is not open to a transferee from one of the parties to the exchange deed to set up the plea of a bona fide purchase for value as the transferee can get no better title than that which his transferor had. Although the Section does not explicitly say that a party to the exchange is entitled to the return even when the property has passed into the hands of an innocent purchaser, there is nothing in the Section which rules out such a contingency : *A I R 1920 Mad 812, Foll.; A I R 1934 Nag 61 and A I R 1934 Lah 934, Dissent.; A I R 1924 All 390, Disting.* [P 426 C 2]

(b) Transfer of Property Act (1882), S. 119 as amended by Act of 1929 — Applicability — Date of contract is governing factor and not date of dispossession.

Section 119 as amended by Act of 1929 does not apply to transfers effected before 1st April 1930. Where the exchange deed is signed by the parties before the aforesaid date and one of them happens to be dispossessed subsequent to the coming into operation of S. 119 as amended by Act of 1929, the governing date for the applicability of the Section will not be the date of dispossession but the date of the contract upon which the right was acquired. [P 427 C 1, 2]

V. Ramaswamy Ayyar and R. Sundaralingam — *for Appellant.*

V. V. Ramadurai — *for Respondents.*

Judgment.—This appeal raises the question of the effect of S. 119, T. P. Act, as it stood before the amendment introduced in 1929. The facts are simple. The plaintiff was the owner of the land in Sch. A. Defendant 1 was the owner of the land in Sch. B. On 20th February 1916, under Ex. A they effected an exchange whereby the plaintiff got Sch. B and defendant 1 got Sch. A. In the deed of exchange each of them describes himself as the owner of the land given in exchange and there are no special covenants excluding the operation of S. 119, T. P. Act. On 24th May 1916 defendant 1 sold the Sch. A land which he had got by the exchange to one Nagammal who on 6th July 1922 sold the same land to the brother of defendant 2 who is the appellant here. Actually the plaintiff found that part of the Sch. B land which he had got by the exchange was included in a big mortgage and the mortgagee got a decree. Under that decree some of the items in Sch. B were sold in court auction to a third party and the plaintiff was dispossessed on 23rd February 1931. Consequently, he filed the suit in which he claims the return of the Sch. A properties and expresses his willingness to surrender the balance of Sch. B properties still in his possession.

Now the law on the subject has been fully discussed by the learned Subordinate Judge with whose conclusions I agree. He follows the decision in 42 Mad 690[1] and holds that the transferee can get no better title than that which his transferor had and that therefore defendant 2 must be deemed to have taken this land subject to the liability which bound defendant 1 to give back the land if the property which he had given in exchange for it to the plaintiff was lost. S. 119 before the amendment merely says that in the absence of a contract to the contrary, the party deprived of the thing or part thereof which he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him. Granted that this Section does not explicitly say that the transferor is entitled to the return even when the property has passed into the hands of an innocent purchaser, there is nothing in the Section which rules out such a contingency. The view taken by the Bench which decided 42 Mad 690[1] has so far as I am aware, never been dissented from in this Court. There are however three cases of other Courts which have been quoted before me as authority for the opposite view. The decision in 46 All 359[2] really is beside the point as it deals only with S. 120, T. P. Act, and does not consider the wording of S. 119. There are two decisions of single Judges, A I R 1934 Lah 934[3] and A I R 1934 Nag 61[4] in which a view different from that of this Court has been adopted, that is to say the view that S. 119 prior to the amendment contemplated only the liabilities of the actual parties to the exchange and did not contemplate the imposition of any liability on an innocent purchaser. That is, of course, substantially the result of the amendment to the Section, but I do not think that the original Section should be interpreted in the light of the subsequent change in the law. I am bound by the decision in 42 Mad 690[1] which is against the view for which the appellant contends. I may remark that Gour's Transfer of Propetry Act takes the opposite view but he quotes no authority at all in support of it. I must therefore on the authorities as they stand uphold the view of the learned Subordinate Judge.

---

[1] **Srinivasa Iyengar v. Jhonsa Rowther, (1920) 7 A I R Mad 812=51 I C 939=42 Mad 690.**

A further contention is that the case will be governed by the amended S. 119 because the dispossession of the plaintiff was in February 1931 after the new Act came into force. Here again I must decide against the appellant. S. 63 of the Amending Act lays it down that S. 59 which amends S. 119 shall not affect the terms of incidents of any transfer of property made or effected before 1st April 1930 or any right, title, obligation or liability acquired, created or incurred before such date. It seems to me that the contract of exchange must be taken to have as an implied term the provision of law governing the contract at that time. It also seems to me that by the contract the plaintiff must be deemed to have acquired a right to work out his remedy of restoration, as against the transferee and those claiming under him, in the contingency of his being dispossessed at some future date. The governing date will not be the date of dispossession, but the date upon which the right was acquired and that is, in my opinion, the date of the contract. In the result therefore I dismiss the appeal with costs. Leave to appeal is granted.

C.R.K./G.N. *Appeal dismissed.*

---

[2] Samar Bahadur Singh v. Jit Lal, (1924) 11 A I R All 390=79 I C 495 = 46 All 359 = 22 A L J 292.

[3] Ganga Singh v. Ragho Ram, (1934) 21 A I R Lah 934.

[4] Sujat Khan v. Nazaf Ali, (1934) 21 A I R Nag 61=148 I C 733=30 N L R 208.

---

* * A. I. R. 1940 Madras 427

FULL BENCH

LEACH C. J., KING AND
KRISHNASWAMI AYYANGAR JJ.

Muthuvenkatapathy Reddy—Appellant.
v.
Kuppu Reddi and others—Respondents.

Appeal No. 109 and Civil Revn. Petn. No. 1188 of 1937, Decided on 7th February 1940, against appellate decree of Dist. Court, South Arcot, D/- 20th April 1937.

(a) Civil P. C. (1908), O. 21, R. 92—Period of 30 days expiring on date when Court is closed — Judgment-debtor assigning mortgage to decree-holder by way of part satisfaction of mortgage decree and on reopening day paying balance after giving credit to value of mortgage—Payment is within time.

Where the period of 30 days expires on the date when the Court is closed and the judgment-debtor assigns a mortgage to the decree-holder by way of part satisfaction of the decretal amount and on the date when the Court reopens pays into the Court the balance after giving credit to the value of the mortgage and on the same day applies for setting aside the sale, the payment can be regarded to be made within time by virtue of S. 10, General Clauses Act. [P 430 C 2]

* * **(b) Civil P. C. (1908), O. 21, R. 89—It is not necessary that payment should be in cash—Judgment-debtor assigning to decree-holder mortgage in part satisfaction of decretal amount — Judgment-debtor depositing difference between amount stated in proclamation and value of mortgage assigned by him—This is sufficient compliance with O. 21, R. 89.**

Any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of the rule. In order to comply with the provisions of O. 21, R. 89 it is not necessary that the payment by the judgment-debtor to the decree-holder must be in cash. [P 431 C 2]

Where the judgment-debtor assigns to the decree-holder a mortgage which had been executed in his favour in part satisfaction of the amount due under the decree, and the judgment-debtor pays into Court the difference between the amounts stated in the sale proclamation and the value of the mortgage assigned to the decree-holder, this is sufficient compliance with O. 21, R. 89 : *AIR 1935 Mad 1050; 1912 M W N 756 and 24 M L J 205, Appr.; A I R 1933 All 510 and A I R 1931 PC 33, Expl.* [P 430 C 1; P 431 C 2]

(c) Civil P. C. (1908), O. 21, R. 92 — Period of 30 days does not govern doing of something outside Court equivalent to deposit into Court. (Per *Krishnaswami Ayyangar J.*)

Rule 92 fixes a period of 30 days not for the doing of something outside Court equivalent to a deposit into Court, but for the making of a deposit as such into Court. The former method of payment is not governed by the rule, and the period of 30 days fixed by it does not therefore apply to it. [P 432 C 1]

Srinivasaraghavan and Thayagarajan — *for Appellant.*

T. R. Srinivasa Aiyangar and N. T. Raghunathan — *for Respondents.*

ORDER OF REFERENCE

Wadsworth J. — This appeal raises a question of some importance on which there is a conflict of authority and in my opinion it is desirable that it should be placed before a Bench. The question is whether a judgment-debtor complies with the provisions of O. 21, R. 89, Civil P. C., when the amount which he deposits for payment to the decree-holder is the amount due after giving credit to an adjustment which is not in fact a cash payment to the decree-holder. There is also a further question arising from the fact that the adjustment in question was made after the period of 30 days from the date of the sale but before the date on which the application to set aside the sale was made with reference to the provisions of S. 10, General Clauses Act.

The sale was held on 2nd December 1935 and item 2 was purchased by the present appellant who is a stranger. The amount of the decree as specified in the proclamation was Rs. 3600 odd. On 1st January 1936 when the 30 days period expired the Courts were closed and on the reopening day, 3rd January 1936, the judgment-debtor preferred an application under O. 21, R. 89 depositing Rs. 247-14-0 to cover the poundage and the 5 per cent. solatium to the purchaser and a sum of Rs. 10 as the balance payable to the decree-holder, after taking credit for an amount adjusted by an arrangement between him and the decree-holder under which on 2nd January 1936 he mortgaged property to the decree-holder. It is contended firstly that, assuming that the adjustment in question is a valid receipt for the purpose of R. 89 of O. 21, it cannot be taken into consideration because it was made more than 30 days after the sale. With reference to this contention, it seems to me that the matter is concluded by the words of R. 89 which are "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder." The receipt must be after the proclamation and before the application. The application ordinarily is to be made within 30 days but when by the operation of S. 10, General Clauses Act, it can be made at some later date it appears to me that any payment made after the proclamation and before the application would be a receipt to be taken into consideration under the terms of Rule 89.

The more difficult question is whether an adjustment by a private arrangement between the judgment-debtor and the decree-holder whereby credit is given to a particular amount can be deemed to be a receipt of that amount for which credit can be taken in making deposits under R. 89. On this question there is a decision of Beasley C. J. reported in 1935 M W N 937[1] which is against the contention of the appellant. The learned Chief Justice held that a mortgage by the judgment-debtor to the decree-holder in satisfaction of the decree may be a sufficient receipt by the decree-holder for the purpose of R. 89 and that it is not necessary for the judgment-debtor to show that the amount for which he takes credit in making his deposit has been received by the decree-holder in cash. This decision follows a series of Bench decisions of this Court all of which are anterior to the decision of the Privy Council in 58 I A 50[2] to which I shall refer later. The decision of the learned Chief Justice has been followed by the Calcutta High Court in I L R (1937) 2 Cal 606[3] and by implication a similar view may be deduced from a Bench decision in 61 C L J 313[4] though the question of the effect of an adjustment as compared with an actual payment was not expressly considered by the Bench. It is however argued that these decisions cannot be reconciled with the decision of the Privy Council in 58 I A 50[2] which must be taken to have destroyed the basis of the decisions upon which the learned Chief Justice relied. Their Lordships of the Privy Council decided that on the rejection of an application under R. 90 the Court is bound under R. 92 to confirm the sale and that the remedy of the judgment-debtor under R. 89 is available only on the deposit being made within the time allowed. They observe that any adjustment between the decree-holder and the judgment-debtor is no ground for setting aside the sale after a third party purchaser has acquired an interest. In the course of their judgment their Lordships expressly disapprove of the decision reported in A I R 1922 Nag 248.[5] This decision was to the effect that when, by an extra-judicial arrangement between the decree-holder and the judgment-debtor, the decree-holder reports that the decree has been satisfied there ceases to be a decree capable of execution and a sale held before this adjustment cannot be confirmed. Their Lordships of the Privy Council do not approve of this decision and hold that under the Code notwithstanding a private arrangement between the decree-holder and the judgment-debtor for the satisfaction of the decree, the sale which has been held must be confirmed unless it is set aside by the procedure laid down in R. 89 and the following rules. It is argued that from this decision it follows that a report of satisfaction under O. 21, R. 2, Civil P. C., made after a sale has been held cannot affect the sale which can only be set aside under the provisions of Rr. 89 to 92 and that when the interest of a third party has been created by the sale no adjustment between the decree-holder and the judgment-debtor can operate to the detriment of the third party.

---

[1] **Subbayya v. Venkata Subba Reddi, (1935) 22 A I R Mad 1050=159 I C 224=1935 M W N 937.**

[2] **Nanehlal v. Umrao Singh, (1931) 18 A I R P C 33=130 I C 686=58 I A 50=27 N L R 95 (P C).**

[3] **National Insurance Co. Ltd. v. Ezekiel Aaron David, (1937) I L R (1937) 2 Cal 606=41 C W N 998.**

[4] **Jyotish Chandra Ghose v. Bireswar Haldar, (1935) 61 C L J 313=39 C W N 829.**

There is a decision of Madhavan Nair J. in 56 Mad 808[6] following the Privy Council in which the learned Judge held that the Court is bound to confirm the sale if no application under R. 89 has been made, even if the decree has ceased to subsist by reason of a decision in appeal passed subsequent to the sale. My attention has also been drawn to an obiter dictum of the Privy Council in (1939) 1 M L J 652[7] at p. 658 to the effect that the only provision for the recording of an adjustment under the Code is that contained in O. 21, R. 2, from which it is argued that O. 21, R. 89 does not contemplate adjustments. And there is an obiter dictum of Sulaiman C. J. in 55 All 697[8] to the effect that there must be an actual payment to the decree-holder to satisfy the requirements of R. 89 and that a mere compromise or an admission of receipt by the decree-holder would not suffice to make the deposit of the balance only by the judgment-debtor a sufficient deposit for the purpose of that rule.

The contention of the appellant on these authorities may briefly be summarized. It is this. The only way in which the Court can recognize an adjustment between the decree-holder and the judgment-debtor is by following the procedure laid down in O. 21, R. 2. This rule has no application when a sale has been held and a stranger has become interested in the property by purchasing that property subject to confirmation. After the sale the confirmation does not depend on the continued subsistence of the decree. It follows automatically, unless the procedure prescribed in R. 89 is strictly followed by the judgment-debtor and the sale is set aside. Just as the disappearance of the decree by an appellate decision is not a ground for setting aside a sale so an adjustment of the decree cannot be a ground for setting aside the sale. There must be a strict compliance with the requirements of R. 89 and R. 89 requires the judgment-debtor to deposit the full amount of the decree less any amount which may have been received by the decree-holder before the application is made.

It seems to me that this is a contention which has considerable substance and on which it seems desirable that there should be an authoritative decision. I have not yet heard the respondent and I do not think it desirable to express any definite opinion on the merits of the contention on which I have only heard one side. The matter is however to my mind one on which a decision of a Bench is desirable. The appeal will therefore be placed before a Bench.

Judgment of the Full Bench

Leach C. J. — In 1935 respondent 3 in this appeal obtained a decree for Rs. 3575 against respondents 1 and 2 in the Court of the District Munsif of Villupuram. In execution of the decree respondent 3 attached and brought to sale 14 items of immovable properties belonging to the judgment-debtors. One item of property was purchased at the court auction by the appellant for the sum of Rs. 264. The total amount realized for the 14 properties was Rs. 2217. The sale took place on 2nd December 1935. On 2nd January 1936 the judgment-debtors assigned to the decree-holder a mortgage which had been executed in their favour. The assignment was in part satisfaction of the amount due under the decree. It is admitted that the value of the mortgage assigned was Rs. 2207 leaving a balance due under the decree of Rs. 10. The Court closed for the Christmas vacation some days before 25th December and did not reopen until 3rd January 1936. On that date the judgment-debtors paid into Court Rs. 10, the difference between the amounts stated in the sale proclamation and the value of the mortgage assigned to the decree-holder. They also paid into Court Rs. 110-12-0 being 5 per cent. of the purchase consideration and Rs. 137-2-0, the amount required for poundage. These payments into Court were accompanied by an application for an order setting aside the sale under the provisions of O. 21, R. 89, Civil P. C. It was contended by the appellant that this application did not lie. In the first place it was said that the full amount ought to have been deposited in Court within 30 days of the sale and the non-fulfilment of this condition vitiated the application. In the second place it was said that in order to comply with the provisions of O. 21, R. 89 the payment by the judgment-debtors to the decree-holder must be in cash and therefore the assignment of the mortgage did not amount to a payment to the decree-holder within the meaning of the rule. The District Munsif decided against the appellant and on appeal his decision was upheld by the District Judge of South Arcot. The present appeal is from the decree of the District Judge.

---

[5] Nilkanth v. Yeshwant, (1922) 9 A I R Nag 248 =65 I C 331=18 N L R 134.

[6] Sorimuthu Pillai v. Muthukrishnan Pillai, (1933) 20 A I R Mad 598 = 143 I C 854 = 65 M L J 253=56 Mad 808.

[7] Oudh Commercial Bank Ltd. Fyzabad v. Bind Basni Kuer, (1939) 26 A I R P C 80=180 I C 878=66 I A 84 = I L R (1939) Kar 136 = 14 Luck 192=(1939) 1 M L J 652 (P C).

[8] Janki Pershad v. Lekhraj, (1933) 20 A I R All 510=149 I C 877=55 All 697=1933 A L J 1004.

Order 21, R. 89, Civil P. C., permits a judgment-debtor to apply to the Court to have a sale of immovable property in execution set aside provided certain conditions are fulfilled. He must deposit in Court for payment to the purchaser a sum equal to 5 per cent. of the purchase money and in addition must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale have been received by the decree-holder. Rule 92 requires these deposits to be made within 30 days from the date of sale. If the deposits are made within the required period the Court is bound to set aside the sale. Under the provisions of Art. 166, Limitation Act, the application for setting aside must be filed within 30 days of the sale. S. 10, General Clauses Act, states that where by any Central Act or regulation made after the commencement of the Act, an act or proceeding is directed or allowed to be done or taken in a Court or office on a certain day or within a prescribed period, then if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. The deposit contemplated by O. 21, R. 89 could not in the present case be made within 30 days of the date of the sale because the Court was closed, but it was made on the reopening day and was in time by a virtue of this provision of the General Clauses Act.

The second question calls for more consideration, but apart from an obiter dictum in an Allahabad decision all the reported cases dealing with this question are against the appellant. As I have indicated, he would have it that the judgment-debtor cannot make payment to the decree-holder within the meaning of cl. (b) of R. 89 unless he tenders cash. In other words, the delivery by the judgment-debtor to the decree-holder of money's worth would not relieve him from the necessity of paying into Court the whole of the decretal amount to entitle him to an order setting aside the sale. This question has been considered by this Court on three occasions. It arose for the first time in (1912) M W N 756[9] which was decided by a Bench composed of Abdur Rahim and Sundara Ayyar JJ. It was there held that an agreement with the decree-holder's widow to treat a portion of the decree debt as discharged in consideration of services rendered by the judgment-debtor to her husband was a valid discharge and the actual receipt of cash was not necessary. In 24 M L J 205[10] Benson and Sundara Ayyar JJ. held that a decree-holder was entitled to waive a portion of the amount due to him and that the waiver operated as payment under R. 89. The decision in (1912) M W N 756[9] was approved of. The question was fully discussed by Beasley C. J. in (1935) M W N 937,[1] a case where the facts were similar to the facts in the present case. There a judgment-debtor put in an application under O. 21, R. 89 and deposited the required five per cent. of the purchase money for payment to the auction-purchaser, but he made no deposit for payment to the decree-holder because the latter had agreed to accept a mortgage from the judgment-debtor in satisfaction of the amount owing to him under the decree. As in the present case, the auction-purchaser objected and contended that the judgment-debtor was required to deposit the amount in cash. This objection was overruled. The learned Chief Justice considered that the granting of the mortgage was a payment to the decree-holder within the meaning of the rule and expressed the opinion that a decree-holder could if he chose waive the whole of the decretal amount, in which case the judgment-debtor would not be required to make any deposit in Court. The Calcutta High Court shares the opinion of this Court on this question : *see* 39 C W N 829[4] and I L R (1937) 2 Cal 606.[3] In the judgment in the latter decision reference was made to the decision in (1935) M W N 937.[1]

---

[9] Lakshminarasimha Charyulu v. Lakshmiammal, (1912) M W N 756=14 I C 326.

[10] Anantha Lakshmi Ammal v. Sankaran Nair, (1913) 24 M L J 205=18 I C 579.

Sulaiman C. J. expressed an opinion to the contrary in 55 All 697,[8] but we have been given to understand that there are no reported cases which support it and the opinion was certainly obiter as cash had been paid in that case. After observing that the question whether the amount had been actually received by the decree-holder was one of fact, the learned Chief Justice said that a mere compromise or admission of the decree-holder would not be sufficient. It would be incumbent on the judgment-debtor to satisfy the Court that the amount not deposited in Court had been actually received by the decree-holder within the time fixed. This case was also considered by Beasley C. J. in (1935) M W N 937,[1] and I agree that the opinion expressed in (1912) M W N 756[9] and 24 M L J 205[10] is preferable. The learned advocate for the appellant has placed great reliance on the decision of the Privy Council in 58 I A 50,[2] but when the judgment is examined it is quite clear that it has no application in the present case. The facts in that case were these. The sale in execution took place on 15th December 1923. On 10th May 1924 the decree-holders accepted a mortgage in satisfaction of the decretal amount. On 28th June 1924, some nine months after the sale had taken place, an application was filed by the judgment-debtors to the Court for an order regarding the adjustment. The Judicial Committee held that after a sale in execution had taken place no adjustment under the provisions of O. 21, R. 2 could take place because that rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. Their Lordships did not consider the question whether O. 21, R. 89 requires a payment by the judgment-debtor to the decree-holder to be in cash. That question did not arise and the questions which did arise are not questions which arise in this case.

In my judgment any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of the rule. In this case the decree-holder was paid most of the amount due to him and the balance, Rs. 10, was deposited into Court by the judgment-debtors when they made the application for setting aside the sale. I hold that the application and the payment into Court were in time and it follows that in my opinion the decision of the District Judge is correct. I would dismiss the appeal with costs of respondents 1 and 2.

King J.—I agree.

Krishnaswami Ayyangar J.—I concur and have little to add except on one aspect of the argument as presented to us by the learned advocate for the petitioner. His main contention was that payment in cash and in cash only was contemplated by O. 21, R. 89 of the Code. Such a strict construction is not only not warranted by the words used in the rule but is opposed to the view consistently taken by this Court for a long number of years, as pointed out by my Lord. Nor is there any substance in the contention that the decision of the Privy Council in 58 I A 50[2] has rendered that view no longer tenable.

It was urged that whatever the form, the payment or what was its equivalent must have been made or done on or before the 30th day after the sale, and in no event later. The fact that the Court was closed on the last day of the period should, it was said, make no difference as it provides an excuse only when the thing to be done has to be done in Court as for instance when a petition or other proceeding has to be presented or where a deposit in cash has to be made in Court. But where an applicant chooses a form of payment, as the assignment of the mortgage in the present case, which can or may be done outside Court he must in order to qualify himself under the rule, complete the payment in the chosen form before the expiry of the 30 days as he should not be permitted to plead S. 4, Limitation Act, in respect of an act for the doing of which, it made no difference whether the Court was closed or open. On this argument, though the application under O. 21, R. 89, would be in time if filed on the day the Court reopened, it must necessarily fail as the condition precedent, namely the deposit, had not been made in time. Two reasons were adduced in support of the argument. First it was said that the period within which the deposit is to be made, namely 30 days is a period fixed not by the Limitation Act which contains the ameliorative provision referred to above, but by Rule 92 which cannot be affected by the Limitation Act in the absence of anything in the Code itself to the contrary. Secondly, it was urged that S. 10, General Clauses Act, which contains a provision parallel to S. 4, Limitation Act, is equally ineffective in a case of this kind. The first contention ignores the fact, that R. 92 fixes a period of 30 days not for the doing of something outside Court equivalent to a deposit into Court, but for the making of a deposit as such into Court. The former method of payment is not governed by the rule, and the period of 30 days fixed by it does not therefore apply to it. The argument would result in the anomaly that there would be two different periods, one fixed by Art. 166 for the application, and the other by R. 92 for the deposit, which may not in all cases synchronize. Such a result could never have been intended by the Legislature. The second argument based on S. 10, General Clauses Act, is open to the same objections. Further this Section is by force of the proviso expressly made inapplicable to any act or proceeding to which the Limitation Act applies. It appears to me that the true view to take of O. 21, R. 89, Civil P. C., is that what is done by consent of parties as a substitute for the deposit, is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By that consent, what was not in fact a payment in cash is turned into a deposit within the meaning of the rule, to be acted upon by the Court in all respects as if it were a payment in cash.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 432

WADSWORTH J.

Mantena Kanakaraju — Petitioner.

v.

Datla Atchutharamanaraju and another — Respondents.

Civil Misc. Petn. No. 4014 of 1938, in Second Appeal No. 423 of 1935, Decided on 21st November 1938, for scaling down the amount due under a decree under the provisions of Madras Act 4 of 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 19 — "Debt" as defined in Act includes decree debt.

The definition of "debt" specifically includes a decree debt and therefore it cannot be said that the Act does not apply to the scaling down of debts which have ripened into decrees after the commencement of the Act. A decree debt is nonetheless a debt because it does not fall within the category for which special provision is made in Section 19. [P 432 C 2]

O. T. G. Nambiar and W. S. Krishnaswamy Naidu — *for Petitioner.*

K. Venkatarama Raju — *for Respondents.*

Order. — It is contended that the Act does not apply to the scaling down of debts which have ripened into decrees after the commencement of the Act. I can find no support in the Act for this contention. The definition of "debt" specifically includes a decree debt and it seems to me clear that a decree debt is nonetheless a debt because it does not fall within the category for which special provision is made in S. 19. I do not think that the petitioner is entitled to deduct the amount debited for interest at a time when the account was still running with fluctuating balance. When the account closed there was a definite amount of Rs. 1874-7-0 due and this must be treated as the principal amount and plaintiffs will be entitled to interest thereon at 6¼ per cent. from 1st October 1937 and the decree will be scaled down accordingly. Leave refused.

C.R.K./G.N. *Order accordingly.*

* A. I. R. 1940 Madras 433
SPECIAL BENCH

LEACH C. J. AND KING AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras— Petitioner.

v.

J. M. Muhammad Ismail Rowther — Respondent.

O. P. No. 255 of 1938, Decided on 6th February 1940; reference by Commissioner of Income-tax, Madras.

*** Income-tax Act (1922), S. 4 (2)—Assessee, a resident of British India, carrying on business in partnership in Saigon (Indo-China)—Profits made in Saigon remitted to Mysore for purchase of Bonds—Bonds so purchased sent to Madras Branch of Imperial Bank of India for safe custody—Assessee obtaining overdraft on security of these bonds—Bonds held conversion of profits into capital and not remittance of profits.**

Where a person invests profits in bonds and no question of remittance of profits arises, the bonds will constitute capital assets. [P 434 C 2]

An assessee who was a resident of Madras Presidency carried on business in partnership in Saigon in Indo-China. In the year of account the assessee made certain profits in Saigon and remitted them to the Bank of Mysore in Mysore city and there purchased Mysore Government Bonds. For certain time the bonds remained in the custody of the Bank of Mysore. Subsequently, the assessee caused the bonds to be sent to Madras Branch of the Imperial Bank of India for safe custody. He obtained an overdraft on the security of these bonds:

Held that the investment of the moneys remitted to Mysore by the assessee must be held to be a conversion of profits into capital, and nothing more. The fact that he had deposited bonds by way of security for an overdraft did not change their character. [P 434 C 2]

K. V. Sesha Ayyangar — *for Petitioner.*
K. Bhashyam and T. R. Srinivasan — *for Respondent.*

Leach C. J.—The assessee is a resident of Koothanallor in the Tanjore District in the Madras Presidency. He derives income from immovable properties which he possesses in British India and in Saigon in Indo-China, and from a business which he carries on in partnership in Saigon. For the year 1937-38 he was assessed to income-tax in this country on a total income of Rs. 62,599. This amount included a sum of Rs. 62,006, which the Income-tax Officer held represented a remittance to British India of profits made in Saigon during the year of account. The assessee objected to the assesment. He contended that he had been over-assessed to the extent of Rupees 60,000. For the two years which ended with 31st March 1936 the assessee's profits in Saigon amounted to $59,290 ; of this he remitted $39,834 during the year of account to the Bank of Mysore, Mysore City, and there purchased Mysore Government bonds of the face value of Rs. 60,000. The actual price paid for these bonds was Rs. 69,416. The whole of this amount was paid out of the moneys remitted from Saigon. For two months the bonds remained in the custody of the Bank of Mysore, but in January 1937 the assessee caused them to be sent to the Madras Branch of the Imperial Bank of India for safe custody. Subsequently, he arranged with the Kumbakonam branch of the Imperial Bank of India for an overdraft for the purpose of purchasing immovable property worth Rs. 33,000. The security consisted of the Mysore Government bonds which the assessee had purchased out of the remittance from Saigon. The assessee says that the income-tax authorities have no right to treat the bonds as representing a remittance of profits, and at his request the Commissioner of Income-tax has referred to this Court for decision the following questions of law :

(i) Whether there was any material before the Assistant Commissioner to justify his conclusion that the Mysore Government bonds purchased by the petitioner in Mysore did not represent his capital ?

(ii) If the answer to the above question is in the affirmative, whether under a proper construction of S. 4 (2) of the Act a sum of Rs. 60,000 representing the face value of the bonds was liable to be assessed or only the amount of Rs. 33,000 which the petitioner had obtained on an overdraft against the security of the bond.

If the first question is answered in favour of the assessee the second question does not arise. The reference was made by the Commissioner on 4th September 1938, but at the suggestion of the learned counsel engaged in the case the hearing was postponed until the Privy Council had decided an appeal which was then pending from the judgment of the Bombay High Court in I L R (1938) Bom 171.[1] The Judicial Committee has now delivered judgment in that case.* The judgment does not decide the question which arises for decision in the present case, but there are observations in it which are helpful to the Court. In the case referred to, the assessee was a limited company and had lying in London a sum of Rs. 18,000 which it had received as income on certain sterling bonds of the

---

[1] Commissioner of Income-tax, Bombay Presidency v. Ahmedabad Advance Mills Ltd., of Bombay, (1938) 25 A I R Bom 207 = 174 I C 658=ILR (1938) Bom 171=40 Bom L R 171.

* [*See* A I R 1940 P C 36—*Ed.*]

Government of India, the interest on which was paid in London. The assessee company invested this income in the purchase of stores and machinery which it shipped to Bombay and utilized in its business in British India. The question was whether the stores and machinery could be regarded as income brought into British India within the meaning of S. 4 (2), Income-tax Act, 1922 and therefore taxable.

The Bombay High Court held that the bringing of stores and machinery into British India did not represent a remittance of profits made abroad. The purchase had resulted in the capitalization of the profits received in England. It was pointed out by Beaumont C. J., that foreign income might be received in sterling or francs or dollars, and might be brought into India in the form of rupees, or be remitted to India by means of a banker's draft and in this connexion referred to the judgment of Lord Brampton in (1902) A C 287,[2] where it was said that income might be received "in specie or in any form known to the commercial world for the transmission of money from one country or place to another," the implication being that it could not be received in any other form. The learned Chief Justice went on to say that in order to attract income-tax in India, what is brought into this country must be income, profits and gains, and if the assessee has converted income received abroad into capital, and then brings that capital to India, he is not bringing into India income, profits or gains. It was not suggested in that case that the stores and machinery were brought into India for the purpose of being sold and the proceeds applied as income, but it was apprehended that if an assessee converted foreign income into some form of capital, for instance bonds, and having realized the assets in this country had applied the proceeds as income the Court would hold that what had been brought into this country was in fact income and not capital. The decision of the Bombay High Court was approved by the Judicial Committee and in delivering the judgment of the Board, Lord Romer quoted the remarks of Lord Lindley in (1902) A C 287,[2] where he said :

> A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument, or other document which represents and produces coin, and is treated as such by business men.

The Privy Council however refrained from deciding the question whether the purchase of bonds out of profits made abroad would represent a remittance of profits if the bonds were brought into British India and realized, as that question did not arise in the case. It was left to be decided if and when the occasion arose. It arises in this case, but on facts very different from those contemplated in the judgment of Beaumont C. J. In the present case the bonds were not bought in Mysore for the purpose of being brought into British India and sold here. On the facts stated in the reference, it must be taken that the assessee bought them as a permanent investment. He has still got the bonds, and the fact that he has deposited them by way of security for an overdraft does not change their character. It is conceded on behalf of the income-tax authorities, and rightly conceded, that where a person invests profits in bonds and no question of remittance of profits arises, the bonds will constitute capital assets. In my opinion, the investment of the moneys remitted to Mysore by the assessee must in the light of the surrounding circumstances be held to be a conversion of profits into capital, and nothing more. The decision in (1900-04) 5 Tax Cas 502,[3] is also helpful here. Lord Johnston, the Lord President, there observed :

> Either the money itself must be brought over in specie, or the money must be sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance.

Later on, the Lord President went on to say :

> Although the bearer bonds are marketable securities, that is, of course, surely neither here nor there, because in one sense everything is a marketable security at a price. The fact that a bearer bond is a marketable security and easily marketable and therefore a negotiable instrument, does not seem to me to touch for one moment the question whether it is an ordinary form of remittance. Nobody ever heard of remitting money by means of a bearer bond, for this very good reason ; you could not possibly remit money by it and know exactly what you are doing, because the price of bearer bonds fluctuates in the market every day, and a bond might start from New York at one price and arrive in London at a perfectly different one. It therefore is not at all in the same category with that way which modern arrangements have perfected, by which you may send money from one country to another in the form of hard cash consigned in a package or box, or, by means of a bank draft, which is, of course, simply a transaction of debtor and creditor between different persons on different sides of the Atlantic.

---

[2] Gresham Life Assurance Society v. Bishop, (1902) A C 287=71 L J K B 618=86 L T 693 =50 W R 593=66 J P 755=4 Tax Cas 464= 18 T L R 626.

[3] Scottish Widows' Fund Life Assurance v. Farmer, (1900-04) 5 Tax Cas 502.

There is also the further factor that before securities can be bought or sold a commission is payable to a broker. In that case part of the revenue of a mutual life assurance society, carrying on business in the United Kingdom only, consisted of interest on foreign bearer bonds and other foreign securities. The securities were kept at the society's head office and the interest was included in its revenue account. When the interest fell due on the foreign bonds the coupons were sent from the society's head office to the agents abroad for the purpose of the collection of interest and out of the interest further foreign securities were bought. The further purchases were also sent to the United Kingdom. The question was whether the receipt of the foreign bonds at the head office represented a receipt of income within the United Kingdom. It was held that it did not.

The Court is not here concerned with the case where a person, in order to avoid the payment of income-tax converts his foreign profits into foreign securities and then proceeds to realize them in British India. There is no suggestion of a device and the statements quoted from the judgments in (1902) A C 287[2] and (1900-04) 5 Tax Cases 502[3] have direct application. For the reasons indicated I would answer the first question in the negative. In these circumstances no answer need be given to the second question. The assessee having succeeded is entitled to his costs, Rs. 250, and to the return of his deposit of Rs. 100.

King J. — I agree.

Krishnaswami Ayyangar J. — I agree.

C.R.K./D.S. *Answered in negative.*

A. I. R. 1940 Madras 435

PATANJALI SASTRI J.

Subbu Pandaram — Defendant 3 — Petitioner.

v.

Lakshminarayana Chettiar — Plaintiff — Respondent.

Civil Revn. Petn. No. 1636 of 1938, Decided on 19th January 1940, to revise order of Sub-Judge, Coimbatore, D/- 12th October 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 19—Application by one member of agriculturist family for scaling down joint family debt — Debt of whole family should be scaled down and not merely of applicant — Scaling down of mortgage debt should be in respect of not only agricultural land included in mortgage but also of other property comprised therein — Act refers to character of debtor and not to character of property comprised.

Section 19 makes it clear that in respect of a joint family debt any member of the family can apply to have the decree debt scaled down according to the provisions of the Act. In such cases it is the debt of the family as a whole that is to be scaled down provided, of course, the joint family is proved to be an agriculturist within the meaning of the Act. There is nothing in the Act to suggest that the benefit of scaling down in such cases is to be restricted to the member of the family who makes the application. The scaling down of a mortgage debt due by an agriculturist joint Hindu family ought to be not only with reference to the agricultural lands which happen to be included in the mortgage but also with reference to other properties like houses, etc. comprised in the mortgage, as the entire scheme of the Act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt. [P 435 C 2]

A. C. Sampath Ayyangar and S. Krishnamachariar — *for Petitioner.*

T. S. Anantharaman — *for Respondent.*

Order. — The learned counsel for the petitioner contends that the order of the Court below directing that the debt should be scaled down only so far as the appellant was concerned and also with reference only to the item of agricultural land included in the mortgage, is wrong. I agree with this contention. The decree debt sought to be scaled down is a debt due by the joint family of defendant 3, petitioner herein, and S. 19 of the Act makes it clear that in respect of a joint family debt any member of the family can apply to have the decree debt scaled down according to the provisions of the Act. And it is equally clear that in such cases it is the debt of the family as a whole that is to be scaled down provided, of course, the joint family is proved to be an agriculturist within the meaning of the Act. There is nothing in the Act to suggest that the benefit of scaling down in such cases is to be restricted to the member of the family who makes the application. Again, the view of the learned Subordinate Judge, that the scaling down of a mortgage debt due by an agriculturist joint Hindu family ought to be only with reference to the agricultural lands which happen to be included in the mortgage but not with reference to other properties like houses, etc., comprised in the mortgage, is erroneous, as the entire scheme of the Act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt.

The learned counsel for the respondent however points out that the main question raised by him in his counter-affidavit filed in the lower Court viz., that the petitioner's family was not an agriculturist at all for the reasons stated therein, was not at all dealt with and decided by the learned Judge. This is no doubt so and it is perhaps due to the misconception of the learned Judge that the scaling down under the Act was to be with reference only to the agricultural lands comprised in the mortgage. There is nothing to support the suggestion of the learned counsel for the petitioner that this point was apparently given up by the respondent whose counsel however repudiates the suggestion before me. In these circumstances I set aside the order of the Court below and send the case back for disposal according to law in the light of the observation herein. The costs of this petition will abide and follow the result.

C.R.K./G.N. *Order accordingly.*

---

* A. I. R. 1940 Madras 436

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank, Ltd.

A. S. S. R. St. Veerappa Chettiar — Applicant.

v.

J. V. Pirrie and another — *Official Liquidators* — Opposite Party.

Appln. No. 1552 of 1939 in O. P. No. 158 of 1938, Decided on 9th November 1939.

*** Set-off—Amount payable by *A* in his individual account—Amount payable to *A* and *B* in their joint account—Amounts can be set-off if on evidence it can be shown that *A* is solely entitled to the amount standing in name of *A* and *B*.**

It is no doubt true that where there is an amount payable by *A* in his individual account and an amount payable to *A* and *B* in their joint account, the two accounts cannot be set-off, but if it could be shown that, though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set-off has always been allowed. Whether the property belongs solely to *A* can be found on evidence: *(1880) 12 Ch D 491 and (1938) 2 K B 801, Rel. on.* [P 436 C 2]

B. Sitarama Rao and K. Chandrasekharan — *for Applicant.*

C. Krishnaswami — *for Opposite Party.*

Order. — This is an application by one Veerappa Chettiar claiming a set-off of the amounts due and payable by the Bank in respect of Fixed Deposit Receipt No. 64/38 dated 6th March 1938 in the accounts of its branch office at Karaikudi for Rs. 7500 in the name of himself and his mother Visalakshi Achi payable to either or survivor and four cash certificates of the total value of Rs. 2071-8-0 against a sum of Rs. 10,087-15-9 owing by him to the Bank on overdraft account. Mr. Sitarama Rao, his learned counsel, has not chosen to press his claim in regard to the cash certificates.

Therefore the only question that has to be considered is that relating to the amount covered by the fixed deposit receipt. It is the case of the applicant that the said sum solely belongs to him and his mother Visalakshi has no interest therein and that her name was included at the time of the original deposit in 1937 as the applicant was then in failing health. The Official Liquidators oppose the claim on the ground that from the terms of the fixed deposit receipt it is a joint debt payable by the Bank and there is nothing to indicate that Visalakshi was only a namelender and therefore there could not be a set-off of a joint debt against a separate debt. It is no doubt true that where there is an amount payable by *A* in his individual account and an amount payable to *A* and *B* in their joint account, the two accounts cannot be set-off, but if it could be shown that, though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set-off has always been allowed. As Cotton L. J. puts it in (1880) 12 Ch D 491[1] at p. 502, the question is whether

> it can be said that the money so absolutely belongs to that one of the two persons in whose joint names the account stands, who has another account of his own that we must treat it as his sole property, and require the balance to be struck between the two accounts.

Whether the property belongs solely to *A*, can be found on evidence: *vide* (1939) 2 K B 801[2] where a deposit receipt stood in the name of a husband and wife was examined to find out whether the money belonged solely to the husband or jointly to the husband and wife. Mr. Sitarama Rao has examined the applicant to prove that the money covered by the fixed deposit receipt solely belonged to him. It is clear from the evidence that he was carrying on business for some years before the deposit in the Bank, that the moneys from his business were from time to time invested in the Chartered Bank of India Ltd., that the

---

1. Ex parte Morier; In re Willis, Percival & Co., (1880) 12 Ch D 491 = 49 L J Bk 9 = 40 L T 792=28 W R 235.
2. Hirschorn v. Evans, (1938) 2 K B 801=107 L J K B 756=159 L T 405=(1938) 3 All E R 491 =82 S J 664=54 T L R 1069.

account in the Chartered Bank stood solely in his name, that in March 1937 there was a balance of nearly Rs. 9000 in the Chartered Bank and he drew a cheque on the Chartered Bank for Rs. 8670 in favour of the Travancore National and Quilon Bank Ltd., and that he directed the latter Bank to issue a fixed deposit receipt for Rs. 7500 in the name of himself and his mother Visalakshi payable to either or survivor and utilise the balance in the purchase of some rubber shares. It is also clear from his deposition that Visalakshi was indebted to him in the sum of over Rs. 2000 on the date of the said deposit, and that the said deposit was renewed for another year on 6th March 1938. I see no reason to disbelieve his evidence. It must therefore be found that the said sum of Rs. 7500 is the sole property of the applicant. Once this conclusion is arrived at, the applicant will be entitled to a set off as claimed by him. The rule of law is absolutely clear and is thus stated in Hart's Law of Banking, Vol. I, at pages 309 and 310 thus:

> Where a person has an account in his own name and has another in the joint names of himself and a second person with the same banker, upon the bankruptcy of the latter the one account cannot be set off against the other, unless the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person, without imposing any terms or directing any enquiry, to transfer the account into his name alone.

It is based on the case in (1880) 12 Ch D 491[1] and the principle laid down in that case has always been accepted as good law. In that case two persons, a brother and sister were executors of an estate and they had a joint account in their joint names. The brother was also indebted to the Bank in a separate account. The question arose whether the amount in one account could be set off against the amount in the other. It was found in that case that it could not be ascertained that the brother was solely entitled to the amount because it depended upon the taking of an account and finding out whether the account would result in a balance in favour of the brother. The learned Judges took the view that the brother and the sister were in the position of joint creditors of the Bank having joint assests in the Bank and no set-off could be allowed. In the course of the judgment, James L. J. remarked thus:

> Unless it could be made out clearly that *A* and *B* were trustees of the fund for *A*, it seems to me there could not be an equitable set off, because the money is due in autre droit and where the money is due in autre droit the only exception which equity has introduced into the principle of a legal set off is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to shew that the ultimate balance would be his property, but when it is nothing but what we used to call in the Privy Council a benami account, that is, an account put by one man in the name of another merely for his own convenience.

The learned Counsel for the Official Liquidators sought to rely on the following observations of Brett L. J. namely, that a set off could not be allowed unless a Court of Equity, "without any terms or any further enquiry, would have obliged the sister to transfer the account into her brother's name, alone." His contention is that this language imports that without any evidence the property must be found to belong to the applicant and not as a result of any evidence being adduced. It seems to me that the contention is based on a misapprehension of the language used by Brett L. J. What Brett L. J. really meant by the use of the expression 'without any further enquiry' was without taking any account. That this must be his meaning is clear from the observations of James L. J. in the same case in the passage above cited and also at pages 499 and 500 as Brett L. J. concurred in the judgment of James L. J., for the reasons given by that learned Judge (*vide* p. 500). It is in this sense that Brett L. J. used the expression 'further enquiry' in his judgment. In view of my finding that the amount of Rs. 7500 covered by the fixed deposit receipt solely belongs to the applicant I direct a set-off of the said sum against the money owing by the applicant to the Bank. The applicant will have the cost of the Judge's Summons and Rs. 100 as and for his Counsel's fee. The Official Liquidators will have Rs. 100 for their costs, the costs to come out of the assets of the Bank.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 437

BURN AND MOCKETT JJ.

A. R. Krishnaswami Ayyar and another — Appellants.

v.

Travancore National Bank Ltd., represented by Messrs. J. V. Pirrie and C. Gill, Provincial Official Liquidators and another — Respondents.

City Civil Court Appeal No. 65 of 1938, Decided on 7th December 1939, against decree of City Civil Judge, Madras, D/- 22nd March 1938.

(a) Principal and Surety — Composition between debtor and creditor—Liability of surety contracting to remain liable after discharge of principal is not extinguished.

Although a composition bond between the principal debtor and the creditor extinguishes the debt to the principal debtor it does not absolve the sureties from their liability under surety bond, where the surety had expressly contracted to remain liable notwithstanding the discharge of the principal and therefore the discharge of the principal cannot be said to be implied discharge of the surety : *(1838) 4 M & W 519 and (1865) 3 H & C 672, Rel. on.* [P 438 C 2]

(b) Banker and Customer — Person standing surety for customer for money paid to latter by Bank—Bank is not bound to disclose to surety its constituent's indebtedness.

Where a bank calls upon its customer to furnish surety with regard to the payment made under a chit fund, the said payment not being distinguishable from any other obligation, it is for the surety to interrogate the debtor on the question of his indebtedness. Under such circumstances the bank is not compelled to break the confidence of its constitutents and disclose its affairs to the surety with regard to the indebtedness of the former : *A I R 1930 Mad 874 and 15 Bom 585, Rel. on.* [P 439 C 1]

S. Athmanathan — *for Appellants.*

John and Row — *for Respondents.*

Mockett J. — This is an appeal by the defendants in a suit filed against them in the City Civil Court by the plaintiffs the Travancore National Bank Ltd. The cause of action is very simple. It is on a surety bond Ex. I by which the defendants made themselves liable to pay to the plaintiffs the amount due from one K. E. Sodawalla. Under Ex. I it will be seen that Sodawalla had been declared the successful bidder at the auction chit on 9th February 1935 and that he was paid a sum of Rs. 3145. The evidence on behalf of the Bank was as given by P. W. 1 that they refused to pay that amount unless, as was their custom, sureties were furnished by the successful bidder of the chit fund. Two such sureties were forthcoming and they are now defendants 1 and 2 in this case. They signed a very formidable document Ex. I from which it will be seen that they made themselves liable in as comprehensive terms as possibly could proceed from the draftsman's pen. The term with which we are immediately concerned is contained in cl. 9 in which it is said :

> It is further agreed that any contract between the borrower and the lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties.

In fact under Ex. II the creditors of Sodawalla including the Travancore National Bank the plaintiffs in an Insolvency Petition No. 541 of 1935 (High Court, Madras) agreed to accept a sum of four annas in the rupee in full satisfaction of their claims ; so that there was as envisaged by cl. 9 a composition. The suit was laid for the whole of the amount due under the bond but it was rightly held in the lower Court that a decree could only be given for the amount less the amount received by the Bank under the composition Ex. II. It has been argued before us that this composition bond extinguishes the debt to the principal debtor and therefore there is no debt for which the sureties can be made liable. These very arguments have been put before the Courts in cases where the document was as identical with the document before us as it is possible for it to be with regard to its terms. In (1838) 4 M & W 519 = 150 E R 1534[1] a document such as this was considered and the same arguments, as will be seen from the report, were put before the Court. Lord Abinger C. B. stated that the deed entered into by the debtor was a composition deed and was within the express terms of the guarantee. It authorized the plaintiffs to compound with their debtor. Accordingly, as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety. And with that the other learned Judges concurred. In a further decision (1865) 3 H & C 672 = 159 E R 695,[2] where (1838) 4 M & W 519[1] was considered Pollock C. B. disposed of an argument which has also been put before us in this case. He holds that the only distinction between the case in (1838) 4 M & W 519[1] and the case before the Bench was that in the case then under consideration there was an absolute release but that in (1838) 9 M & W 519[1] although there was not in terms a release there was what substantially amounted to the same thing. The learned Judge continues :

> Under a composition, a part is taken in satisfaction of the whole. Money accepted as a part of a debt is not a composition, but a part payment. Where there is a release, the creditor in effect says to the debtor, 'I release you from your debt' : whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing.

---

1. Cowper v. Smith, (1838) 4 M & W 519=51 R R 709=150 E R 1534.
2. Union Bank of Manchester Ltd. v. Beech, (1865) 3 H & C 672=34 L J Ex 133=12 L T (N S) 499=13 W R 922=146 R R 673 = 159 E R 695.

It will be seen therefore that the construction of Ex. I has virtually been dealt with by authority which we are content to follow.

The next point argued before us was that there was a duty on the Bank to disclose Sodawalla's overdraft liability at the time the surety was taken. This point was made under two headings, first on the general liability of the bank under such circumstances and secondly a special liability in this case because it was alleged by the witnesses for the defence that in answer to questions by the defence as to the financial position of Sodawalla, the bank representative, P. W. 1, Mr. Kuruvilla assured defendant 1 that Sodawalla's financial position was beyond reproach. It is said by D. W. 2 that Mr. Kuruvilla stated "His account is one of the best. You need not be anxious. Only the rules require two signatures." With regard to the first aspect the contention of the defendants is clearly negatived by the decision of a Bench of this High Court reported in 53 Mad 826[3] where it is laid down that there is no general legal obligation on the part of a Bank to volunteer to a surety particulars of one of its constituent's indebtedness, for, this is a matter on which the surety has to inform himself. S. 143, Contract Act, on which the defendants rely, is as follows :

> Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

This Section has been considered and the High Court of Bombay in a judgment delivered by Sargent C. J. in 15 Bom 585[4] took the view that the expression "keeping silence" in that Section clearly implied intentional concealment as distinguished from mere non-disclosure which no doubt was a fatal objection in insurance policies. We agree with that view. In this particular case the facts are very simple. The Bank called upon its customer to furnish surety with regard to the payment made under a chit fund. We see no reason to distinguish a payment under a chit fund from any other obligation and under these circumstances surely it will be for the surety to interrogate the debtor. We agree that there is nothing in the authorities to suggest under such circumstances that the bank is compelled to break the confidence of its constitutents and disclose its affairs to the surety. With regard to the second aspect the learned Judge has disbelieved the evidence of the defendants. He is not prepared to accept the story that by fraudulent misrepresentation they were induced to enter into the surety bond and we see no reason to differ from that view. The result of our conclusion is that this appeal must be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 439

WADSWORTH J.

Ponnuchami Chetti and others — Appellants.

v.

Annakamu Servai and another — Respondents.

Second Appeal No. 1041 of 1937, Decided on 11th October 1939, against decree of Sub-Judge, Dindigul, in A. S. No. 3 of 1937.

Madras Estates Land Act (1 of 1908), S. 112 —Sale bad for want of proper service of notice — Any person interested in land affected by sale can challenge it in Civil Court — Right is not restricted to registered pattadar.

When a sale under S. 112 is bad for want of proper service of notice, there is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land which is adversely affected by the sale, from challenging that sale in the ordinary Civil Courts and protecting his interest. Such a suit is not a suit under the Estates Land Act but is one under the ordinary law to protect the rights of the person having an interest in land. Merely because it is a suit to contest the legality of a sale under the Estates Land Act, it cannot be said that the suit can only be brought by the person who is a registered pattadar. Consequently, a person having merely possessory title is entitled to sue : *A I R 1926 Mad 352 and S. A. No. 538 of 1936, Rel. on.* [P 440 C 2; P 441 C 1]

T. R. Venkatarama Sastry, K. Rajah Ayyar and K. Muthuswamy Iyer — *for Appellants.*

V. Ramaswamy Ayyar and K. S. Ramamurthy — *for Respondents.*

Judgment.—This appeal raises the question of the right of a person, who is interested in land but is not the registered pattadar thereof, to bring a suit in the Civil Court to declare a sale held under S. 112, Estates Land Act, to be invalid and to obtain an injunction protecting his possession. The essential facts of this case are that the two items in suit were originally acquired under an insolvency sale by one Solaimalai who let the plaintiff into possession under an agreement to sell. Solamalai's title ceased by reason of a sale for arrears of rent. The purchaser in the rent sale was one Muthuveerappa who under a private arrangement with the plaintiff allowed the plaintiff to retain possession of the land, though the patta was in Muthuveerappa's name. In 1931 there was a sale for arrears of rent of one of the items which was bought in by the zamindar, defendant 4 here. In 1933 there was a similar sale of the other item which also was purchased by the zamindar. After each of these purchases the plaintiff applied to the zamindar for patta which was eventually refused and the zamindar in 1934 granted patta for both numbers to defendants 1 and 2. Thereafter there was trouble about the harvesting of crops and magisterial orders recognized the right of defendants 1 and 2 to the harvest. But it has been found that the plaintiff continued in possession upto the time of the suit. That finding is one of fact and though it is true that the learned appellate Judge makes a mistake with reference to certain payments of kist made by the plaintiff, there are no grounds upon which I could hold that the finding of fact does not bind me in second appeal. It has also been found as a fact that with reference to both the rent sales, which the plaintiff attacked, there was no personal service, no proper attempt to effect personal service and no proof of any valid affixture. As a result of these findings the lower Appellate Court decreed the plaintiff's suit. The appellants are defendants 1 and 2, the rival claimants, and defendant 4, the zamindar.

---

[3] Imperial Bank of India v. Avanashi Chettiar, (1930) 17 A I R Mad 874 = 128 I C 518 = 53 Mad 826=59 M L J 513.

[4] Balkrishna V. N. Kirtikar v. Bank of Bengal, (1891) 15 Bom 585.

It must be conceded on the findings of fact that, though the plaintiff's title anterior to the rent sales may have been defective, he was in possession with the permission of the registered pattadar and had a right to hold possession against any one other than the true owner. It is well established that a suit will lie in the Civil Court for a declaration that a sale held under S. 112, Madras Estates Land Act, is invalid for want of service of notice which is an essential preliminary to the validity of such a sale. It is strenuously contended by Mr. Venkatarama Sastri for the appellants that such a suit will not lie at the instance of any one other than the person who was entitled to have notice of the sale, that is to say, the registered pattadar. The contention is that a mere occupant who has not been recognised by the landholder has no right to be included in the formalities of a sale under S. 112 and that provided the registered pattadar acquiesces in the sale as one carried out with a sufficient degree of formality, it does not lie in the mouth of the person whose presence on the land has been tolerated by the registered pattadar to question that sale on technical grounds. There is a long series of decisions of this Court to the effect that when a sale is held without due notice as prescribed under S. 112 that sale is invalid. There are decisions to the effect that such a sale is a nullity, the question having arisen usually with reference to limitation. It seems to me unnecessary for the purpose of this case to decide whether a sale which, so far as the Court was concerned, was attended with all due formalities is merely voidable as the result of the failure by the Court's process server to do that which he purports to have done, or whether such a sale would be an absolute nullity which would bind nobody at all. I am however of opinion that when a sale is bad for want of proper service of notice, there is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land which is adversely affected by the sale, from challenging that sale in the ordinary Civil Courts and protecting his interest.

Numerous cases have been cited before me dealing with suits to declare such a sale to be invalid. So far as I am aware, there is no case in which the right of a person interested who is not the registered pattadar to bring such a suit has been denied. There is one decision of a single Judge 23 M L W 149[1] in which the right of suit by a person other than the registered pattadar has been recognized and an unreported decision (S. A. No. 538 of 1936) has recognized such a right of suit at the instance of a person who though not the registered pattadar had applied to the landholder under S. 146 for recognition. The point seems to me to be this. A suit such as that with which we are dealing is not a suit under the Madras Estates Land Act, which for certain purposes declines to recognize any body other than the registered pattadar, though for other purposes it recognizes persons having an interest who are not the registered pattadars. The present suit is a suit under the ordinary law to protect the rights of a person having an interest in land, which rights are threatened by the alleged illegal act of an authority purporting to act under the colour of the law. Ordinarily speaking, when the law gives to a public authority a power to invade the rights of a private individual, it is incumbent upon the public authority to observe those formalities which are prescribed by the law investing it with the powers. If private rights are invaded without the observance of those formalities which are prescribed, the person whose interest is adversely affected by this invasion has a right of suit. This right of suit is not confined to persons with a perfect title to the property which is threatened. Provided that they have such an interest in the property as the law will protect, it can supply the basis for a suit to resist an invasion of that right under the colour of the law, when the law has not actually been followed. Merely because this is a suit to contest the legality of a sale under the Madras Estates Land Act it cannot to my mind be contended that the suit can only be brought by the person who is registered pattadar.

---

[1] Setharama Naidu v. Govindasami Chettiar, (1926) 13 A I R Mad 352=92 I C 976=23 M L W 149.

There is no analogy with suits brought under that Act and the plaintiff is not seeking a remedy provided under that Act. He is suing for the protection of his rights as a person having a possessory title which under the ordinary law the Courts will protect from unauthorised invasions. That title is threatened by a sale purporting to have been held under the powers conferred by S. 112, Estates Land Act. The plaintiff is entitled to come to the Court, prove his possessory title and show that the sale which purports to have been a sale under this special law has not been carried out in accordance with that law and therefore can convey no title to the purchaser. It seems to me therefore that the decision of the lower Appellate Court is correct and that the plaintiff's suit must succeed on the findings. In the result, the appeal is dismissed with costs of the plaintiff-respondent 1. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 441

VENKATARAMANA RAO AND
KUNHI RAMAN JJ.

Official Assignee, Madras representing the estate of S. N. Firm — Appellant.

v.

Natesam Pillai — Respondent.

Appeal No. 90 of 1937, Decided on 16th November 1939, against decree of Sub-Judge, Trichinopoly, D/- 12th December 1936.

(a) Banker and Customer — Fiduciary relation — Fact that person had no prior banking transaction with bank or that he gave directions to bank to apply in particular manner moneys standing to his credit does not by itself make relationship between parties fiduciary.

The mere fact that a person had no prior banking transactions with the bank is not by itself sufficient to exclude the possibility of his having become a customer of the bank when he pays in a certain amount nor does the fact that he gives directions to the bank to apply in a particular manner moneys standing to his credit necessarily make the relationship between the parties fiduciary : *A I R 1920 P C 88 and A I R 1940 Mad 98, Rel. on.* [P 443 C 1, 2]

(b) Banker and Customer—Amount credited in anamath or suspense account to await instructions of creditor for its disposal—No pass book or cheque book issued to creditor when amount received by bank — Relation between parties must be deemed to be fiduciary — Creditor is entitled to preferential claim.

Where the account books of the parties show that the amounts were credited in anamath or suspense account to await the instructions of the creditor as regards their disposal and the regular procedure of giving pass books or cheque books is not followed by the bank nor any agreement regarding the interest payable on the deposits is entered into, the amounts must be deemed to have been received by the bank in a fiduciary capacity and not as between a bank and its customer. Consequently, the creditor must be held entitled to preferential claim over other customers of the bank; *(1889) 60 L T 397 ; (1870) 5 Ch A 233 ; 36 Mad 499 ; 34 Mad 125 and 32 Mad 68, Rel. on.* [P 443 C 2]

K. P. Ramakrishna Aiyar — *for Appellant.*

B. Sitarama Rao and A. V. Narayanaswamy Aiyar — *for Respondent.*

Kunhi Raman J.—The Official Assignee of Madras who was impleaded as defendant 17 in O. S. No. 64 of 1935 on the file of the Subordinate Judge's Court of Trichinopoly is the appellant. He was brought on record as representing the estate of defendants 1 to 7 who were adjudicated insolvents in I. P. No. 345 of 1935 on 6th September 1935. They were members of a joint Hindu family which was carrying on banking business under the name and style of the S. N. Firm which suspended business on 30th April 1935. Between 25th March 1935 and 17th April 1935 the plaintiff-respondent had paid this firm a total sum of Rs. 6950 at Trichinopoly in the following circumstances. The plaintiff had arranged to purchase certain lands in the village of Thiruvarambur from one S. V. Nallasivam Pillai of Tuticorin. When the plaintiff told defendant 3 of this plan the latter suggested that the transaction could be arranged through the defendant's branch at Tuticorin which he said was close to Nallaperumal Pillai's shop of that place. The plaintiff's case was that the payment referred to above was made by him under an arrangement that the firm of defendants 1 to 7 should keep the total amount in trust for him until he decided how it should be disposed of. The plaintiff had no prior banking transactions with the defendants' firm. The plaintiff's case was that the amount was not deposited by him with the firm and that when he made the payment, no relationship of banker and customer arose between him and the firm. On the other hand the defendants' firm received the amount in a fiduciary capacity. He therefore wanted to recover the full amount from the assets of the firm and not merely in the shape of dividends declared from time to time by the Official Assignee.

The claim was resisted in the Court below on the ground that the plaintiff was not entitled to any preferential treatment in respect of the total amount paid by him, because it was paid by him as a deposit which was to carry interest at 5 annas per cent. per annum in the ordinary course of the banking business of the firm. This contention of the defendants was negatived by the trial Court which has found on the evidence that the amount was paid by plaintiff on anamath account on the understanding that the total amount should be paid back to him when he intended to go to Tuticorin or that a draft should be given to him for the total amount to be paid at Tuticorin by the defendant's branch there. The defendants suspended payment before the plaintiff had made up his mind as to what course he should adopt. The learned Subordinate Judge states in his judgment, and quite correctly too, that had the plaintiff adopted the second course and had he taken a draft on the defendants' branch at Tuticorin the position taken up by the plaintiff at the trial might have been untenable. It might then have been assumed that the transaction was an ordinary banking transaction between the plaintiff and the firm which would have relegated the plaintiff to the position of an ordinary customer of the Bank who would have had to take his turn with the other customers of the Bank for obtaining satisfaction. On the ground therefore that the Bank held the plaintiff's money in a fiduciary capacity as the result of which the property in the amount did not vest in the Official Assignee, the Court below has recognized the plaintiff's claim to preferential treatment along with such other persons as may be similarly situated. The plaintiff's suit has accordingly been decreed and it is against this decree that the present appeal is preferred.

The learned advocate for the appellant contends that the money was paid to the Bank to be held "at call," that is to say to be paid back to plaintiff whenever he demanded payment. He points out that this shows that in fact it was paid into a current account to the credit of the plaintiff and that therefore the plaintiff must be regarded as an ordinary customer of the Bank and not as a person who had entrusted money to the Bank to be held in a fiduciary capacity.

The learned advocate for the respondent on the other hand stresses the fact that the plaintiff did not at any time have a banking account with the firm. The amount was paid by the plaintiff at the invitation of defendant 3. No cheque book or pass book was given to the plaintiff by the firm. No entry was made of the payment in the current account or fixed deposit register of the Bank. The firm did not produce its fair day book at the trial. No ledger was opened crediting plaintiff with the amount until at any rate 30th April 1935 by which time the Bank had already suspended payment. He therefore argues that the payment was made to the firm as bailee or agent and that consequently the view taken by the lower Court is correct.

It must be stated at the outset that the appellant's case that the amount was paid into plaintiff's current account and that it was to carry interest at five annas per cent. has not been substantiated. It seems to us that the test for ascertaining whether there was any fiduciary relationship or only the relationship of banker and customer between the parties is put succinctly in Hart on Banking, Vol. I (Edn. 4) at page 582, where the decision in (1889) 60 L T 397 =6 Morrell 81[1] is considered. In that case Julius Plitt handed a cheque to Alexandar Brown, a Banker, with whom he had no banking account, and obtained a receipt to the effect that the cheque was given for collection. Brown was adjudicated bankrupt after he had collected the amount of the cheque and before he had paid the whole of it to Plitt. The trustee claimed the balance of the proceeds of the cheque. Cave J., observed in the course of the argument:

---

[1] In re Brown ; Ex parte Plitt, (1889) 60 L T 397=37 W R 463=6 Morrel 81.

> Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand, there is no trust.

It was held in that case that the relation between the parties was not the ordinary relation of banker and customer. Plitt had handed the cheque to Brown

> for Brown to receive and hold it for him. If so it is not the ordinary case of banker and customer.

In (1870) 5 Ch A 233[2] at p. 240, Lord Hatherley L. C., says as follows:

> I apprehend that the true rule applicable to these cases is to be found in (1844-48) 2 H L C 28[3] at p. 35 where it is clearly stated by Lord Cottenham who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of a banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited because it is the ordinary course of trade to make use of them for his own profit. He does make use of them and he invests money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see.

The mere fact that the plaintiff had no prior banking transaction with the defendant's firm will not of course by itself be sufficient to exclude the possibility of the plaintiff having become a customer of the Bank when he paid in the amounts. This is made clear in the judgment of the Privy Council in (1920) A C 683.[4] On p. 687, occur the following sentences:

> Their Lordships are of opinion that the word 'customer' signifies a relationship in which the duration is not of essence. A person whose money has been accepted by a Bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the Bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitue and a new comer, but between a person for whom the Bank performs a casual service, such as for instance, cashing a cheque for a person introduced by one of their customers, and a person who has no account of his own at the Bank.

See also the opinion of Lord Davey in (1901) A C 414[5] at p. 420. Again the mere fact that a customer gives directions to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary. This was made clear in the decision reported in 1939 M W N 1063,[6] where money was invested in a Bank's Savings Bank Account and a standing order was given that out of this account payment must be made towards certain recurring chit subscriptions payable by the depositor. The scope of the decision in (1857) 26 L J Ch 710[7] is explained in the judgment in that case, and it was held that the depositor was a customer of the Bank and not a person entitled to preferential treatment since no trust was created. The decisions of this Court reported in 36 Mad 499,[8] 34 Mad 125[9] and 32 Mad 68[10] do not lay down any principles opposed to the rulings quoted above.

The account books of the parties in the present case show that the amounts were credited in anamath or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants' oral evidence shows that when amounts were paid to the Bank in current account or fixed deposit generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received. Applying the principles of law laid down in the authorities quoted above, we hold that the amounts were received by the Bank in a fiduciary capacity and not as between a Bank and its customer and that consequently the view taken by the lower Court is correct. The appeal therefore fails and must be dismissed with costs payable out of the estate.

C.R.K./G.N. *Appeal dismissed.*

---

[2] Burdwick v. Garick, (1870) 5 Ch A 233=39 L J Ch 369=18 W R 387.

[3] Foley v. Hill, (1844-48) 2 H L C 28.

[4] Commissioner of Taxation v. English Scottish and Australian Bank Ltd., (1920) 7 A I R P C 88=(1920) A C 683=89 L J P C 181=123 L T 34=36 P L R 305.

[5] Great Western Railway Co. v. London and County Banking Co. Ltd., (1901) A C 414.

[6] Dharmambal Ammal v. James Voice Pirrie, (1940) 27 A I R Mad 98=1939 M W N 1063.

[7] Farley v. Turner, (1857) 26 L J Ch 710=3 Jur (N S) 532=5 W R 666.

[8] Official Assignee of Madras v. Rajah Iyer, (1913) 36 Mad 499=6 I C 383=(1910) M W N 451.

[9] Official Assignee of Madras v. Mellapparan Kanoor Sarvajana Sahaya Nidhi, (1911) 34 Mad 125=6 I C 427=(1910) M W N 421.

[10] Official Assignee of Madras v. Smith, (1909) 32 Mad 68=1 I C 712.

A. I. R. 1940 Madras 444

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Muna Ravanna, Muna Muhammad Kassim Sahib — Appellant.

v.

Ana, Runa, Suna, Subramanian Chettiar — Respondent.

Appeal No. 229 of 1936, Decided on 15th September 1939, against decree of Sub-Judge, Sivaganga, D/- 29th July 1936.

Civil P. C. (1908), O. 21, R. 63 — Objection to attachment under O. 21, R. 58 rejected by executing Court, sale deed in favour of claimant being fictitious—Suit by claimant under O. 21, R. 63 — Onus to prove genuineness of sale deed and valuable consideration is on claimant.

Where objection to attachment of property under O. 21, R. 58 is rejected by the executing Court on the ground that the sale deed relied on by the claimant in proof of his title is fictitious and the claimant institutes a regular suit under O. 21, R. 63, the onus of proving that the sale in his favour is a genuine transaction and that he purchased the property for a valuable consideration is on the claimant. This fact being specially within the knowledge of the claimant the burden of proving that fact must lie on him. The recital as to the passing of consideration in the sale deed cannot be of any evidentiary value by itself as against a person who was not a party to the deed : *A I R 1929 Pat 579 ; A I R 1932 Mad 302 ; A I R 1927 P C 237 ; A I R 1930 P C 255 and A I R 1938 P C 290, Expl.; A I R 1932 Lah 174 ; A I R 1937 Lah 847 and A I R 1937 Pat 76, Rel. on ; A I R 1933 All 198, Commented upon.* [P 444 C 2; P 448 C 2]

K. Rajah Ayyar and S. Nagaraja Aiyar— *for Appellant.*

B. Sitarama Rao (Government Pleader) and K. S. Venkatarama Iyer — *for Respondent.*

Abdur Rahman J. — The suit out of which this appeal arises was instituted by a defeated claimant on the dismissal of his petition under O. 21, R. 58, Civil P. C., raising objections to the attachment of a property purchased by him from one Syed Ibrahim under a sale deed Ex. B executed on 22nd May 1928. The property was attached in execution of a decree passed in favour of the Ceylon Holland Trading Society against a firm of which the said Syed Ibrahim was a partner in respect of certain dealings which had taken place in 1929. The decree was assigned by the Trading Society to the defendant in the present suit and the attachment was effected at the latter's instance. The objection raised by the plaintiff was fully investigated by the execution Court and was dismissed on the ground that the judgment debtor was found to be in possession of the property on his own behalf and the sale deed in favour of the plaintiff was not bona fide or for consideration. Aggrieved by this order the plaintiff instituted the present suit under O. 21, R. 63. This has been also dismissed by the Subordinate Judge of Sivaganga who held the sale by Syed Ibrahim to be fictitious and found that it was not intended to divest the judgment debtor of his possession for title to the property. The plaintiff appeals. Realizing the infirmities in the plaintiff's evidence and having regard to the close relationship between the vendor and the vendee, to both of which we will have to refer in due course, learned counsel for the appellant has first of all contended that it was unnecessary for him to establish the consideration for which the sale was effected in his client's favour and that it was enough for him, in proof of his title, to produce and prove a duly registered deed executed by the owner. Once the plaintiff has, he says, succeeded in establishing ostensible title to the property, it would be for the defendant to disclose it and if he failed so to do, the ostensible title in his client's favour must prevail.

Having heard Mr. Rajah Ayyar on behalf of the appellant, we are of opinion that the contention has no force and must be overruled. The plaintiff had, as stated above, failed in his objections raised to the attachment of the property after they had been investigated by the execution Court and when he instituted the present suit to get rid of the order passed against him, it would be for him to show as he wished the Court to believe, that the sale in his favour was a genuine transaction and that he had purchased the property for a valuable consideration. This was a fact specially within the plaintiff's knowledge and the burden of proving that fact must obviously lie on him. The recital as to the passing of consideration in the sale deed cannot be of any evidentiary value by itself as against a person who, like the defendant or his predecessor in interest, was not a party to the deed. Moreover, the order passed by the Court in execution, although summary in character, would nonetheless remain binding on the appellant unless it was set aside by a decree passed in a regular suit. Mr. Rajah Ayyar however contends that a Division Bench of this Court has taken a different view in 55 Mad 748[1] and relies on the following passage appearing at p. 750:

> If following the usual practice, the plaintiff assumes the original burden and puts in the registered deed, then, if the defendant has nothing at all to say against it, the plaintiff would succeed. If however the defendant can then show utter inadequacy of consideration or some other circumstance suggesting a fraudulent sale, the plaintiff would in turn have to plead something more than the innocent appearance of the instrument. He must show that it is as good as it looks.

The last words, it may be remarked, have been taken from a Full Bench judgment in 30 I C 855[2] where Jenkins C. J. observed:

> The onus in this case is on Jamahar to show affirmatively that not only the ostensible but the real title also is in her. She is a plaintiff who is calling in a suit contemplated by the Code, an adverse decision of the Court given, it is true, in a summary proceeding but conclusive subject to the result of this suit. . . . . The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look.

Having gone through the judgment in 55 Mad 748[1] carefully we are unable to agree that the learned Judges had held that the onus of proving want of consideration would be on the defendant. They observed at page 751:

> Of course, as observed in the beginning of this judgment, the defendant cannot escape the burden at some stage or other. If the plaintiff produces his deed, and swears that *it is genuine* and *for full consideration*, and the defendant has nothing to say to the contrary, the plaintiff will succeed. . . . . But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims.

The italicized words are important and give expression to the view entertained by them. It must however be admitted that certain expressions in this judgment are rather loose and seem to lend support to the contention raised by the learned counsel for the appellant, although one can well conceive of the situation where a party raised an objection to an attachment and produced a duly registered deed in support of it while the opposing party kept silent and did not challenge the transaction. If this was all that the learned Judges were trying to convey, no exception can be taken to what they said in that limited sense but it would be wrong to extend their meaning to anything more than this. The burden of proof, if the expression is used in the sense of introducing evidence, is constantly fluctuating and if a party has prima facie proved execution of a sale deed in his favour and sworn to the consideration having been paid by him, this may be enough in the circumstances of a particular case to shift the onus to the opposing party who may then be called upon to show or rather rebut that the deed was not executed by those having title or that the consideration had not passed in fact.

We are confirmed in the view we take of this decision by the fact that two decisions of the Privy Council were referred to by the learned Judges in support of the proposition which they were intending to propound. The first one was given in 5 Rang 852[3] and the second in 60 M L J 341.[4] The facts of the first case (5 Rang 852[3]) to which we will have to refer in some detail later, were that the plaintiffs had shown that a large part of the consideration had passed in respect of the transaction which the plaintiffs had alleged to be genuine. It was after they had succeeded in showing that the transaction was for consideration that it was pointed out by the learned Judges of the High Court at Rangoon that under those circumstances they were of opinion that the burden lay very heavily on the defendant to show that the deed of sale was not a genuine one. Their Lordships of the Judicial Committee were merely confirming the statement made by the learned Judges of the High Court and not laying down any abstract principle in regard to the onus of proof in such cases. The learned Judges had while deciding 55 Mad 748[1] themselves observed that the Privy Council decision did not lay down any proposition casting the onus upon the defendant. The second decision of their Lordships of the Privy Council, however, was more directly in point and the decision in 55 Mad 748[1] cannot be held to lay down any different principle. Their Lordships had in their judgment observed as follows:

> Under O. 21, R. 63 the decision in the said claim proceedings was final subject to the result of this suit which the plaintiff had instituted for a declaration that the deeds are valid and that the said properties are not liable to be attached in execution of the decree of the appellant. In their

---

1. Appatuhrai Chettiar v. Vellayan Chettiar, (1932) 19 A I R Mad 302=137 I C 879 = 55 Mad 748=62 M L J 236.
2. Jamahar Kumari Bibi v. Askaran Boid, (1916) 3 A I R Cal 666 = 30 I C 855 = 22 C L J 27 (F B).
3. V. E. A. R. M. Firm v. Maung Ba Kyin, (1927) 14 A I R P C 237 = 105 I C 788 = 5 Rang 852 (P C).
4. Mohammad Ali Mohammad Khan v. Mt. Bismilla Begum, (1930) 17 A I R P C 255 = 128 I C 647=60 M L J 341=35 C W N 324 (P C).

Lordships' opinion she is not entitled to this declaration unless she establishes to their satisfaction that the deeds in question were bona fide and were intended by defendant 2 to pass the beneficial interest in the premises in favour of the mutavalli of the wakf and the plaintiff respectively.

These observations are clear in themselves but Mr. Rajah Ayyar contends that their Lordships were not enunciating any general principle but had only observed that the plaintiff would not be entitled to the declaration unless she established to their (i. e. their Lordships') satisfaction that the deeds in question were bona fide, etc. It must be remembered in this connexion that the person who had asked for a declaration that the deeds were valid and that the properties were not attachable had succeeded in the High Court and it was the creditor decree-holder who had appealed to the Privy Council. The main question for determination in that case was whether a deed of wakf dated 19th November 1916 and a deed of gift dated 30th June 1917 were void or voidable at the option of the appellant who had obtained a money decree against respondent 2, the executant of these documents. The observations were not made because the plaintiff had lost in the High Court and in consequence of that failure she had been required to show to their Lordships' satisfaction that the judgment under appeal was wrong, but she was called upon to show that the deeds were bona fide in spite of a decision by the High Court in her favour. This observation was made by their Lordships because the onus of proving the bona fide nature of the transaction was held to lie on her. What transpired at the hearing of this appeal in arguments (and reported in 35 C W N 324[4]) leaves no room for doubt as to the view their Lordships had taken in regard to this question. Mr. Dunne who appeared for the creditor (appellant) asserted that the transactions were a series of blinds and that the judgment-debtor was attempting to defraud the appellant by putting all his property beyond the reach of his creditors. Mr. Jopling on behalf of the alienee-respondent alleged that the transactions were real and bona fide, effected by registered deeds which were duly acted upon. In reply to this argument the following observations were made by their Lordships and are extremely important:

Viscount Dunedin : The onus is upon you to show that the order in execution is wrong.

Sir Lancelot Sanderson : In this suit, having regard to what was decided in the execution department the onus was on you to show that these were real transactions.

Counsel : I submit that the judgment of the executing Court is not evidence or conclusive against me: S. 43, Evidence Act.

Sir Binod Mitter : That judgment is final under O. 21, R. 63, unless set aside.

Counsel : We are expressly allowed to bring this suit. The function of the executing Court was to deal with the question of possession.

Sir Binod Mitter : The judgment in execution may not be res judicata but the question is whether it is not evidence to some extent. Of course the principal question under O. 21, R. 58 is one of possession, but the Court has to go incidentally into the question of title in order to determine the character of possession. That had been laid down in several Indian cases.

Counsel : The deed of dower is one for value. There is no rule that a man cannot prefer one creditor to another.

Sir Binod Mitter : That question was recently decided by the Board in 7 Rang 624.[5]

Mr. Dunne in reply : The onus was upon the respondent to satisfy the Court that these two transactions were valid and real transactions.

Viscount Dunedin : That is quite clear.

In view of these cases having been cited before the learned Judges and noticed by them in their judgment in 55 Mad 748,[1] it is impossible to hold that they were laying down any different rule. The next case to which our attention was drawn was decided by a Division Bench of the Patna High Court. It was that in 7 Pat 777[6] where it was held that the burden of proof in a suit under O. 21, R. 63 lay on the party seeking to establish his right to attach the property in dispute. But it must be remembered that the objection under O. 21, R. 58, had been dismissed in this case for non-prosecution and this is how Kulwant Sahay J. who had written a concurring judgment in this case distinguished it in the following year in 8 Pat 890.[7] After referring to various judgments of the Bombay, Allahabad and Calcutta Courts it was held in the latter case that in a suit under O. 21, R. 63 the onus was on the plaintiff who relied on a deed of transfer, to prove not merely the valid execution of the document and the passing of consideration thereunder but also the fact that the document was really what it purported to be and was not merely a colourable transaction. It may be stated here that the decision in 5 Rang 852[3] by their Lordships of the Judicial Cammittee was understood by the learned Judges of the Patna High Court in the same manner as we have understood it. The learned Judges observe that

---

[5] Ma Pwa May v. Chettiar Firm, (1929) 16 A I R P C 279=120 I C 645= 56 I A 379 = 7 Rang 624 (P C).

[6] Gillu Mull v. Manohar Das Jai Narain, (1928) 15 A I R Pat 434=112 I C 371=7 Pat 777=9 P L T 461.

[7] Mahadeo Missir v. Ram Prasad, (1929) 16 A I R Pat 579=119 I C 74=8 Pat 890=10 P L T 339.

> the circumstances upon which their Lordships of the High Court of Rangoon placed the onus upon the defendant were set out in the judgment, namely the fact that the plaintiff had proved the passing of the consideration.

When the matter went before their Lordships of the Judicial Committee they observed as follows :

> Now they (meaning the plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration.

Their Lordships then proceeded to observe:

> So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore there only remains the Rs. 3000.

The remaining paragraph printed at page 855 of the case reported in 5 Rang 852[3] may be reproduced to make out their Lordships' meaning clearly :

> No doubt the evidence is in a very ragged condition as to precisely where and when that money was paid and, if it was necessary to show it was paid in hard cash, probably such proof would fail. But their Lordships take this view, that supposing that it was not established, inasmuch as it has been held by the Judges below that the total value of the property was only Rs. 20,000 this Rs. 17,000 being an absolutely good consideration, the remaining Rs. 3000 is not enough to allow them to draw the conclusion that it was a fraudulent sale.

It was then observed by the learned Judges of the Patna High Court:

> In other words, their Lordships cast the burden upon the defendant in that case to show that the sale was fraudulent because the plaintiff had succeeded in proving the passing of a consideration . . . . Their Lordships agreed with the view of the High Court that the plaintiff had succeeded in establishing the passing of consideration at least to the extent of Rs. 17,000 and that the only question was as regards the balance of Rs. 3000 and it appears that what was urged before their Lordships was that as the evidence as regards the passing of this portion of the consideration was unsatisfactory the sale was a fraudulent sale. Their Lordships refused to accede to this argument in view of the fact that Rs. 17,000 out of the consideration of Rs. 20,000 was an absolutely good consideration and that the remaining Rs. 3000 was not enough to allow them to draw the conclusion that it was a fraudulent sale. Their Lordships do not lay it down as a proposition of law that in a suit under the provisions of O. 21, R. 63, Civil P. C., where the plaintiff relies on a deed of sale alleged to have been executed by the judgment debtor, the onus lies on the defendant to prove that the sale is not a real sale.

We have referred to this case in detail as we find that Sir Dinshaw Mullah has in his well known commentary on the Code of Civil Procedure at p. 789, (Edn. 10), understood the decision by their Lordships of the Privy Council in 5 Rang 852[3] as laying down a different rule and has also cited an Allahabad case, 55 All 266,[8] in support of the conclusion that if in spite of an adverse decision by an execution Court, a plaintiff brings a suit claiming his title under a deed, the onus would be on the defendant to prove the benami character of the deed. There is no doubt that the learned Judges of the Allahabad Court do observe at p. 270 that,

> a comparatively recent pronouncement of their Lordships of the Privy Council made in A I R 1927 P C 237[3] has definitely laid down that the plaintiffs being the ostensible owners of the property under a duly registered deed and a deed of transfer, the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration,

but how they understood the Privy Council decision is explained in the paragraph beginning on the same page the earlier portion of which reads as follows :

> There is no doubt that the Privy Council case to which reference has been made above is an authority for the proposition that an ostensible owner of the property whose objection has been dismissed under O. 21, R. 58, Civil P. C., and who therefore brings a suit under O. 21, R. 63, Civil P. C., for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original owner, but also that he was not the benamidar for the judgment-debtor as alleged by the decree-holder. The rule that in such a case the plaintiff must establish his title is not departed from.

To this no exception can be taken but what is stated by these learned Judges later in this paragraph does not seem to follow from what they had stated to be the effect of the decision of their Lordships of the Judicial Committee. They observe there as follows :

> The quantum of onus is however the same as in an ordinary case in which the benami character of an instrument is in question. The initial onus undoubtedly rests on the plaintiff. He has to establish his title to the property; but having established the due execution of the deed of conveyance by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible owner is only a benamidar.

This would mean that the plaintiff was not, in their opinion, to show that "he was

---

8. Abdul Sattar v. Hira Dei, (1933) 20 A I R All 198=144 I C 1002=55 All 266=1933 A L J 1612.

not the benamidar for the judgment-debtor as alleged by the decree-holder." But this is exactly how they had understood the decision of the Judicial Committee themselves in an earlier portion of this very paragraph. After comparing S. 283 of the old Code with O. 21, R. 63 of the present Code the learned Judges of the Allahabad High Court subsequently add :

> The scope of R. 63 is wider than that of S. 283 of the old Code. The former makes a title suit within the period of one year necessary by a person who preferred an objection and against whom an order is made. To our minds this is the only ground on which it is possible to reconcile the view taken in the cases decided by the Indian High Courts with the view now expressed by their Lordships of the Privy Council. Whether the ground suggested above is well founded or not, we must follow the Privy Council case, which, if not reconcilable in the manner suggested above, should be deemed to have overruled the contrary opinion previously expressed by the High Courts. We must take it to be the law that, in a case like this, the plaintiff having established due execution of the sale deed in his favour by a person who was admittedly the owner of the property to which it relates, he should be deemed to have discharged the initial onus which lay upon him; and the burden of proof being thus shifted on the defendant, the latter must establish the benami character of such deed by showing that the consideration proceeded from the alleged owner or otherwise.

The conclusion thus arrived at by them does not follow from their own reading of the Privy Council decision and we are with great deference unable to follow it. Nor are we inclined to agree with what has been stated by Sir Dinshaw Mulla in his commentary with regard to the effect of the decision in 5 Rang 852.[3] The general rule that would apply to cases where the plaintiff sues on the basis of his title and the defendant raises a plea of benami would not, in our opinion, apply where the question has been gone into once by an execution Court on a petition of objections under O. 21, R. 58 and decided against the claimant. If the claimant brings a suit later under O. 21, R. 63 he will have to establish that he was in possession of the property on his own behalf and not on that of the judgment-debtor and that the consideration for the sale had emanated from him. Once this is established it would then be for the defendants to rebut the evidence and to show that the plaintiff's name was benami or that the sale in his favour was fraudulent. Mr. Rajah Ayyar drew our attention in the end to the observations of their Lordships of the Judicial Committee in A I R 1938 P C 290,[9] where Sir George Lowndes in delivering their Lordships' opinion observed as follows :

> A good deal of argument was addressed to the question of burden of proof. Apparently it has been the settled practice of Indian Courts, when objections to an attachment in execution have been disallowed and a suit has been filed by the objector under O. 21, R. 63 of the Code, to put the onus of proving the bona fides of any transaction upon which the objector relies upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material. In the present case where the facts are fully established, and the inference from them is clear, their Lordships think that nothing would be gained by any examination of the authorities to which reference has been made.

This case does not hold that the onus of proving the bona fide nature of the transaction in a suit under O. 21, R. 63 would not lie on the plaintiff. But the suggestion was that the question would not have been left for further consideration unless their Lordships were inclined to doubt the proposition stated by the learned Judges of the High Court of Lahore in the case under appeal. We are unable to read this judgment as throwing any doubt on the proposition that the onus would in such circumstances lie on the plaintiff and feel that their Lordships refused to go into this question as they felt that it was unnecessary so to do. At all events the decision by their Lordships reported in 35 C W N 324[4] cannot be held to have been overruled subsequently and must be held to cover the point to be decided now.

Our attention was drawn by Mr. Sitarama Rao to a number of cases decided by the Lahore High Court, out of which it would be sufficient to refer to a Division Bench decision in 131 I C 383[10] and to a case decided by Teckchand J. in A I R 1937 Lah 847.[11] They hold that the onus would in the circumstances of the present case lie on the plaintiff. The same conclusion was arrived at by the Patna High Court in A I R 1937 Pat 76[12] where the learned Chief Justice and another Judge of that Court took the same view. We are therefore of opinion that the onus of establishing that the transaction was genuine and for consideration was on the plaintiff-appellant and if he has failed to establish this, his suit must be held to have been rightly dismissed by the Court below. Coming to the facts of the case we find that a sale deed in regard to three properties including the one attached by the assignee decree-holder was executed by Syed Ibrahim on 22nd May 1928. The consideration for the sale was alleged to be a sum of Rs. 30,000. In regard to the consideration the following recital in the sale deed is interesting :

---

[9] Mohammad Ismail v. Hanuman Prasad, (1938) 25 A I R P C 290=178 I C 476 (P C).

[10] Janki Das v. Gulzar, (1932) 19 A I R Lah 174 =131 I C 383=12 Lah 763=32 P L R 350.

[11] Mela Ram v. Inayat Begam, (1937) 24 A I R Lah 847=169 I C 123.

[12] Radhakishun v. Keola Prasad, (1937) 24 A I R Pat 76=167 I C 118=17 P L T 785.

> The amount due to you with matter of the borrowings had from you by my father during his lifetime is Rs. 17,000; the amount which I have already received from you for the purpose of discharging the other debts borrowed during his lifetime and for meeting the expenses of his funeral obsequies, khattam fatiha, etc., and for meeting my marriage expenses, etc., is Rs. 10,500, and the sum which I have this day received in cash for the benefit of the family is Rs. 2500. Total of the said items is Rs. 30,000.

It might be mentioned that even the comparatively smaller sum of Rs. 2500 which was alleged to have been received by the vendor on the date of execution of the deed was not paid before the Sub-Registrar. The oral evidence produced in this connexion is worthless and cannot be relied upon. The plaintiff has failed to produce any accounts even in regard to the larger sum of Rs. 17,000 which was stated to have been advanced by him to the vendor's father who had died some time in 1926. There is nothing on the record to show why such large sums were lent by the plaintiff and the dates on which they were said to have been advanced are not known, anyhow not stated. The plaintiff when cross-examined had to admit that he had no accounts to show that he was in possession of such large amounts at the time when he was said to have advanced them by way of loan and was obliged to take shelter behind the statement that these were his savings. This is all the more surprising when we find that he had been maintaining accounts of his business according to his own statement and producing them before the income-tax authorities. It was admitted that he had no voucher or any other document for the moneys alleged to have been lent by him. Nor has he produced any witness to prove the advances made by him to Syed Ibrahim's father. The main statement in this connexion is that of the plaintiff himself and this does not carry conviction. It is impossible to rely on the statement made by P. W. 4 in cross-examination. The allegation in regard to the advance of Rs. 10,500, made by the plaintiff to Syed Ibrahim himself does not also stand the test of even a cursory examination.

The plaintiff has had to admit in his cross-examination that he had no voucher to evidence the advance of this sum. Nor could he state in the witness box when the several sums making up Rs. 10,500 were paid by him. No accounts were produced by the plaintiff in regard to this advance either and besides the two witnesses (P. W.s 4 and 5) before whom these sums of money were stated to have been acknowledged by Syed Ibrahim there is no other witness who has deposed to the advance made by the plaintiff. Two slips of papers (Exs. C and C-2) have been produced on behalf of Syed Ibrahim but it is remarkable that Syed Ibrahim has not come into the witness box. Nor have his accounts been produced in Court. These slips of papers could have been easily manufactured for the purposes of this case. They are written in pencil and it is difficult to conceive that this was the only memoranda of money kept by Syed Ibrahim for the money advanced to him. As for P. W.s 4 and 5 they have come into Court as witnesses in the pose of mediators who were sent by the plaintiff to Syed Ibrahim to get the amount due by him and brought about the sale of the properties as he had no liquid cash to pay.

P. W. 5 is a close relation of the plaintiff and if his statement is to be believed the entire sum of Rs. 27,500 was paid by the plaintiff on two occasions while the plaintiff himself tells a different tale. As for P. W. 4 he seems to have purchased some village in partnership with the plaintiff 4 or 5 years before his statement was recorded in 1935 and this seems to be sufficient for him to come and make a statement in his favour. Had these witnesses brought about the transaction, it is improbable that they would not have attested the sale deed in favour of the plaintiff. The Subordinate Judge placed no reliance on the statements of the witnesses produced by the plaintiff and having read their statements ourselves we entirely agree with the estimate he formed of them. The plaintiff's task was rendered far more difficult than it might have otherwise been by the facts that he is not only a maternal uncle of Syed Ibrahim but that his brother's daughter was married to the latter. If Syed Ibrahim wanted to execute a fictitious sale deed it was difficult for him to find a person more suitable than the plaintiff to fulfil his nefarious design. We must for the above reasons find that the plaintiff has totally failed to establish that the sale deed executed by Syed Ibrahim in his favour was for consideration or was a genuine transaction. On this finding the appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 450

WADSWORTH J.

Thyagarajan Chetty and another — Appellants.

v.

Narayana Thevan — Respondent.

Second Appeal No. 235 of 1935, Decided on 16th January 1939, against decree of Dist. Court, West Tanjore, in A. S. No. 44 of 1933.

(a) Evidence Act (1872), S. 32 (3)— Recital of boundary in document between third parties is admissible when statement is against proprietary interest of person making it and when executant is dead.

A recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. But this rule is subject to exceptions. Such a statement when contained in a document against the proprietary interest of the person making it can be admitted under S. 32 (3), Evidence Act, when the executant of the document is dead: *23 Bom 63, Rel. on.* [P 450 C 2]

(b) Evidence Act (1872), S. 157—Recital of boundary in mortgage deed is admissible under S. 157 when executant of document is himself witness.

A recital of a boundary in a mortgage deed is a statement made at or about the time when the fact took place. One cannot of course speak of a boundary as a fact which took place at one time or another. But what is to be got from this statement is not really the fact of the boundary but the fact that land on the boundary was at a particular time in the possession of a particular individual, and the statement in the mortgage deed that so and so was in possession of the land on such and such a boundary is a former statement made at the time when the fact of possession was taking place—a contemporaneous statement regarding the occupation of land on the boundary. In this view it is admissible under S. 157, Evidence Act: *A I R 1927 Cal 230, Expl.* [P 450 C 2; P 451 C 1]

R. Rangachari — *for Appellants.*

S. Ramanuja Ayyangar — *for Respondent.*

Judgment. — The only question arising in this appeal is one relating to the admissibility of a mortgage document, Ex. A which was put into evidence as containing a recital of a boundary which supports the plaintiff's case of title. The document was marked in the trial Court without formal proof, but with an objection to its admissibility. It was a mortgage by three brothers, namely D. W. 2, P. W. 1 and another who is alleged to be dead, though there is no evidence so far as I can find of his death. It relates to a land, in which the present parties have no interest but to a land which is situated to the west of the land which is the subject-matter of the present suit. Now it is well established that a recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. But this rule is subject to exceptions. There is a good deal of authority for the view that such a statement when contained in a document against the proprietary interest of the person making it can be admitted under S. 32 (3), Evidence Act, when the executant of the document is dead: *vide* 23 Bom 63.[1] The appellant has suggested that he can rely upon this decision in the present case on the ground that the third of the three executants is dead; but unfortunately this allegation is not based on any evidence on the record. It is however contended that when the executant of the document containing a recital of boundary upon which reliance is placed is himself a witness in the case, the recital can be let into evidence under S. 157, Evidence Act, as a former statement corroborating the deposition. The only express decision on this point to which my attention has been drawn is contained in 44 C L J 582.[2] That decision does not discuss the precise terms of S. 157, but proceeds on a concession that the recital of a boundary in a document not inter partes can be admitted to corroborate a witness who himself is the executant of the document. It must however be pointed out that S. 157 does not make all previous statements admissible to corroborate the testimony of a witness but only two classes of statements: (1) a statement made by a witness relating to the same fact at or about the time when the fact took place and (2) a statement made before any authority legally competent to investigate the fact. Clearly, the second of these categories has no reference to recitals in deeds. But can it be said that a recital of a boundary in a mortgage deed is a statement made at or about the time when the fact took place? With some hesitation I think that it can. One cannot of course speak of a boundary as a fact which took place at one time or another. But what is to be got from this statement is not really the fact of the boundary but the fact that land on the boundary was at a particular time in the possession of a particular individual, and the statement in the mortgage deed that so and so was in possession of the land on such and such a boundary is in my opinion a former statement made at the time when the fact of possession was taking place — a contemporaneous statement regarding the occupation of land on the boundary. In this view, it is admissible under S. 157, Evidence Act. It follows that a piece of evidence legally admissible has been wrongly rejected by the lower Appellate Court. The appeal is therefore allowed and the case is remanded to the lower Appellate Court for fresh disposal in the light of this judgment. Costs to abide the result.

---

[1] Ningawa v. Bharmappa, (1899) 23 Bom 63.

[2] Katabuddin v. Nafar Chandra, (1927) 14 A I R Cal 230=99 I C 907=44 C L J 582.

C.R.K./D.S. *Case remanded.*

A. I. R. 1940 Madras 451

LEACH C. J. AND KUNHI RAMAN J.

Secretary of State — Petitioner.

v.

A. Veerayya Vandayar — Respondent.

Civil Revn. Petn. No. 953 of 1937, Decided on 27th October 1939, to revise order of Dist. Munsif, Tanjore, D/- 13th February 1937.

Madras Estates Land Act (1 of 1908), S. 189, as amended by Act of 1936—Suit filed by inamdar in Civil Court for ejectment of tenants—During its pendency Amending Act of 1936 coming into force—Civil Court should only dismiss suit and cannot order refund of court-fees.

The Amending Act does not take away the jurisdiction of the Civil Court to receive plaints of inamdar for ejectment of tenants but as the result of the amendment the relief sought cannot be granted. Hence, where during the pendency of suit for ejectment filed in the Civil Court the Amending Act comes into force, the proper course for the Court to adopt is to dismiss the suit. In these circumstances the Court cannot invoke its inherent powers to order the refund of the court-fees or to grant a certificate under the Court-fees Act. [P 452 C 1]

B. Sitarama Rao, Government Pleader—*for Petitioner*.

S. Kuppuswamy — *for Respondent*.

Leach C. J.—The respondent is an inamdar and in 1934 filed a number of suits in the Court of the District Munsif of Tanjore for the ejectment of tenants. He claimed that he was the owner of the kudiwaram rights and that the defendants had refused to surrender to him possession of the lands which they were cultivating. At the time the suits were filed the respondent was entitled in law to institute the suits in the District Munsif's Court and there to substantiate his claim that he possessed the kudiwaram rights. During the pendency of the suits, the Legislature amended the Estates Land Act, 1908, and the amendment had the effect of making the respondent's inam an estate within the meaning of the Act, which meant that the amendment took away the right of the Civil Court to grant a decree for ejectment. The only course left to the respondent was to apply to the Revenue Court for an order for compensation for loss of the kudiwaram rights, if he possessed them. Certain of the suits were tried before the amendment of the Act and decrees were obtained. In respect of the suits which were undecided at the time of the amendment the District Munsif returned the plaints to the respondent, whereupon the respondent applied for refund of the court-fees. The District Munsif held that he had inherent power to grant a certificate for the purpose of enabling the respondent to obtain a refund from the Collector and accordingly issued a certificate. The Government has filed the petition now before us for revision of the District Munsif's order. It is said that the District Munsif should have refused to grant the certificate as his proper course was to dismiss the suits. The Legislature had not said the suits could not be filed but had merely taken away the right of the Court to grant decrees. Unfortunately for the respondent this argument must prevail.

By the Madras Estates Land (Third Amendment) Act, 1936, the definition of the word "estate" was extended and the extension included an inam village. Therefore the respondent's inam became an estate within the meaning of the Madras Estates Land Act, 1908. S. 9 says that no landholder shall as such be entitled to eject a ryot from his holding or any part thereof otherwise than in accordance with the provisions of the Act. The only provisions dealing with ejectment are contained in Ss. 151 and 185-B. S. 151 permits a landholder to institute a suit before a Collector to eject a ryot from his holding on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. Before referring to S. 185-B it is necessary to state what is provided in S. 185-A. In the case of an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, S. 185-A provides that in respect of any land which does not fall within specified categories (with which the present case is not concerned) the landholder may within two years of the date of the commencement of the Amending Act (31st October 1936) lodge an application for a declaration by a special tribunal constituted under the Act that the kudiwaram in such land was vested in him on 1st November 1933 and that he has retained it ever since.

The declaration by the special tribunal or by a majority of the members is final and is not liable to be questioned in a Court of law. S. 185-B then provides for the payment to the landholder by the tenant of compensation for the kudiwaran right declared by the tribunal and if the compensation is not paid the ryot may be ejected. Therefore unless the tenant commits waste or refuses to pay the compensation fixed by the special tribunal for the loss to the landholder of the kudiwaram right, he cannot be ejected from the land. S. 189 gives the Collector power to try suits of the character described in Parts A and B of the Schedule to the Act and states that no Civil Court in the exercise of its original jurisdiction shall take cognizance of such matters. The only suit for ejectment which the Collector is empowered to try is a suit for ejectment under S. 151 of the Act. Therefore, the position is that the Act does not take away the jurisdiction of the Civil Court to receive plaints of the nature of those filed by the respondent but as the result of the amendment the relief sought cannot be granted. The suits having been properly filed in the Civil Court but in the meantime the Legislature having taken away the right to the relief claimed, the proper course for the District Munsif to adopt was to dismiss the suits. In these circumstances the Court cannot invoke its inherent powers to order the refund of the court-fees or to grant a certificate under the Court-fees Act.

At the same time, it is difficult to understand the motive which has prompted this application for revision. The respondent having paid the court-fees required for the hearing of his suits is denied relief. It is to be observed that by the Madras Estates Land (Amendment) Act, 1934, the hearing of the suits was stayed and it was by the later Act of 1936 that the right to relief was taken away. One would have thought that in fairness the Act of 1936 would have provided for the refund of the court-fees paid in pending suits. This Court cannot help the respondent, but he certainly has a strong moral claim to a refund. The petition will be granted but there will be no order as to costs.

C.R.K./D.S. *Petition granted.*

A. I. R. 1940 Madras 452

HORWILL J.

Kasireddi Siddareddi and others — Appellants.

v.

Mandapalle Co-operative Society and others — Respondents.

Second Appeal No. 611 of 1936, Decided on 31st October 1939, against decree of Sub-Judge, Cuddappah, in A. S. No. 50 of 1935.

Co-operative Societies Act (1912), S. 43, Rules under, R. 14 (5) (Madras) — Land sold for recovery of money due to Co-operative Society—Sale proclamation silent as to encumbrance—Land is not sold free of encumbrances —Principle of caveat emptor applies—No question of estoppel arises.

In the case of a sale in execution of an award sent by the Registrar to the revenue authorities under R. 14 (5) the property is not sold free from encumbrances. Ordinarily the principle of caveat emptor applies and the mortgagee is under no obligation to reveal his mortgage. Since there is no duty cast upon the Co-operative Society of informing intending purchasers that the land was being sold free of encumbrances, there is no reason to conclude from the absence of any mention of any encumbrance in the proclamation that there was no encumbrance. When there is no duty cast upon the society to reveal their mortgage, no question of estoppel arises: *A I R 1933 Mad 649, Disting.* [P 453 C 1]

Ch. Raghava Rao — *for Appellants.*

A. Bhujanga Rao — *for Respondents.*

Judgment. — The husband of defendant 2, Lakshmayya, owed two sums of money to the Mandapalle Co-operative Society. The first was secured and the second unsecured. The Registrar passed an award with regard to the first debt ; and it was then sent to the revenue authorities for execution under R. 14 (5), Co-operative Societies Act, and for recovery of the decree amount as if it were arrears of land revenue. Where land is sold for recovery of land revenue it is sold free of encumbrances ; but it has been frequently held that where land is sold for the recovery of money due to Government or to public bodies under special Acts, such as the Co-operative Societies Act and Abkari Act for example, the land is not actually sold free of encumbrances. Nevertheless a precisely similar form of proclamation is generally used in the recovery of such money ;

and so there is no mention in the proclamation, as there would be in a proclamation in a sale held under the Civil Procedure Code, of any encumbrance. In the present case, although there were encumbrances, there was therefore no mention of them in the proclamation ; and the appellant purchased the land believing, he says, that there were no encumbrances on it. He therefore brought the present suit for a declaration that this land belonged to him free of all encumbrances. The question that arose for consideration in the Courts below and also arises here is whether, in fact, the land may be deemed to belong to the appellant free from encumbrances or not. The lower Appellate Court held that the land was not sold free of encumbrances and it therefore dismissed the suit.

The land can only be deemed to have been sold free from encumbrances if there was a duty cast upon the Co-operative Society of informing intending purchasers that the land was being sold free from encumbrances. No satisfactory reason has been given to me why it should be assumed that such a duty lay upon the Co-operative Society. Ordinarily, the principle of caveat emptor applies and the mortgagee is under no obligation to reveal his mortgage. There was further no reason why the appellant should conclude, from the absence of any mention of any encumbrance in the proclamation, that there was no encumbrance. There were in fact three encumbrances, one of which was in favour of his own father and uncle. If there was no duty cast upon the Co-operative Society to reveal their mortgage, then there was no estoppel. The Co-operative Society did not do any act which led the appellant to believe that there was no encumbrance and to bid on that assumption.

The learned advocate for the appellant has placed reliance on some observations in 65 M L J 317.[1] There, some property was sold for arrears of abkari revenue. The purchaser did not pay the money he bid and so the land was re-sold and the Government sought to recover from the first bidder the difference between the amount that he bid and the amount that was subsequently realized in the second sale. That difference was an enormous one; and the Court concluded on the facts that the difference was due to the fact that the property was first sold with a proclamation in the ordinary form, whereas in the second case it was sold with a proclamation which revealed an existing mortgage. In that decision, far from it being held that the proclamation was bound to reveal the mortgage, it was held that the Government were not legally bound to notify in the sale of immovable property for default under the Abkari Act that it is subject to encumbrances. The decision in that case turned on the finding that the same property was not sold on the two occasions. S. 36 (4), Revenue Recovery Act, runs thus :

> Where the purchaser may refuse or omit to deposit the said sum of money . . . . . . the property shall be re-sold at the expense and hazard of such purchaser.

It was there held that the property that was sold in the first instance was property free of mortgage and the property sold in the second case was property subject to a mortgage, and that therefore S. 36 (4) did not apply, in that the same property was not re-sold. The Co-operative Society was therefore under no legal obligation to notify that mortgage, although one would have expected them to do so. In fact, they seem to have done their best to notify bidders. D. W. 1, who was acting on behalf of the Co-operative Society, obtained an encumbrance certificate and sent it to the tahsildar before the sale. He was surprised, he says, to learn that no mention was made of the encumbrance. The appellant could have ascertained the existence of the mortgage if he had so chosen; and as there was no mention of an encumbrance or the absence of one in the proclamation, one would have expected him to have ascertained before purchasing the property whether or not there was any encumbrance. The appeal fails and is dismissed with costs. No leave.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 453

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Kuttukken Eramullan Haji and others — Appellants.

v.

Pappinisseri Chandroth Narayanan and others — Respondents.

Second Appeal No. 878 of 1935, Decided on 26th October 1939, against decree of Sub-Judge, Tellicherry, in A. S. No. 138 of 1934.

---

[1] Govindarajulu Naidu v. Secy. of State, (1933) 20 A I R Mad 649=144 I C 525=65 M L J 317.

Malabar Compensation for Tenants' Improvements Act (1 of 1900), Ss. 3, 5 and 19—Kanom deed executed before 1886 providing that jenmi should pay compensation for improvements at rate specified therein—Kanomdar creating sub-kanom — Sub-tenants of sub-kanomdar not aware of contract between jenmi and kanomdar can claim compensation under Act and not according to rate specified in kanom deed.

A kanom deed executed prior to 1886 provided that the jenmi redeeming the kanom should be called upon to pay compensation for improvements at rates specified therein. Subsequently the kanomdar created sub-kanom. The sub-tenants of the sub-kanomdar had no notice of the covenant between the jenmi and the kanomdar regarding payment of compensation. In a suit by jenmi for redemption of the kanom the sub-tenants of the sub-kanomdar claimed to be entitled to compensation for improvements under the provisions of the Act:

Held that the sub-tenants came within the definition of tenants and there was no privity of contract between them and the jenmi. Besides this, the covenant regarding payment of compensation at specified rates did not run with the land. Even if it be held that it ran with the land the sub-tenants were transferees for consideration without notice of covenant. Hence, they were entitled to compensation according to the provisions of the Act and not at rates specified in the deed. [P 454 C 2; P 455 C 1, 2]

O. T. G. Nambiar and A. Achuthan Nambiar — *for Appellants.*

K. Kuttikrishna Menon, C. Govindan and T. K. Raman Nambisan — *for Respondents.*

Leach C. J.—Respondents 1 and 2 filed a suit in the Court of the District Munsif of Taliparamba for the redemption of a kanom on the payment of the kanom amount and the value of the improvements. Respondent 1 is the melcharthdar (lessee from the jenmi with power to redeem the kanom) and respondent 2 is the jenmi who granted a kanom to the karnavan of respondent 11's tarwad on 29th June 1884. On 5th June 1892, the kanomdar created a sub-kanom in favour of three persons who are not parties to the suit. In the original kanom deed, it was stipulated that the jenmi should only be called upon to pay for improvements to the property at the rates stipulated therein. The sub-tenants of the sub-kanomdar were made parties to the suit and contended that they were entitled before ejectment to compensation on the basis of the provisions of the Malabar Compensation for Tenants' Improvement Act, 1900. The plaintiff-respondents maintained that the sub-tenants were only entitled to compensation at the lower rates mentioned in the kanom deed of 29th June 1884. The District Munsif granted a decree for redemption on payment of the kanom amount, Rs. 2500, and the value of the improvements calculated under the provisions of the Act. The plaintiff-respondents challenged the decision of the District Munsif that the Act applied in an appeal to the Subordinate Judge of Tellicherry. The Subordinate Judge allowed the appeal, holding that the deed and not the Act governed the position. His decision meant a reduction of Rs. 8145-9-0 in the amount of compensation payable to the tenant defendants. Thirteen of them have filed this present second appeal.

The District Munsif held that the sub-tenant defendants had no notice of the terms of the kanom deed of 29th June 1884 and that when they entered into possession of their lands they believed bona fide that they would be paid the value of improvements under the Malabar Compensation for Tenants' Improvements Act when their sub-tenancies terminated. The Subordinate Judge did not question this finding of the District Munsif, but held that it should be presumed that all the sub-tenants had notice of the terms of the kanom deed. He also held that the stipulation that the jenmi should only pay compensation at the rates mentioned in the deed amounted to a covenant which ran with the land. S. 19 of the Act provides that:

> Nothing in any contract made after the first day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act.

There was a stipulation in the sub-kanom deed of 5th June 1892 that improvements should be paid for at the same rates as those mentioned in the earlier deed. But the sub-kanom deed falls within the mischief of S. 19 and unless the provisions of the earlier deed with regard to payment of compensation amounts to a covenant running with land of which the sub-tenants had notice, the decision of the Subordinate Judge must be set aside and the judgment of the District Munsif restored. S. 3 of the Act defines the words "tenant" with its grammatical variations, and cognate expressions, as including,

> a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who, with the bona fide intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator.

The sub-tenants therefore clearly come within the definition of 'tenants'. S. 5 says:

> (1) Every tenant shall on ejectment be entitled to compensation for improvements which have

been made by him, his predecessor-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid, and every tenant to whom compensation is so due shall, notwithstanding determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be.

A sub-tenant is a person who comes within the definition of "tenant" and consequently cannot be dispossessed of the land cultivated by him unless he has been paid the amount of the compensation allowed by the Act, if he is in possession under a contract later than 1st January 1886. Now it is quite clear that there is in law no privity of contract or of estate between the sub-tenants and the jenmi: *see* 40 Mad 1111[1] and 1939 M W N 601.[2] In the former case, of which the Privy Council approved in the latter case, Wallis C. J. said:

> The latter part of S. 108 shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of a lessee against his sub-lessee or mortgagee.

"There appears," he added,

> to be no sufficient reason for supposing that it was the intention of the Legislature by this Section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor.

In 1939 M W N 601,[2] the Judicial Committee held that a mortgage of a lease in any of the six forms of mortgage referred to in S. 58, T. P. Act, is not an absolute assignment under the Indian law and does not create privity of estate between the lessor and the mortgagee. Therefore it is not open to the jenmi or the melcharthdar to claim that the appellants were privy to the contract of 29th June 1884 or to the estate created thereby. There is no reason to doubt the correctness of the finding of the District Munsif that the sub-tenants had no actual notice of the deed of 29th June 1884, and the decision of the Subordinate Judge that they had constructive notice of it cannot be supported. Nor can support be given to his finding that the provision in the deed with regard to compensation amounts to a covenant running with the land. Mr. Kuttikrishna Menon has frankly and properly conceded that unless the provision in the deed can be regarded as falling within the provisions of S. 40, T. P. Act, his clients are out of Court. S. 40 states that where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon the obligation may be enforced against a transferee with notice, but not against a transferee for consideration and without notice of the obligation. The position then is this. The obligation must be annexed to the ownership of the property, but even then it cannot be enforced against a transferee for consideration without notice. In the present case it cannot be said that the contract entered into between the jenmi and the kanomdar under which the jenmi was only to pay for improvements at specified rates is to be regarded as an obligation annexed to the ownership of the property. It cannot be placed any higher than a personal covenant, and being a personal covenant it cannot be enforced against the appellants. Moreover, the sub-tenants are transferees for consideration and they took their holdings without notice of the obligation under which the kanomdars had placed themselves. Therefore even if that obligation could be regarded as an obligation annexed to the land it would still be unenforceable. It follows that the rights of the sub-tenants to compensation are the rights given by the statute.

The second appeal must be allowed and the decree of the District Munsif restored, with costs in this Court and in the lower Appellate Court. Six months will be the period fixed for redemption.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 455

LEACH C. J. AND
KRISHNASWAMI AYYANGAR J.

Madura Kallalagar Devasthanam through K. N. Radhakrishna Ayyar, trustee — Appellant.

v.

N. Subbiah Ambalam — Respondent.

Second Appeal No. 617 of 1938, Decided on 24th October 1939, against decree of Dist. Court, Madura, in A. S. No. 99 of 1937.

Madras Estates Land Act (1 of 1908), S. 3 (11) — Water in landholder's tank augmented by water from Government source—Tenant of single crop wet land using water from tank for

---

[1] Theethalan v. Eralapad Rajah, Calicut, (1918) 5 A I R Mad 425=40 I C 841 = 40 Mad 1111 =32 M L J 442.

[2] Ram Kinker Bannerjee v. Satyacharan Srimani, (1939) 26 A I R P C 14=179 I C 328 = 66 I A 50=I L R (1939) Kar 78=I L R (1939) 1 Cal 288 = 1939 M W N 601 (P C).

second crop without permission — Government water when it gets into landholder's tank becomes his property — Landholder is entitled to levy extra charge for extra water for second crop — Fact that tenant pays cess to Government under Madras Irrigation Cess Act makes no difference.

On no conceivable theory can the water in an estate tank, the solum of which is vested in the landholder, be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon water belonging to Government but upon its coming from a source belonging to the Government. Therefore where water in the landholder's tank is augmented by water from Government source, once the Government water gets into the tank it becomes the property of the landholder and the landlord is entitled to levy an extra charge from his tenant of a single crop wet land who utilizes extra water, without permission, from the tank for raising a second crop on his holding: *A I R 1938 Mad 342, Rel. on.* [P 458 C 1]

The fact that under the Madras Irrigation Cess Act, 1865, the Government has power to levy from the tenant a water cess makes no difference for S. 1-A (4) of that Act leaves the position of the landholder and the tenant inter se entirely unaffected. [P 458 C 1]

P. N. Marthandam Pillai and C. Rangaswamy Iyengar — *for Appellant.*

K. Swaminatha Ayyar—*for Respondent.*

ORDER OF REFERENCE.

Patanjali Sastri J.—This second appeal raises the question whether the applicant as a landholder is entitled to levy any extra charge for water taken by the respondent, a ryot, for the cultivation of second crop on his holding which is a single crop wet land. It is common ground that it became possible to raise second crop on the land only because of the supply of Periyar water for which the ryot has paid water cess to the Government and that this Periyar water is stored in the appellant's tank before it is supplied to the respondent for irrigation purposes. It appears to be well settled that ordinarily if a ryot takes water from the village tank for cultivating a second crop for a holding which is registered as single crop wet land, the landholder is entitled to levy extra charge: *see* 13 M L W 387,[1] 12 M L J 22[2] and the observations of Varadachariar J. in (1938) 1 M L J 256.[3] But the difficulty in this case arises owing to the water supply in the village tank being supplemented by Periyar water for which the respondent has to pay water cess to the Government. It is argued for the respondent that the water used for the cultivation of the second crop was really Government water and not the landholder's water and that therefore the basis of the appellant's claim fails. But I find it difficult to discover any principle underlying the argument that merely because the water, which is normally collected and stored in the landholder's tank and is supplied to the ryot therefrom by means of sluices controlled and regulated by the landholder, is supplemented from a Government source and the ryot is called upon on that account to pay water cess to the Government, the water that is supplied to the ryot for his second crop should be deemed to be Government water so as to disentitle the landholder from claiming an extra charge for such water. On no conceivable theory can the water in an estate tank, the solum of which is vested in the landholder, be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government: 56 Mad 696[4] at p. 699. It seems to me therefore that on the principle of the series of decisions referred to above, the water flowing into the landholder's tank even from a Government source becomes landholder's water though the fact that such water comes into the tank and is paid for by the ryot may conceivably make a difference as to the quantum of the extra charge leviable by the landholder for the use of such water for a second crop.

The only decision which appears to have considered this question is 59 Mad 5,[5] but the learned Judges there have spoken with different voices and the consideration of the question was to a certain extent complicated by the contention there raised that such a claim for an extra charge would amount to an enhancement within the meaning of S. 30, Madras Estates Land Act. Venkatasubba Rao J. seems to take the extreme view that even in an ordinary case where no Government water is brought into the tank, the landholder's right to rent must be determined with reference to the Sections of the Estates Land Act and that unless he brings himself within the terms of S. 30, he has no right to levy an extra charge for water taken for second crop cultivation on single crop wet lands. It seems to me that this view cannot now be sustained in view of the Full Bench decision in (1938) 1 M L J 256[3] which clearly recognizes the existence of the landlord's right to levy extra charge for unauthorized appropriation of water in the landholder's tank quite apart from the provisions of the Estates Land Act. See the observations of Varadachariar J. at p. 266. Ramesam J., the other learned Judge who took part in 59 Mad 5,[5] would seem to agree with the earlier cases of this Court holding that in the ordinary case, the landlord would be entitled to levy an extra charge for unauthorized user of the water for second crop cultivation and the claim to such a charge would not be an enhancement under S. 30 (at p. 15). But the learned Judge seems to be of the opinion that where, as in the present case, Government water has been brought into the tank and the ryot pays water cess to the Government, the landlord will have no right to levy an extra charge except by applying under S. 30 of the Estates Land Act to the Collector and showing that he has fulfilled the conditions laid down in that Section (at p. 26). It is difficult however to see why the additional supply of water to the landholder's tank from a Government source and the consequent payment of water cess to the Government by the ryot should so radically affect not only the landlord's right to recover an extra charge for second crop but also the procedure for its recovery.

---

[1] Midnapore Zamindary Co. Ltd. v. Muthappudayan, (1921) 8 A I R Mad 195=62 I C 337 =44 Mad 534=40 M L J 213=13 M L W 387.

[2] Venkatarao v. Vaithilinga Udayan, (1902) 12 M L J 22.

[3] Venkataraju Garu v. Maharaja of Pithapuram, (1938) 25 A I R Mad 342=174 I C 434=I L R (1938) Mad 381=(1938) 1 M L J 256 (F B).

[4] Ayyanna v. Secretary of State, (1933) 20 A I R Mad 646 = 145 I C 594 = 56 Mad 696 = 65 M L J 179.

[5] Sundaram Pillai v. Karuppayee Ammal, (1935) 22 A I R Mad 1073=160 I C 1015=59 Mad 5 =69 M L J 48.

The question is by no means free from difficulty and having regard to its general importance to numerous landholders and ryots in the region covered by the Government Periyar Project, I think it desirable that there should be an authoritative ruling on the point. I refer this appeal therefore to a Bench and direct it to be placed before the Chief Justice for orders as to posting it before a Division Bench or a Full Bench as my lord thinks fit.

Judgment of the Division Bench.

Leach C. J.—The appellant is a landlord and supplies water to his tenants from his own tank. The respondent is one of the tenants, and previous to Fasli 1343 he took sufficient water from the tank for the cultivation of one crop on his holding. In Faslis 1343, 1344 and 1345 without his landlord's permission he took water for the raising of a second crop. As the result, the appellant filed a suit in the Court of the Deputy Collector, Melur, for the recovery of water rate on the basis of the two crops which the respondent had raised in each of the years mentioned. The Deputy Collector decreed the suit. An appeal then followed to the District Judge of Madura who reversed the Deputy Collector's decision in so far as it related to the additional charge claimed as the result of the tenant using water for the raising of second crops. Throughout it has been common ground that the water in the appellant's tank was augmented by water which Government allowed to flow into it from channels leading from the Periyar dam, which is a Government source. The respondent's case was that he had raised the second crop from water belonging to Government flowing from the appellant's tank. It may be taken that the raising of the second crop was only possible as the result of the increase in the water in the tank resulting from the supply which the tank received from the Periyar dam. The District Judge held that the landlord was not entitled to rent based on the second crop unless he could show that he had increased the capacity of the tank by deepening it or widening it or raising its bunds to receive Periyar water so that it might be available to the tenants to raise second crops. The landlord had not done this, but even if he had he could not, it was said, get anything extra unless he applied under S. 30, Madras Estates Land Act, 1908, for enhancement of rent. The District Judge also held that the water which the respondent had used for the raising of the second crops was not the landlord's water, but water belonging to Government. He expressed the opinion that the extent of the water passing through the landlord's tank could not confer on the landlord any special rights in the absence of proof that he had contributed something for the purpose of facilitating the supply. The appellant, having lost before the District Judge, filed the present appeal which in the first instance came before Patanjali Sastri J. who considered that the question was one which should be decided by a Bench.

The decision of the District Judge is erroneous on both the points which I have mentioned. I will take the second point first. The fact that the Government water flowed into the appellant's tank did not mean that when that water got there it remained Government water. It mingled with the appellant's water and it must be regarded as being the appellant's water. I agree with the remarks of Patanjali Sastri J. in his referring order that on no conceivable theory can the water in an estate tank, the solum of which is vested in the landholder, be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon water belonging to the Government but upon its coming from a source belonging to the Government. The Government, if it had so desired, could no doubt have prevented its water flowing into the appellant's tank, but it allowed its water to get there and once it got there it passed out of its control and must in law be regarded as the property of the appellant. When the District Judge delivered his judgment the decision of the Full Bench of this Court in I L R (1938) Mad 381[3] had not been given and the legal position had therefore not then been clarified. In that case, as in this, extra water for a second crop had been taken by a tenant from a landholder's tank without the landholder's permission and the landholder filed a suit before the Deputy Collector for the recovery from the ryot of a sum of money for water taken without his permission. It was held that "rent" as defined in S. 3 (11) of the Act included money payable for water taken without permission and the suit was not a suit for enhancement of rent. The decision in I L R (1938) Mad 381[3] clearly governs the present case and the appellant's contention that he is entitled to recover the amount claimed by him for the water taken from his tank for the raising of the second crops in the three years mentioned must be upheld.

The fact that under the Madras Irrigation Cess Act, 1865, the Government has power to levy from the respondent a water cess makes no difference. S. 1-A (4) provides that nothing in the Section shall affect the rights and liabilities of the landholder and the ryot inter se under any contract expressed or implied, in regard to the payment of water cess. Therefore, the Act leaves the position of the landholder and the tenant inter se entirely unaffected. The respondent having taken water for the second crop from the appellant's own tank must pay for it. The appeal will be allowed and the order of the Deputy Collector restored with costs here and in the lower Appellate Court.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 458

VENKATARAMANA RAO AND
KUNHI RAMAN JJ.

Akki Dodda Basappa — Appellant.

v.

Akki Mallamma and another — Respondents.

Appeal No. 295 of 1936, Decided on 16th October 1939, against decree of Dist. Court, Bellary, D/- 13th October 1936.

(a) Hindu Law — Widow — Maintenance — Decree against undivided members made charge on family property—Decree cannot be defeated by any subsequent partition between members.

Where a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, i.e. instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. [P 460 C 1]

Where therefore the widow has secured her right of fixing her claim against the whole joint family and getting a charge on a reasonable portion of the property, the right or charge cannot be taken away from her by any subsequent partition between the members of the family: *AIR 1939 Mad 781 (F B), Expl.; 27 Mad 45 ; 2 Bom 494 ; A I R 1927 Mad 1189 and A I R 1937 Mad 915, Rel. on.* [P 460 C 2]

(b) Hindu Law — Widow — Maintenance decree against undivided members — Subsequent partition — No suit lies by member for declaration that he is not liable for maintenance by reason of partition to which widow was consenting party — Question falls within S. 47, Civil P. C.

Where a widow obtains a decree against the undivided members of the joint family and subsequently the members effect a partition, a suit, by a member for declaration that as a result of the partition, to which the widow was a consenting party, he is not liable for her maintenance, does not lie. The question falls within the purview of S. 47, Civil P. C. [P 461 C 1]

V. S. Narasimhachari — *for Appellant.*

D. R. Krishna Rao and K. Umamaheswaran — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the decree of the learned District Judge of Bellary dismissing the plaintiff's suit for a declaration that the decree passed in O. S. No. 3 of 1928 on the file of the Sub-Court of Bellary against himself and defendant 2 in favour of defendant 1 is not binding on him. The facts are few and not in dispute. Defendant 1's husband died in or about 1918 leaving him surviving defendant 1, defendant 2 his son by the first wife and the plaintiff his brother. On the date of his death defendant 1's husband was a member of an undivided family consisting of himself, the plaintiff and defendant 2. In 1928 defendant 1 filed a suit for maintenance and residence against the plaintiff and defendant 2 and obtained a decree on 23rd January 1929 by which the plaintiff and defendant 2 were directed to pay maintenance at the rate of Rs. 40 per month and arrears of maintenance and the maintenance decreed was made a charge on the property described in Schs. A and B to the decree. The decree also directed the plaintiff and defendant 2 to put defendant 1 in possession of the house, item 2 in Sch. C to the decree, and defendant 1 was to enjoy the same for her lifetime after which it must revert to the plaintiff and defendant 2. In pursuance of the said decree, defendant 1 was put in possession of the said house and she had been realizing the maintenance in accordance with the terms of the said decree. It is alleged in the plaint that on 18th December 1935 the plaintiff and defendant 2 effected a partition between themselves and that by reason of the said partition the plaintiff was no longer bound by the said decree. The allegation in regard thereto is made in para. 5 of the plaint thus:

> Under Hindu law defendant 1 is entitled to be maintained out of her husband's property and there is no such obligation against the plaintiff after the division of the joint family properties. The decree in O. S. No. 3 of 1928 became inoperative after the division between plaintiff and defendant 2. The decree in O. S. No. 3 of 1928 is against the joint family properties and there are no such properties now. There is no personal obligation on the plaintiff to maintain defendant 1.

It is alleged in the plaint that defendant 1 agreed to the terms of the division by which the plaintiff was not to be liable under the decree. The main defence of defendant 1 was that she was not a consenting party to the division at all and that the decree in question was obtained by her against the plaintiff and defendant 2 personally as well as against the joint family properties of the family, that no partition made subsequently by the plaintiff and defendant 2 without her assent would be of any avail or could legally operate to extinguish the decree obtained by her. The defence of defendant 2 was that in the partition effected between himself and the plaintiff he got very little property, that the major portion of the property, was retained by the plaintiff that it would be unjust to shift the burden of the entire decree on him and in any event the decree in O. S. No. 3 of 1928 continued to be binding on all the parties and could not be declared to be not binding on the plaintiff. The learned District Judge dismissed the suit on the ground that the suit was incompetent by reason of S. 47, Civil P. C.

In appeal, it is contended by Mr. Narasimhachariar, counsel for the plaintiff-appellant, that by reason of the subsequent partition the plaintiff is no longer bound to maintain defendant 1 and the said decree obtained against him must therefore be declared inoperative. He contends that as the decree is a maintenance decree, it is open to the plaintiff to institute a suit by reason of the events that happened subsequent to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree and that it is competent to the Court to modify the same in view of the said change of circumstances. He has also urged that the partition is such a subsequent event and under the Hindu law the obligation to maintain a widow is only from out of her husband's share and as the husband's share has now fallen to defendant 2 the proper person to maintain her is defendant 2, the plaintiff's obligation having ceased with the disruption of the family. Mr. Narasimhachariar has not been able to cite any authority in support of any of the contentions put forward and he frankly confesses that there is no direct authority on the point. He however contends that the recent decision of the Full Bench in (1939) 2 M L J 340[1] at p. 343, though not a direct decision on the point would cover the present case. The exact point for decision before the Full Bench was whether the decision in 35 Mad 147[2] or the decision in 55 Mad 752[3] was correct. Their Lordships were of the opinion that 35 Mad 147[2] was wrongly decided and that 55 Mad 752[3] should be followed; 55 Mad 752[3] decided that

> where the widow of a coparcener sues for maintenance after there has been a partition, she cannot

---

[1] Lakshmidevamma v. Veera Reddi, (1939) 26 A I R Mad 781 = I L R (1939) Mad 877 = (1939) 2 M L J 340 (F B).

[2] Subrayulu Chetti v. Kamalavalli Thayaramma, (1911) 35 Mad 147 = 10 I C 347 = 21 M L J 493=(1911) 2 M W N 148.

[3] Narasimham v. Venkatasubbamma, (1932) 19 A I R Mad 351=137 I C 749=55 Mad 752= 62 M L J 433.

enforce her right against any of the surviving coparceners except those who have taken her husband's share.

But Mr. Narasimhachariar contends that the reasoning on which that decision was based would apply to the case in question. We are not inclined to agree with him in this contention. The observations in (1939) 2 M L J 340[1] at p. 343, on which reliance is placed, run thus:

> There is here a clear statement (referring to Smritichandrika) that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasized that the duty is dependent on the taking of the property.

But their Lordships proceed further and remark as follows:

> While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate.

It seems to us that these observations would apply to the present case. When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, i. e., instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. In 27 Mad 45,[4] Bhashyam Ayyangar J. made the following observations which are referred to by the Full Bench with approval:

> When an undivided Hindu family consists of two or more males related as father and sons or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, quoad the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving coparcener or coparceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein.

These observations are in strict consonance with the theory of Hindu law that when a member of an undivided family dies, his share survives to all the members of the family and every member has got an interest therein subject to the principle that so long as there is a son, a grandson, and a great grandson of the deceased coparcener the share of the deceased coparcener would be taken by the son or grandson or great grandson on a partition on the principle of representation and in their absence only would the shares of the other members be augmented. As observed by West J. in 2 Bom 494[5] at p. 509:

> The rule is a consequence of the doctrine that the right of each coparcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint tenants.

In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in A I R 1927 Mad 1189[6] and also by Varadachariar J. in 46 M L W 550[7] the charge created in her favour need not be limited to the husband's share but in certain circumstances may exceed the husband's share. When therefore the widow has secured her right fixing her claim against the whole joint family and getting a charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family. The cases relied on by Mr. Narasimhachariar where the maintenance has been reduced or increased according as the circumstances of the family do not affect the question in issue at all, nor can the Full Bench decision be taken as an authority for the position that a right secured by a widow against the entire joint family by a decree of Court is taken away by a subsequent partition between the members of the family. At the partition it is open to members to stipulate that the widow's maintenance may be paid by any one of the members as in this case by defendant 2 and that in default of payment the other members may have a right to contribution or indemnity against the person who under the partition was made liable to pay. But that is an arrangement inter se between the members with which the widow has no concern.

Where a widow has secured a charge on certain properties that charge is not de-

---

4. Jayanti Subbiah v. Alamelu Mangamma, (1904) 27 Mad 45.

5. Lakshman Ramachandra v. Satyabhamabai, (1877) 2 Bom 494.

6. Karuppa Kaundan v. Chinna Nallammal, (1927) 14 A I R Mad 1189.

7. Ramarayudu v. Sitalakshmamma, (1937) 24 A I R Mad 915=177 I C 33=46 M L W 550.

feated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. In our opinion partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosever's hands the properties may be. We are therefore of the opinion that the plaintiff is not entitled to the declaration sought. In view of this, it is unnecessary to go into the question whether a suit is competent or not. But there is a question of fact raised by the plaintiff, namely that the widow was a consenting party to the partition by which the plaintiff's liability came to an end and therefore by reason of the adjustment thus arrived at between all parties his liability under the decree became satisfied. This would strictly be a question under S. 47, Civil P. C., and cannot be gone into in an independent suit. Mr. Narasimhachariar now requests that the plaint may be converted into a petition under S. 47, Civil P. C. We allow the plaint to be treated as a proceeding under S. 47, in so far as the relief based on adjustment of the decree is concerned and direct the plaintiff to strike out para. 5 of the plaint and all other allegations in the plaint in so far as they have a bearing on the question raised in para. 5 which has been decided against him by this judgment. We therefore direct the District Judge of Bellary to go into the question whether defendant 1 was a consenting party to the partition and agreed to take her maintenance only from defendent 2 and agreed to treat the liability of the plaintiff as satisfied under the decree. It is open to the defendants to file a counter affidavit raising such objections as they may be advised in regard to the premises. Subject to the directions given above, the appeal fails and is dismissed with costs—one set.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 461

PATANJALI SASTRI J.

Peri. Su. Aru. Peria Karuppan Chettiar — Appellant.

v.

Doraiswamy Naicken and others — Respondents.

Second Appeal No. 585 of 1936, Decided on 31st October 1939, against decree of Dist. Court, Coimbatore, in A. S. No. 222 of 1934.

(a) Civil P. C. (1908), O. 34, R. 5 — R. 5 recognizes only payment into Court—Preliminary mortgage decree cannot be deemed to be satisfied by private purchase by mortgagee from mortgagor—Mortgagee is still entitled to apply for final decree.

Order 34, Rule 5 recognizes only one method of payment, namely payment into Court, of the amount fixed in the preliminary mortgage decree and that in default of such payment the Court is bound on the application of the decree-holder to pass a final decree for sale. [P 462 C 2]

Therefore a preliminary mortgage decree cannot be deemed to have been satisfied by the private purchase from the mortgagor by the mortgagee so as to stop the running of time. There is nothing to preclude the mortgagee from filing the application for final decree even after the purchase: *A I R 1919 Mad 792, Rel. on.* [P 462 C 2]

(b) Limitation Act (1908), S. 20 (2) — Payment—S. 20 (2) applies where mortgagee is in possession and receives rents and profits as mortgagee and not as purchaser from mortgagor though his title may not prevail against third person.

Provisions of S. 20 (2) apply only when the mortgagee is in possession of the property and receives the rents and profits thereof as a mortgagee but not where he is in possession and receives the rents and profits in his own absolute right as against the mortgagor, though it may turn out to be the case that such right cannot prevail against the title of a third party. Therefore the receipt of rents by the mortgagee as the owner of the property under his purchase from the judgment-debtor cannot be said to be payment within the meaning of S. 20: *A I R 1937 Mad 642 and A I R 1934 Mad 656, Rel. on ; A I R 1922 Cal 114 and A I R 1938 Mad 465, Disting.* [P 462 C 1]

S. Ramachandra Iyer — *for Appellant.*

A. C. Sampath Ayyangar — *for Respondents.*

Judgment. — The only question arising in this appeal is one of limitation. Respondent 1 having obtained a preliminary mortgage decree on 8th April 1926, filed an application for the passing of the final decree for sale on 27th October 1933. The appellant who had even before the institution of the mortgage suit attached the same property in execution of his money decree and purchased it in execution on 6th July 1931 opposed the application as barred by limitation. Both the Courts below have held that the application is not barred and passed a final decree for sale. Against that decree this appeal has been preferred.

The appellant's learned counsel contends that both the grounds on which the Court below has overruled the plea of limitation are erroneous and unsustainable, while the respondent 1's learned counsel maintains that they are valid. The time fixed for payment under the preliminary decree having expired on 8th October 1926, the application for final decree made in October 1933 is prima facie barred but the respondent invokes S. 20 (2), Limitation Act, and contends that, inasmuch as he was placed in possession of the mortgaged property in pursuance of a private sale from the mortgagor in July 1926, pending the attachment in execution of the appellant's decree, his receipt of the rents and profits of the property should be regarded as payments by the mortgagor within the meaning of that Section so as to extend the period of limitation each time such rents and profits were received. This contention cannot be accepted as it has been held by this Court in (1937) 2 M L J 170[1] and 153 I C 462,[2] that the provisions of S. 20 (2) apply only when the mortgagee is in possession of the property and receives the rents and profits thereof as a mortgagee but not where he is in possession and receives the rents and profits in his own absolute right as against the mortgagor, though it may turn out to be the case that such right cannot prevail against the title of a third party. In view of these decisions, it cannot be said that the receipt of rents by the respondent as the owner of the property under his purchase from the judgment-debtor was a payment within the meaning of S. 20.

Respondent 1's learned counsel has placed reliance in support of his contention on 35 C L J 58.[3] But, in that case, the sale to the mortgagee was not completed so that the relationship of mortgagor and mortgagee between the parties still continued to subsist. The decision therefore does not assist the respondent in this case. It was distinguished on this ground in (1937) 2 M L J 170.[1] Respondent 1's counsel also relied on the decision of Horwill J. reported in A I R 1938 Mad 465[4] but the facts of that case were entirely different and it has no application here as there is no question of estoppel or taking up of inconsistent positions.

The second ground urged for getting over the bar of limitation is that respondent 1's decree must be deemed to have been satisfied by the private sale of the property to him in July 1926 and that it was only when the appellant purchased the property in Court auction in execution of his own decree in July 1931 that the liability under the preliminary mortgage decree was revived. This argument proceeds, in my opinion, upon a misconception of the true position so far as the decree is concerned. There is no question here of setting aside any sale which previously operated as a satisfaction of the decree. The private purchase by the respondent was, to his knowledge, always subject to the infirmity that it was liable, by virtue of S. 64, Civil P. C., to be superseded by the appellant bringing the property to sale in pursuance of his attachment in the execution of his own decree. It cannot therefore be said that there was any satisfaction of the decree and such satisfaction has since been set aside so as to revive that decree. Moreover, it has been held in this Court that O. 34, R. 5 of the Code recognises only one method of payment, namely, payment into Court of the amount fixed by preliminary mortgage decree and that in default of such payment, the Court is bound on the application of the decree-holder to pass a final decree for sale: *see* 42 Mad 61.[5] Therefore the preliminary mortgage decree could not be deemed to have been satisfied by the private purchase from the mortgagor so as to stop the running of time, and there was nothing to preclude the respondent from filing the application for the passing of the final decree after 8th October 1926. This contention also fails.

The respondents' counsel lastly urged that, in any case, as there have been successive acknowledgments or payments under Ss. 19 and 20, there can be no bar of limitation. He relies upon the payment of costs by the appellant as defendant 5 in the mortgage suit in October 1928 and the subsequent acknowledgment of the mortgage debt in Ex. E, the execution application filed by the appellant in February 1930 in which it was stated that the property was subject to the mortgage in favour of respondent 1. But the payment in October 1928 cannot avail the respondent as it is not evidenced by any writing as required by S. 20, Limitation Act, and it is clear that, if the payment in October 1928 cannot be relied on, Ex. E will be of no use. The appeal therefore succeeds and is allowed with costs throughout. Leave to appeal granted.

C.R.K./G.N. *Appeal allowed.*

---

[1] Mohamad Yusuf v. Narayana Pillai, (1937) 24 AIR Mad 642=172 IC 576=(1937)2 MLJ 170.

[2] Failesatha Banu v. Muhammad Rashidhuddin Quaraishi, (1934) 21 A I R Mad 656=153 I C 462.

[3] Bamacharan v. Nimai, (1922) 9 A I R Cal 114 =64 I C 903=35 C L J 58.

[4] Mariyappa Nadar v. Ramanuja Naick, (1938) 25 A I R Mad 465=180 I C 908.

[5] Singa Raja v. Pethu Raja, (1919) 6 A I R Mad 792=48 I C 196=42 Mad 61=35 M L J 579.

* A. I. R. 1940 Madras 463

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Meenakshi Ammal and another — Appellants.

v.

Murugayya Mooppanar — Respondent.

Letters Patent Appeal No. 29 of 1937, Decided on 8th November 1939, against judgment of Varadachariar J., in S. A. No. 1280 of 1932, *reported in A. I. R. 1937 Madras 640.*

*** Hindu Law — Succession — Illegitimate daughters are not entitled to succeed to stridhanam of their mother's mother.**

It is true that so far as the daughter is concerned, she is entitled under the Hindu law to succeed to her mother's property notwithstanding she is illegitimate. But there is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's stridhanam. Hence, the illegitimate daughters of a Hindu woman are not entitled to succeed to the stridhanam of their mother's mother, where the family is governed by the ordinary Hindu law and not by rules based on custom as in the case of dancing girls: *4 Bom 104; 31 Bom 495 and 26 Mad 509, Expl.; A I R 1915 Mad 63, Ref.* [P 464 C 1, 2]

K. S. Desikan — *for Appellants.*

S. Muthiah Mudaliar — *for Respondent.*

Leach C. J.—The question raised in this appeal is whether the illegitimate daughters of a Hindu woman are entitled to succeed to the stridhanam of their mother's mother, the family being governed by the ordinary Hindu law and not by rules based on custom as in the case of dancing girls. The appellants are the illegitimate daughters of one Dharmu Ammal, who died on 27th April 1921. Dharmu Ammal was the legitimate daughter of one Murugayi Ammal, who left stridhanam property. The appellants claim that under Hindu law they are the nearest heirs of Murugayi, who was also survived by Venkatachalam Chetti, the grandson of her sister. It is common ground that if the appellants are not heirs of Murugayi the person entitled to the property is Venkatachalam. The suit out of which this appeal arises was filed by the appellants in the Court of the District Munsif of Tiruvadi with the object of setting aside an alienation of immovable property forming part of Murugayi's stridhanam. The alienation was in favour of the respondent's predecessors-in-title and was made by Venkatachalam on 20th July 1910. The District Munsif accepted the appellants' contention that they were the heirs of Murugayi and decreed the suit, but his decision was reversed on appeal by the District Judge of West Tanjore. The appellants then appealed to this Court and their appeal was heard by Varadachariar J. who confirmed the decree of the District Judge. Varadachariar J. pointed out that the general principle of the Hindu law was undoubtedly to limit heirship to legitimate issue, but in the case of illegitimate sons amongst Sudras a special exception had been made by the texts. The exception did not however extend beyond the illegitimate sons of Sudras. The fact that Courts had recognized as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations. It has been argued on behalf of the appellant that the following paragraphs from the Mitakshara, Chap. II, S. 11 should be read as including both the legitimate and illegitimate daughters:

> (15) On failure of all the daughters, the daughters' daughters take, under this text. "It will go to the daughters if she leaves progeny, &c."
>
> (16) If there be a multitude of these (and if they be) children of different mothers, and unequal in number, shares should be allotted to them through their mothers, as directed by Gautama: "Or, according to the mothers, let the special shares (be adjusted) in each class."
>
> (17) If there be daughters as well as daughters' daughters simultaneously, a trifle only should be given to the daughters' daughters. As has been directed by Manu: "Such of the daughters of those (daughters) as may exist, even to those, something should be given, as may be fit, from the property of the grandmother, on the score of affection."

This argument is expressly negatived by the decision of this Court (Oldfield and Seshagiri Iyer JJ.) in 38 Mad 1144.[1] Oldfield J. observed:

> It was then contended that references to 'daughters' in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son, as heirs to their mother. But, firstly, that is not the primary sense of those references and is unauthorized by the rules of interpretation recognized by both English and Hindu law: *vide* 33 Bom 452.[2] And next, it has not been shown how such a substitution can be carried out or logically limited, should it, for instance, be extended to the law relating to the daughter's right to inherit from the father, in spite of the absence of any special provision in her favour such as is available in the case of illegitimate sons?

Seshagiri Iyer J. after referring to the text conferring a right of heirship on the illegitimate son of a Sudra, observed that illegitimate children have no place in

---

[1] Meenakshi v. Muniyandi Panikhan, (1915) 2 A I R Mad 63=25 I C 957=38 Mad 1144=27 M L J 353.

[2] Bhimacharya v. Ramacharya, (1909) 33 Bom 452=3 I C 750=11 Bom L R 654.

Hindu law when there are legitimate heirs at least under the Mitakshara system, except in the special case of the illegitimate son of a Sudra. Before the ordinary rules of succession can be departed from in favour of illegitimate offspring, there must be express authority to be found in the ancient texts or some statutory provision. It is conceded that the texts do not go beyond making provision in respect of an illegitimate son of a Sudra and the appellants are not able to rely on any statutory provision. With one exception, the cases which have been quoted to the Court have all had reference to the rights of the daughter, not the granddaughter, to succeed. It is not disputed by the learned advocate for the respondent that so far as the daughter is concerned she is entitled under the Hindu law to succeed to her mother's property notwithstanding she is illegitimate. Of course, if there were also a legitimate daughter the illegitimate daughter would be postponed to the legitimate issue.

The case which provides the exception is 26 Mad 509,[3] where the question was whether the degradation of a daughter on account of her adultery put an end to her right to inherit the stridhanam property of her mother. It was held that because the daughter had been living in adultery she did not lose her right to inherit her mother's stridhanam property. On this finding it was held that the daughter's two illegitimate daughters were held to be entitled to their grandmother's stridhanam in preference to their mother's brothers. The question whether the illegitimate daughters were entitled to inherit their grandmother's property was never raised. It was merely assumed that the illegitimate daughters took their mother's place. Therefore the judgment in that case cannot be read as deciding the question now before us or accepted as an authority in favour of the appellants' contention.

The learned advocate for the appellants has drawn the Court's attention to a statement in Sir Hari Singh Gour's Hindu Code, Edn. 4, p. 1149, where it is stated that unchastity and illegitimacy are no bar to succession to stridhanam. This broad statement is based on the decisions of the Bombay High Court in 4 Bom 104[4] and 31 Bom 495.[5] An examination of the judgments in these cases, however fails to lend support to the statement that illegitimacy is no bar to succession to stridhanam, if by this is meant succession to the stridhanam of a person other than the mother. In the former of these two cases the question was whether under the Hindu law prevailing in the Bombay Presidency a daughter was barred by incontinence from succession to the estate of her father, and it was held that she was not. In the latter case, a daughter who had lived by prostitution claimed her father's property as heir to the exclusion of her sisters who were married. The question was whether the rule that an unmarried daughter inherits to her father before his married daughter applied in such a case. It is clear that there is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's stridhanam. I consider that the decision of Varadachariar J. is correct and that the appellants are not entitled to have the alienation set aside. They are not heirs of Murugayi and the person who is entitled to her property is Venkatachalam who was responsible for the alienation to the respondent's predecessor-in-title. The appeal will be dismissed with costs.

Krishnaswami Ayyangar J.—I am of the same opinion. I can find no warrant for holding that as a general rule the system of succession under the Mitakshara law is based on a relationship other than a relationship through valid marriage and legitimate descent. A qualified right in favour of the illegitimate son amongst sudras, by choice of the father as it has been described, has been recognized but this is in the nature of an exception and must accordingly be kept within the limits of the exception itself. It is true that an illegitimate daughter has been held to be entitled to inherit to the stridhanam property of her mother. This right will however be found on examination to be based not upon any ancient texts or rule of law but upon custom and analogy : *See* 2 M H C R 196[6] at p. 201. Reference was made by learned counsel for the appellant to a passage from Yagnavalkya cited in the case mentioned. That passage is :

> A damsel's child is one born of an unmarried woman; he is considered the son of his maternal grand-sire.

---

[3] Angammal v. Venkata, (1903) 26 Mad 509.

[4] Advyappa v. Rudrava, (1879) 4 Bom 104.

[5] Tara v. Krishna, (1907) 31 Bom 495 = 9 Bom L R 774.

[6] Myna Bai v. Ootaram, (1859-61) 8 M I A 400 =2 M H C R 196=2 W R 4=1 Suther 452= 1 Sar 797 (P C).

This text has reference to the kanina son, one of the twelve sons recognized in the ancient law of whom all except one have long since become obsolete. The passage throws no light on the right of a daughter's daughter to inherit to her grandmother's estate. Even if the text should be held to have validity at the present day it would only mean that a kanina son would be entitled to inherit directly as a son to the maternal grandfather's estate. The text however has really no bearing on the question which falls to be decided in this case.

C.R.K./D.S. *Appeal dismissed.*

---

* * A. I. R. 1940 Madras 465

FULL BENCH

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

E. P. Kumaravel Nadar — Petitioner.

v.

T. P. Shanmuga Nadar and others — Respondents.

S. R. Nos. 32601, 32137 and 28253 of 1939, Decided on 4th March 1940, to revise order of Dist. Court, Tinnevelly, D/- 30th August 1939.

*** * Criminal P. C. (1898), Ss. 439 and 476 —Order of Civil Court under S. 476—Revision lies under S. 115, Civil P. C., and not under S. 439, Criminal P. C.:** *I L R (1939) Mad 439 =A I R 1939 Mad 472=(1939) 1 M L J 480, Overruled.*

Section 439 only applies to cases which come before the Criminal Courts within the meaning of the Code of Criminal Procedure. A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476 and if for the purposes of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure and not by those of the Code of Criminal Procedure. Hence, where an order has been passed by a Civil Court under S. 476, Criminal P. C., S. 439 has no application. The High Court can only exercise the revisional powers under S. 115, Civil P. C.: *26 Mad 139; A I R 1917 Mad 971 (F B); 40 Cal 477 (F B) and A I R 1931 Cal 604, Foll.; A I R 1938 Bom 225 (F B) and A I R 1931 Lah 761 (F B) Dissent.; A I R 1934 Mad 52 (F B), Expl.; I L R (1939) Mad 439=A I R 1939 Mad 472=(1939) 1 M L J 480,* **Overruled.** [P 468 C 1; P 469 C 2]

N. Rajagopala Ayyangar for P. S. Raghavarama Sastri, K. S. Rajagopalachari for K. Rajah Ayyar and S. Ramachandran for R. Sundaralingam — *for Petitioner.*

Advocate-General — *for Respondents.*

Leach C. J. — Three matters have been placed before this Full Bench and they can be dealt with conveniently in the same judgment as they all involve the same question. The first case arises out of a suit which was tried by the Subordinate Judge of Tinnevelly. The plaintiff contended that a postcard which had been put in evidence by defendants 1 and 2 on the allegation that it had been written by defendant 3 to defendant 2 was a false document. Subsequently, the plaintiff filed an application asking the Court to prosecute the three defendants under the provisions of S. 476, Criminal P. C., for offences alleged to have been committed under Ss. 463, 464, 471, 473 and 476, I. P. C. The Court dismissed the application and the Subordinate Judge's decision was upheld by the judgment of the District Judge on appeal. The plaintiff has now asked this Court to revise the order of the District Judge under the provisions of Ss. 435 and 439, Criminal P. C., and to direct the prosecution to take place. In the second case an application was made to the Court of the District Munsif of Tiruvarur by the petitioner, the assignee of a decree, to direct the prosecution of the respondents under Ss. 206 and 207, I. P. C. The application was granted by the District Munsif, but the respondents appealed to the District Judge of East Tanjore, who reversed the order of the District Munsif. The petitioner asks that the order of the District Munsif be restored by this Court under its powers of revision under Ss. 435 and 439, Criminal P. C. The third matter arises out of an application filed by defendant 2 in a suit in the Court of the Subordinate Judge of Mayavaram against the respondents. The application was rejected by the Subordinate Judge and on appeal to the District Judge of East Tanjore the decision was upheld. The petitioner asks this Court to direct under the provisions of S. 115, Civil P. C., a complaint to be made.

Rule 37 of the Criminal Rules of Practice and Orders of this Court provides that every application made to a Criminal Court under the provisions of Ss. 476, 476-A or 485, Criminal P. C., and every appeal filed against an order made under these Sections or filed in a Court of Session against an order of a Court of Small Causes in the mufassal under S. 486, Criminal P. C., shall be registered as a criminal miscellaneous petition and a criminal appeal respectively. The rule further directs that such applications or appeals when filed in a Civil Court shall be registered as civil miscellaneous petitions and civil miscellaneous appeals respectively and states that the rule applies to revision petitions also. The question which the Court is called upon to decide is whether the petitions now under discussion shall be registered as criminal or civil revision petitions. In the recent case in I L R (1939) Mad 439,[1] Pandrang Row J. held that the jurisdiction which is exercised by a Civil Court in filing a complaint under S. 476, Criminal P. C., is a jurisdiction exercised under that Code and that revision petitions to this Court should be filed on the criminal side and not on the civil side. The learned Judge was of the opinion that R. 37 was ultra vires. The question is one of considerable importance because the revisional powers of this Court under the Code of Criminal Procedure are greater than the powers conferred on it by S. 115, Civil P. C. Under the latter Code the Court can only interfere when a subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. Under S. 439, Criminal P. C., the High Court has power to exercise any of the powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428, and therefore has the power to interfere on a question of fact when in its opinion the finding of a subordinate Court is against the weight of evidence. The question now under discussion has been the subject of other decisions of this Court and has also been debated in most of the High Courts of India. I shall in due course refer to the cases which have been quoted to us in argument, but before doing so, it is desirable to refer in some detail to the Sections of the Code of Criminal Procedure which have bearing on the question.

Section 195 (1) (b) of the Code as it now stands states that no Court shall take cognizance of any offence puishable under Ss. 194, 195, 196, 199, 200, 205 to 211 and 228, Penal Code, when the offence is alleged to have been committed in, or in relation to, a proceeding in Court, except on the complaint in writing of the Court or of some other Court to which the Court is subordinate. Sub-s. 1 (c) contains a similar provision with regard to an offence described in S. 463 or punishable under Ss. 471, 475 or 476, Penal Code. Before the Code of Criminal Procedure was amended the Section did not require the Court to file the complaint. It only required the Court to give its previous sanction to the complaint being filed. Sub-s. (3) of S. 195 reads as follows :

> For the purposes of this Section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate :
>
> Provided that (a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; and (b) where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connexion with which the offence is alleged to have been committed.

Section 476 states that when a Civil, Revenue or Criminal Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in S. 195, sub-s. (1), cl. (b) or cl. (c) which appears to have been committed in or in relation to a proceeding in that Court, the Court may after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint in writing which shall be forwarded to a Magistrate of the First Class having jurisdiction, whereupon the Magistrate shall proceed according to law and as if upon complaint made under S. 200. S 476-A permits a superior Court to make the complaint where the subordinate Court has omitted to do so, and S. 476-B allows appeals from orders made on such matters by the subordinate Court. S. 476-B reads as follows :

> Any person on whose application any Civil, Revenue, or Criminal Court has refused to make a complaint under S. 476 or S. 476-A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-s. (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under S. 476 and if it makes such complaint, the provisions of that Section shall apply accordingly.

I have already referred in general terms to S. 439 of the Code, but it is necessary to examine its provisions more closely in conjunction with the provisions of S. 435. S. 435 states that the High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of a proceeding before an inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality, propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior Court. The Section only gives power to call for the record of a proceeding before an inferior Criminal Court. S. 439 reads as follows :

---

[1] In re D. S. Raju Gupta, (1939) 26 A I R Mad 472=ILR (1939) Mad 439=(1939) 1 MLJ 480.

> (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338, and may enhance the sentence; and when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429.
>
> (2) No order under this Section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Where the sentence dealt with under this Section has been passed by a Magistrate acting otherwise than under S. 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the First Class.
>
> (4) Nothing in this Section applies to an entry made under S. 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.
>
> (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.
>
> (6) Notwithstanding anything contained in this Section any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Although the Section does not in terms say that the High Court's power of revision is confined to criminal cases it seems to me to be obvious that the Section is not intended to travel beyond cases in Criminal Courts. Sub-s. (1) states that when the record has been called for, the Court may enhance the 'sentence.' Sub-s. (2) says that no order under the Section shall be made to the prejudice of "the accused" unless he has had an opportunity of being heard. Sub-s. (3) deals with the matter of "sentence." Sub-s. (4) provides that nothing in the Section applies to an entry made under S. 273 of the Code or be deemed to authorize the Court to convert a finding of "acquittal" into one of "conviction," and sub-s. (5) prohibits the Court from exercising revisional powers where the Code gives the right of appeal and no appeal has been preferred.

The only other Section which calls for mention before proceeding to examine the authorities is S. 478, which is to the effect that when any offence contemplated by S. 195 is committed before a Civil or Revenue Court, or is brought under the notice of a Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session or the Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, the Civil or Revenue Court may, instead of sending the case under S. 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be. For the purpose of an inquiry under this Section, the Civil or Revenue Court may exercise all the powers of a Magistrate and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chap. 18 and of Chap. 33 in cases where that Chapter applies and shall be deemed to have been held by a Magistrate. The fact that the Legislature considered that in such a case the Civil or Revenue Court should be given the powers of a Magistrate is not without significance. The Section shows that in holding the inquiry it is still a Civil Court and it is necessary to give it the authority of a Magistrate for the purpose.

Rule 37 of the Criminal Rules of Practice of this Court is based on the judgment of Bhashyam Ayyangar J. in 26 Mad 139.[2] The learned Judge was firmly of the opinion that the High Court cannot under the provisions of Ss. 435 and 439, Criminal P. C., revise an order passed by any Court other than a Criminal Court under cl. (b) or cl. (c) of sub-s. (1) of S. 195 of the Code according sanction for the prosecution of any person who is alleged to have committed any of the offences referred to in that Section. When the judgment of Bhashyam Ayyangar J. was delivered the Code of Civil Procedure 1882 was in force and the corresponding Section to S. 115 of the present Code was S. 622. While he was of the opinion that the provisions of the Code of Criminal Procedure could not be invoked when there were proceedings in a Civil Court under Ss. 195 and 476, Criminal P. C., he recognized that in a proper case the High Court would have powers of revision under the Civil Procedure Code. In 55 M L J 798[3] this Court held that it had no power under S. 115, Civil P. C., to interfere in revision with the decision of a Revenue Court, and since that case was decided this Court has not revised decisions of Revenue Courts unless the case was of a nature which justified the issue of a writ of certiorari. In 63 M L J 450,[4] which was decided by a Full Bench, doubts were cast on the correctness of the decision in 55 M L J 798,[3] except so far as Chapter 11, Madras Estates Land Act, 1908 was concerned, but that decision has been not overruled and has in fact since been followed. On the other hand, the Calcuttta High Court has from early days considered that it had power to revise decisions of Revenue Courts. In his judgment in 26 Mad 139[2] Bhashyam Ayyangar J. observed that as this Court had no power to interfere with the decision of a Revenue Court under S. 195, Criminal P. C., it was difficult to see on what principle similar proceedings of a Civil Court could be revised under S. 439, Criminal P. C. It has been suggested in the present case that as this Court has no power to interfere with the decision of a Revenue Court it would mean, if the view of Bhashyam Ayyangar J. is to prevail, that an order of a Revenue Court directing proceedings to be instituted for an offence referred to in S. 195, Criminal P. C., or an order refusing to institute proceedings would not be subject to revision at all. This may very well be the case, but because the Legislature has failed to provide for such an eventuality the Court cannot step in and remedy the defect. That must be left to the Legislature.

---

[2] In re Chennangowd, (1903) 26 Mad 139 = 2 Weir 197.

It was held by a Bench of three Judges of this Court (Oldfield, Sadasiva Iyer and Seshagiri Iyer JJ.) in 31 M L J 440[5] that on an application for revision of an order of a Civil Court granting sanction to prosecute under S. 476, Criminal P. C., the Court's powers of interference are limited to S. 115, Civil P. C., and therefore the High Court cannot interfere under S. 439, Criminal P. C. It is true that Sadasiva Iyer J. expressed doubt as to the correctness of the decision of Bhashyam Iyengar J. in 26 Mad 139,[2] but as the practice of treating such matters as being of the nature of civil revision petitions had existed for fourteen years in this province he did not wish to reopen the question. This decision must be regarded as expressing the law in this province unless it is overruled by a Bench of greater strength or the Legislature interferes.

In 57 Mad 177,[6] a Bench composed of Beasley C. J., Bardswell and Burn JJ. held that in an appeal under S. 476 B, Criminal P. C., in a civil proceeding the Appellate Court has power under cls. (c) and (d) of S. 423 of that Code to remand the matter to the lower Court for proper disposal. The application of the Criminal Procedure Code is certainly not in keeping with the decision in 31 M L J 440,[5] but as Bardswell J. who delivered the judgment of the Bench in 57 Mad 177[6] said that it was unnecessary to discuss whether the proceedings of a Civil Court under S. 476 B could be revised by a High Court under S. 439, Criminal P. C., and this in spite of the fact that 31 M L J 440[5] was mentioned in the order of reference, the conclusion is that it was not intended to question the authority of that decision, illogical though this may be. The basis of the decision in 57 Mad 177[6] was that the matter was of a criminal rather than of a civil character, but if this were the governing factor, the decision in 31 M L J 440[5] would be wrong. The Bench which decided 57 Mad 177[6] could not overrule the decision in 31 M L J 440[5] and did not purport to do so. In holding in I L R (1939) Mad 439,[1] that the jurisdiction which is exercised by a Civil Court in filing a complaint under S. 476, Criminal P. C., is a jurisdiction exercised under that Code and is of a criminal nature, Pandrang Row J. also did not consider the ruling of the Full Bench in 31 M L J 440[5] or the judgment of Bhashyam Ayyangar J. in 26 Mad 139.[2] His judgment was based on 57 Mad 177[6] and on the decision of the Lahore High Court in 13 Lah 342[7] and that of the Bombay High Court in I L R (1938) Bom 331.[8]

The opinion of the Calcutta High Court is in agreement with the opinion of this

---

[3] Ragunadha Patro v. Govinda Patro, (1928) 15 A I R Mad 1032=55 M L J 798 (F B).

[4] Rajah of Mandasa v. Jagannayakalu, (1932) 19 A I R Mad 612=140 I C 331=55 Mad 883 = 63 M L J 450 (F B).

[5] Emperor v. Venkanna Patrudu, (1917) 4 A I R Mad 971 = 36 I C 483 = 17 Cr L J 515 = 31 M L J 440 (F B).

[6] Janardhana Rao v. Lakshmi Narasamma, (1934) 21 A I R Mad 52=1934 Cr C 52 = 147 I C 351=35 Cr L J 392=65 M L J 873 = 57 Mad 177 (F B).

[7] Dhanpat Rai v. Balak Ram, (1931) 18 A I R Lah 761=1931 Cr C 1065=135 I C 594 = 33 Cr L J 178=13 Lah 342=33 P L R 558 (F B).

[8] Emperor v. Bhatu Sadu, (1938) 25 A I R Bom 225 = 174 I C 780 = 39 Cr L J 495 = I L R (1938) Bom 331=40 Bom L R 297 (F B).

Court as expressed in 26 Mad 139[2] and 31 M L J 440.[5] In 40 Cal 477[9] a Full Bench of five Judges (Jenkins C. J. and Harrington, Stephen, Asutosh Mookerjee and Holmwood JJ.) held that where an order has been passed by a Civil Court under S. 476, Criminal P. C., S. 439 has no application. The High Court can only exercise the revisional powers under S. 115, Civil P. C. This decision was accepted without question in 59 Cal 68.[10]

The opinion of the Bombay High Court expressed in I L R (1938) Bom 331[8] was also that of a Full Bench. The Court held that the reference in S. 476-B to S. 195 (3), Criminal P. C., only determined the forum and not the character of the Court. It was considered that a Civil Court in passing an order under S. 476-B was exercising jurisdiction in a criminal matter, and therefore its order could be revised under S. 439, Criminal P. C.

A Full Bench of three Judges of the Allahabad High Court discussed the question in 26 All 249.[11] Two of the learned Judges (Stanley C. J. and Blair J.) were of the opinion that in a proceeding under S. 476, Criminal P. C., arising out of a civil suit the Court had no jurisdiction to revise under S. 439 of that Code, but the third learned Judge (Banerji J.) was of the contrary opinion. Banerji J. considered that as S. 439 gave the High Court the right in "any proceeding" to exercise the powers conferred on a Court of Appeal, the Section must be deemed to apply to a proceeding in a Civil Court as well as to a proceeding in a Criminal Court. He refused to read S. 439 in conjunction with S. 435. I do not consider that S. 439 can be read alone, but even when read alone, I consider that there is strong indication that it has reference only to criminal proceedings as I have already pointed out.

The practice of the Lahore High Court has been to treat revision petitions as falling within S. 439, Criminal P. C., irrespective of whether the order under revision was passed by a Civil, Criminal or Revenue Court and in 13 Lah 342[7] a Full Bench decided that the practice should not be departed from.

I have said enough to indicate that there has been a great divergence of opinion on the question, but so far as this Court is concerned, it is at present governed by the decision in 31 M L J 440,[5] and this Bench has no power to reverse that decision. Nor do I think it should do so, even if it had the power. As I have indicated, S. 439 only applies to cases which come before the Criminal Courts within the meaning of the Code of Criminal Procedure. In my opinion, a Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, and if for the purposes of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure and not by those of the Code of Criminal Procedure. The fact that an appeal from an order passed on an application when it has been dealt with by a Civil Court lies to an appellate Civil Court emphasizes the civil character of the Court dealing with the application. In the wording of the relevant Sections of the Code of Criminal Procedure, I can find no justification for regarding the Court as being anything but a Civil Court. The position is not a satisfactory one because an application for revision arising out of proceedings in a civil suit must be dealt with on a different basis from a similar application arising out of criminal proceedings, but it is a situation which the Court cannot remedy, but only regret. It is a situation which the Legislature alone can deal with, and I trust that in the near future action will be taken. I hold that the petitions now before the Court should be numbered as civil revision petitions and dealt with on that basis.

King J.—I agree.

Krishnaswami Ayyangar J.—I entirely agree, but inasmuch as it has been suggested in 13 Lah 342,[7] per Tekchand J., that the reasons given by Banerji J. in his dissenting judgment in 26 All 249[11] have not been met, I desire to add a few words. So far as that judgment relied on the practice which then obtained in the Allahabad High Court, it is enough to say that the practice here has been different. In fact it appears that whichever view found acceptance at the hands of the learned Judges who have had to consider the point, it was the result to a large extent of the practice prevalent in the particular Court which was also no doubt sought to be supported by a consideration of the language of the statute. To my mind, the dominant consideration however appears to have been furnished in almost every one of the decided cases by the existing practice of the Court concerned. It will not altogether be out of place for me to examine the correctness of the opposite view, in so far as it has been sought to be supported by what has been called the wider language employed in S. 439, as compared with S. 435. The suggestion is that whereas the power to call for records, is restricted by S. 435, to the proceedings of an inferior Criminal Court alone, such a restriction does not find place in S. 439, which confers the power of revision, on the High Court. That power is given it is said in the case of any proceeding not necessarily the proceeding of an inferior Criminal Court, the record of which has been called for by the High Court, or which has been reported for its orders, or which otherwise comes to its knowledge. In other words, the argument is that while the High Court's power to call for records is a limited power under S. 435, limited, it is said, to the proceedings of an inferior Criminal Court, the opening words "In the case of any proceedings" in S. 439 standing unqualified by any such limitation, implies a larger power, that is, a power to revise the proceedings of all subordinate Courts, Civil as well as Criminal. I am not however satisfied that there is any substance in this argument. It will be seen on examination, that the whole Chapter in which these two Sections occur, is concerned with the subject of reference and revision and regulates the relative procedure to be followed with respect to the proceedings of inferior Criminal Courts only. All the Sections in this Chapter, except three, namely, Ss. 439, 440 and 442, refer expressly to subordinate Criminal Courts. The two latter Sections are purely procedural, relating respectively to the right of audience, and the necessity for certification of the order passed on revision to the subordinate Court concerned. If we leave them out of account, S. 439 would, if the argument were sound, remain the solitary exception in a Chapter, which but for this exception, is concerned purely with the orders of Criminal Courts; and I am naturally disinclined to adopt such a construction unless the language is sufficiently express for the purpose.

---

[9] Emperor v. Har Prasad Das, (1913) 40 Cal 477 =19 I C 197=17 C W N 647 = 17 C L J 245 (FB).

[10] Surendra Nath v. Sushilkumar, (1931) 18 A I R Cal 604=1931 Cr C 756 = 134 I C 1063 = 33 Cr L J 88=59 Cal 68=35 C W N 775.

[11] In the matter of the Petition of Bhup Kunvar, (1904) 26 All 249=1904 A W N 15=1 Cr L J 78 (F B).

Section 439 posits a situation in which, the records have been called for under S. 435, or a report received under S. 438, or a proceeding of a subordinate Court otherwise come to the knowledge of the High Court. By these three modes or any of them, information has to reach the High Court, before it can proceed to exercise its power of revision. Plainly here, a multiplicity of channels of information is alone contemplated, and not a multiplicity in the nature or character of the information itself on which the High Court is to act. The records of an inferior Criminal Court alone, can be called for under S. 435. The report under S. 438 can again only be in respect of the proceedings of such a Court. Logically it would seem that it must be the proceedings of a similar Court but coming otherwise to its knowledge that the High Court is empowered by S. 439, to revise. In other words, the Section postulates an identity in the nature and character of the proceedings subjected to its revision though there may be a variety in the means of information. The words "or otherwise" occur in Ss. 436, 437 and 438 in connexion with "any record," "any case" and "any proceeding" respectively, and in these contexts it is impossible to imagine Courts other than inferior Criminal Courts being intended. I am constrained to hold, on a comprehensive consideration of the object and scope of the Chapter, and of the wording of the Sections themselves taken as a whole and not in isolation, that there is no support for the opposite construction.

C.R.K./D.S. *Order accordingly.*

✻ ✻ A. I. R. 1940 Madras 470

FULL BENCH

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

Pavayi and others — Appellants.

v.

Palanivela Goundan and others — Respondents.

Second Appeal No. 665 of 1936, Decided on 6th March 1940, against decree of Sub-Judge, Salem, in A. S. No. 5 of 1935.

✻ ✻ Limitation Act (1908), Ss. 19 and 20 — Mortgagor losing all interest in mortgaged property—He cannot by acknowledgment under S. 19 or payment of interest or principal under S. 20 bind person on whom his interest has devolved : *24 M L J 66=17 I C 619; 55 Mad 758 =A I R 1932 Mad 516=138 I C 632 and A I R 1935 Mad 899=161 I C 924, Overruled.*

A mortgagor who has lost all interest in the mortgaged property cannot by an acknowledgment within the meaning of S 19 or by the payment of interest or principal within the meaning of S. 20, bind the person on whom his interest has devolved: *(1863) 1 De G J & S 122 and (1886) 33 Ch D 127, Rel. on; A I R 1925 Mad 1108 and 1 C L J 337, Approved; 32 Cal 1077 and 33 Cal 1278, Dissent.;*

24 M L J 66 = 17 I C 619 ; 55 Mad 758 = A I R 1932 Mad 516=138 I C 632 and A I R 1935 Mad 899=161 I C 924, **Overruled.** [P 473 C 1; P 474 C 1]

S. S. Ramachandra Aiyar — *for Appellants.*

M. Krishna Bharathi—*for Respondents.*

Leach C. J. — This appeal raises a question of limitation and one of some difficulty. The appellants filed a suit in the Court of the District Munsif of Salem to enforce a mortgage which had been created on 12th November 1913 by a Hindu father and his son. The appellants are the assignees of an interest in the mortgage. Under the terms of the mortgage deed the debt became payable in one year. On 16th January 1919, a creditor of the mortgagors obtained a money decree against them and in execution of that decree purchased the equity of redemption. On 16th December 1920 the first mortgagor paid to the mortgagees Rs. 200 towards the amount of interest then due in respect of the mortgage debt. A record of this payment was endorsed on the deed and signed by the first mortgagor. A suit to enforce the mortgage was filed on 9th December 1932. The question which arises is whether the payment of the Rs. 200 on 16th December 1920 saves the suit from being barred by the law of limitation. That the personal remedy against the mortgagors is barred is conceded, but it is said that inasmuch as the payment of the Rs. 200 towards interest was made within eight years of the creation of the mortgage, a fresh period of limitation started and the suit having been filed within twelve years from the date of the payment of interest, the appellants are entitled to have the property sold in order to realize what is due to them. The District Munsif held that the payment of interest on 16th December 1920 did operate to save limitation and granted the appellants a decree. On appeal the Subordinate Judge of Salem held that the suit was out of time.

The Subordinate Judge's decision was based on his interpretation of S. 20, Limitation Act, which says that where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. By the Limitation (Amendment) Act, 1927, a proviso was inserted to the effect that after 1st January 1928 acknowledgment of the payment must be in the handwriting of, or in a writing signed by, the person making the payment. As I have indicated, there was such an acknowledgment in writing by the first mortgagor, but as this was not necessary at the time the Rs. 200 was paid, the mere payment would have been sufficient if the Section applied. In this Court, it has been contended on behalf of the appellants that both Ss. 19 and 20 can be called in aid to save limitation. S. 19 states that where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability has been made in writing signed by the party against whom the property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was signed.

For the respondent it has been argued that inasmuch as the mortgagors had parted with all their interest in the properties as the result of the court auction on 16th January 1919 they were not personally liable to pay the mortgage debt, and therefore did not come within S. 20, Limitation Act. On the same basis, it was contended that they were not in a position to give an acknowledgment of liability within the meaning of S. 19. There are several decisions of this Court bearing on the question, which has also been raised before the Calcutta High Court. I will state the effect of these decisions and then discuss the principle involved in the light of certain English decisions which in my opinion also have bearing.

The decisions of this Court are those given in 24 M L J 66,[1] A I R 1925 Mad 1108,[2] 55 Mad 758[3] and A I R 1935 Mad 899.[4] In 24 M L J 66[1] a person executed a deed of gift of the whole of his property. After the gift had been made he paid interest in respect of the amount due on a promissory note signed by him before the date of the gift. Benson and Sundara Aiyer JJ. held that by reason of the provisions of S. 20, Limitation Act, the payment was sufficient to keep alive the debt against the universal

---

1. Velayudam Pillai v. Vaithilinga Pillai, (1913) 24 M L J 66=17 I C 619.
2. Yagnanarayana v. Venkata Krishna Rao, (1925) 12 A I R Mad 1108=86 I C 434.
3. Muthu Chettiar v. Muthusami Iyengar, (1932) 19 A I R Mad 516=138 I C 632=55 Mad 758 =63 M L J 111.
4. Narayana v. Venkataramana, (1935) 22 A I R Mad 899=161 I C 924.

donee. In A I R 1925 Mad 1108,[2] Coutts-Trotter C. J. and Ramesam J. considered that a person who was a party to a mortgage contract could make an acknowledgment even after his interest in the properties had ceased, but they added that the acknowledgment bound only him or persons claiming through him, i. e. assignees from him after the acknowledgment. They accepted the opinion expressed by Mookerjee J. in 1 C L J 337,[5] to which I shall presently refer. In 55 Mad 758,[3] Jackson J. held that an acknowledgment of mortgage debt made by a mortgagor after he had lost his interest in the mortgaged property affected both him and his alienee, but Krishnan Pandalai J. who formed the Bench with Jackson J. did not go to this length. In his view an acknowledgment of the mortgage debt made by a mortgagor who had sold a portion of the mortgaged property, but remained personally, or in respect of the unsold portion, liable on the mortgage, was effective to save limitation as against the property sold. In A I R 1935 Mad 899,[4] Ramesam and Stone JJ. held that by reason of S. 19, Limitation Act, an acknowledgment by the mortgagor subsequent to the sale of the mortgaged property saved limitation and made the purchaser of the equity of redemption liable on the mortgage. In that case the mortgagee undertook to deliver a quantity of paddy in payment of principal and interest and the deliveries of paddy were endorsed on the deed. The deliveries of paddy were made on 3rd January 1904, 14th January 1911 and 12th January 1914 in payment of interest. The mortgagor sold the equity of redemption on 5th January 1908. The mortgagee filed a suit on the mortgage within twelve years from 12th January 1914. The purchaser of the equity of redemption contended that the suit was barred as the mortgagor could not bind his successors, but this contention was not accepted. In that case the defendant relied on the following dictum of Lord Westbury in (1863) 46 E R 47 = 1 De G J & S 122,[6] where the Lord Chancellor said :

> It was not the intention nor is the effect of the Section to give to the mortgagor or other person, who is 'by law compellable to pay the interest', a statutory power to deprive, by his acknowledgment given to a prior encumbrancer, the subsequent encumbrancers the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no person having a charge on lands shall recover more than six years interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived.

Ramesam and Stone JJ. rejected this argument on the ground that they did not see any injustice in making a purchaser or subsequent encumbrancer liable in such circumstances in view of the fact that in India there was a law of registration and every purchaser or encumbrancer can easily know of the existence of a prior mortgage. I will now turn to the Calcutta decisions. In 32 Cal 1077,[7] a Bench of that Court (Maclean C. J. and Mitra J.) held that S. 19, Limitation Act, applied in these circumstances. *A* mortgaged several properties under a deed dated 28th April 1887. He then sold one of them to *B* who mortgaged it to *C* and in a mortgage suit by *C* the property was sold and purchased by *D*. After the sale had taken place *A* paid part of the principal as well as interest under the mortgage to *B* and made an acknowledgment of his liability under it. The question was whether the acknowledgment kept the mortgage debt alive against the property bought by *D*. It was held that it did. Maclean C. J. expressed a similar opinion sitting with Holmwood J. in 33 Cal 1278.[8] But these decisions of the Calcutta High Court are not in accord with that of Mookerjee J. in 1 C L J 337[5] on which reliance was placed in A I R 1925 Mad 1108.[2] Mookerjee J. there said :

> It is argued on behalf of the respondents that the second mortgagee derives his title or liability from the mortgagor, and that consequently an acknowledgment by the mortgagor in favour of the first mortgagee, is operative against the second mortgagee, no matter whether such acknowledgment was given before or after the second mortgagee derived his title. After careful consideration of this argument, I am unable to accept it as well founded. I think that the proper construction to be put upon the Section (S. 19, Limitation Act) is that when it makes an acknowledgment given by one person operative as against another on the ground that the latter derives title or liability from the former, it contemplates that the derivation of title or liability (which is the essential condition for the extended operation of the acknowledgment) takes place after the acknowledgment has been given.

In certain of the cases to which I have referred the mortgagor retained an interest in part of the mortgaged properties sold, but I do not consider that this makes any

---

5. Surjiram Marwari v. Barhamdeo Persad, (1905) 1 C L J 337.
6. Bolding v. Lane, (1863) 1 De G J & S 122 = 32 L J Ch 219 = 9 Jur (N S) 506 = 7 L T (N S) 812 = 11 W R 386 = 46 E R 47.
7. Krishna Chandra Saha v. Bhairab Chandra Saha, (1905) 32 Cal 1077 = 9 C W N 868.
8. Domi Lal Sahu v. Roshan Deobay, (1906) 33 Cal 1278 = 11 C W N 107.

difference in principle. The question is whether a mortgagor who has lost all interest in the mortgaged property, can by an acknowledgment within the meaning of S. 19 or by the payment of interest or principal within the meaning of S. 20, bind the person on whom his interest has devolved. If he cannot bind the purchaser of the equity of redemption when the purchase covers the whole of the mortgaged properties, obviously he cannot bind the purchaser of part of the mortgaged properties.

As I have shown Coutts-Trotter C. J. and Ramesam J. in A I R 1925 Mad 1108[3] accepted the opinion of Mookerjee J. in 1 C L J 337[5] that in order to be binding on the assignee the acknowledgment must be made before the person making it has parted with his interest in the property, and I see no reason to doubt the correctness of this opinion. And if a mortgagor, who has lost all interest in the mortgaged property cannot bind the purchaser of the equity of redemption by an acknowledgment, he cannot bind his assignee by a part payment of interest or principal. A payment of interest to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorized in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt. If the mortgagee's remedy against the property is not barred, the mortgagor or his representative-in-interest can avoid the sale by payment of the mortgage debt, but that does not make him liable to pay. He may pay if he chooses. If he does not choose the mortgagee is left to his remedy against the property. I do not share the opinion that the English authorities are not in point. There is no fundamental difference between the provisions of Ss. 19 and 20, Limitation Act, and the corresponding provisions of the English Act. S. 40 of the Act for the Limitation of Actions and Suits relating to Real Property (3 and 4 Will. IV, Ch. 27) was in these terms:

> That after the said 31st December 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty days after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Section 40 of the Act of 1833 has been replaced by S. 8, Real Property Limitation Act, 1874 (37 and 38 Vict, Ch. 57), but the only difference between the two Sections is that a period of limitation of twelve years has been substituted for one of twenty years. It seems to me that Ss. 19 and 20, Limitation Act, embody all the elements of this Section. I have already quoted the observations of Lord Westbury in (1863) 1 De G J & S 122[6] and no English authority has been quoted to us which throws doubt on the opinion there expressed. In fact, the Court of appeal applied the same principle in (1886) 33 Ch D 127.[9] In that case a solicitor lent money to a client on equitable mortgage, and on 12th February 1866, an account was settled between them as to the amount due. In July 1878, the client assigned the mortgaged property to his two nephews; and the question was whether an entry dated 10th September 1878, in a diary kept by the Solicitor, who had since died, was admissible in evidence. That entry showed the receipt of money paid by the mortgagor by way of interest. North J. held that this entry was not admissible in evidence. On appeal it was held that assuming the entry to be admissible in evidence, as to which the Court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shown to be the agent of the assignees. Therefore the payment of interest did not start a new period of limitation. Cotton L. J. said:

> "In my opinion even if in fact C. E. Smith" (the client) in September 1878, paid a sum in respect of interest on this mortgage, that would not be sufficient to prevent the statute running in favour of those to whom previously to this time he had transferred the property. It is said that he had assigned it subject to the mortgages and charges thereon. That is so, but that does not make him an agent to pay interest on behalf of those to whom he has transferred the property. It may be he might have a claim against them, but that is not the question which we are considering. The question is whether this payment is to be considered as their payment, that is to say, whether he is to be considered as their agent in making it. They say in their statement of defence that if this payment was made it was not made by their authority or with their knowledge. In my opinion, then even if the entry is admissible, it does not prove anything that can help the plaintiff.

---

[9] Newbould v. Smith, (1886) 33 Ch D 127.

Lindley and Lopes L. JJ. delivered judgments to the same effect. I can see no reason why the principle propounded in (1863) 1 De G J & S 122[6] and (1886) 33 Ch D 127[9] should not be applied in India. The principle is one which accords in full with the spirit of the equity and unless the Indian Statute of Limitation is so worded as to preclude its application and—I have said sufficient to indicate my opinion that it does not—it must be applied. It follows that in my judgment the decisions of this Court which have not applied this principle should no longer be regarded as good law. I hold that the case has been rightly decided by the Subordinate Judge and that the appeal should be dismissed with costs.

King J.—I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Appeal dismissed.*

✻ ✻ A. I. R. 1940 Madras 474

FULL BENCH

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

Chikkanna Chettiar — Petitioner.

v.

V. S. Perumal Chettiar and another — Respondents.

Civil Revn. Petn. No. 729 of 1938, Decided on 23rd February 1940, to revise decree of Dist. Court, Salem, in A. S. No. 20 of 1935.

✻ ✻ **Land Acquisition Act (1894), Ss. 3 (d) and 30—Appeal lies from decision of Subordinate Judge appointed under S. 3 (d) to decide dispute referred by Collector under S. 30 :** *59 Mad 554 = A I R 1936 Mad 514 = 165 I C 405, Overruled.*

The Subordinate Judge who is appointed under S. 3 (d) of the Act to decide a dispute with regard to the allocation of compensation money does not constitute a Court of record, but admittedly he does constitute a Civil Court. Hence an appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under S. 3 (d) to decide a dispute referred by the Collector under S. 30 of the Act : *Case law discussed ; 59 Mad 554=A I R 1936 Mad 514=165 I C 405*, **Overruled** ; *A I R 1922 P C 80 and A I R 1939 P C 133, Rel. on.* [P 477 C 1, 2]

D. Ramaswamy Aiyengar — *for Petitioner.*

T. M. Krishnaswamy Aiyar — *for Respondents.*

Leach C. J.—This revision petition raises the question whether an appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under S. 3 (d), Land Acquisition Act 1894, to decide a dispute referred by the Collector under S. 30 of the Act. That Section empowers the Collector to refer to "the Court" a dispute as to the apportionment of the amount of compensation settled under S. 11 or as to the persons to whom the compensation is payable. S. 3 (d) defines the word 'Court' as meaning a principal Civil Court of original jurisdiction, unless the Provincial Government has appointed (as it is empowered to do) a special judicial officer to perform the functions of the Court. In this case the Government of Madras appointed the Subordinate Judge of Salem to perform the functions of the Court under the Act. The petitioner was dissatisfied with the decision of the Subordinate Judge and filed an appeal to the District Judge of Salem, but the District Judge dismissed the appeal on the ground that it was incompetent by reason of the decision of this Court in 59 Mad 554.[1] The petitioner conceded that this was the effect of the decision, but he contends that it does not correctly state the law. He says that the judgments of the Privy Council in 49 I A 129=45 Mad 320[2] and I L R (1939) All 460[3] leave no doubt that an appeal does lie.

Before proceeding to examine the authorities which have been quoted to us in the course of the arguments, I will refer to other provisions of the Land Acquisition Act which have bearing on the question under discussion. S. 18 says that any person who has not accepted an award may require the Collector to refer the matter for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested. Therefore a person interested can require the Collector to refer a dispute as to the apportionment to the Court, just as the Collector may refer it on his own initiative under the provisions of S. 30. As the result of the decision of the Privy Council in 39 I A 197=40 Cal 21,[4] S. 26 of the Act was amended, and it is now provided that an award made under S. 18

---

1. Krishnamoorthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam, (1936) 23 A I R Mad 514 = 165 I C 405 = 59 Mad 554=71 M L J 76.
2. Ramachandra Rao v. Ramachandra Rao, (1922) 9 A I R P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).
3. Bhagwati v. Ram Kali, (1939) 26 A I R P C 133=181 I C 211=66 I A 145 = I L R (1939) Kar P C 199=I L R (1939) All 460 (P C).
4. Rangoon Batatoung Company Ltd. v. Collector, Rangoon, (1913) 40 Cal 21 = 16 I C 188 = 39 I A 197=16 C W N 961=16 C L J 245 (PC).

shall be deemed to be a decree and the statement of the grounds of the award a judgment within the meaning of S. 2, cl. (2), and S. 2, cl. (9) respectively, of the Code of Civil Procedure, 1908. The effect of this amendment is to bring the award within the purview of S. 54. S. 31 says that on making an award under S. 11 (which relates to the inquiry into the area of the land, the compensation payable for it, and the apportionment of the compensation) the Collector shall pay the compensation awarded by him to the persons entitled thereto, unless prevented by one or more of the following contingencies: (i) If they shall not consent to receive it, (ii) or if there be no person competent to alienate the land ; or (iii) if there be any dispute as to the title to receive the compensation or as to the apportionment of it. In such circumstances, the Collector shall deposit the amount of the compensation in the Court to which a reference under S. 18 would be submitted. S. 53 says that save in so far as they may be inconsistent with anything contained in the Act the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act. S. 54 reads as follows :

> Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall lie only in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to His Majesty in Council subject to the provisions contained in Sec. 110, Civil P. C., 1908, and in O. 45 thereof.

The petitioner says that a judicial officer appointed under S. 3 (d) constitutes a Court and that by virtue of the provisions of S. 53 and of the saving words "subject to the provisions of the Code of Civil Procedure, 1908 applicable to appeals from original decrees" which precede the restrictive provisions of S. 54 there is a right of appeal. In 45 Mad 320[2] a dispute arose as to the apportionment of compensation awarded by the Collector. This dispute was decided by the District Court of Tanjore and resulted in an appeal to this Court. In a subsequent suit, the title to the land with which the acquisition proceedings were concerned was again disputed and it was this suit which gave rise to the appeal to the Judicial Committee. The area in the subsequent suit was larger than the area with which the proceedings were concerned, but this did not affect the question of title. The Judicial Committee held that the decision of this Court on appeal from the District Court's order of apportionment operated as res judicata. It was argued that the decision of this Court in the proceedings arising out of the land acquisition case could not be regarded as a decree, but their Lordships said that how the proceedings were commenced was a matter which was not material, provided that they were instituted in the manner that gave the Court jurisdiction "for they ended in a decree made by the High Court and appealable to this Board." The Board in effect held that the decision of the District Judge amounted to a decree and that the decision of this Court was a decree appealable to the Board. As the proceedings had resulted in a decree which had decided the question raised in the subsequent suit the decree operated as res judicata. The ground of the decision was stated in these words:

> Such a dispute (the dispute regarding apportionment) forms no part of the award and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal, which would be wholly taken away when the piece of land was represented by a sum of money paid into Court.

In I L R (1939) All 460,[3] the Privy Council considered the judgment in 45 Mad 320[2] and re-affirmed it. Delivering the judgment of the Board, Lord Porter said:

> In order successfully to establish a plea of res judicata or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case.
>
> It was at one time a matter of doubt in India, whether the determination of a Court to which a matter has been referred by the Collector under S. 18, Land Acquisition Act, was such a decision. That doubt was resolved by the judgment of this Board in 45 Mad 320,[2] which decided that where a dispute as to the title to receive the compensation has been referred to the Court, a decree thereon not appealed from renders the question of title res judicata in a suit between the parties to the dispute. In that case some question arose as to whether any appeal lay to His Majesty in Council in a case where the determination of the Judge ended in an award and not in a decree. The Board took the view that where the matter referred was not the adequacy of the amount of compensation awarded, but a dispute between the persons claiming compensation, involving, it may be, difficult questions of title, the resultant decision was not an award but a decree.

It will now be convenient to refer to the other authorities which have been referred to in argument. In 56 M L J 387[5] Devadoss and Jackson JJ. held that an order passed by a Subordinate Judge on a reference under S. 30, Land Acquisition Act, was a decree within the meaning of S. 2 (2), Civil P. C., and an appeal lay from it under S. 96 of the Code, which provides that an appeal shall lie from every decree passed by a Court exercising original jurisdiction to the Court authorized to hear appeals. S. 13, Madras Civil Courts Act, 1873, says that regular or special appeals shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court and that appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 5000, in which case the appeal shall lie to the High Court. In 56 M L J 387[5] the Court considered the decisions of the Privy Council in 40 Cal 21[4] and 45 Mad 320.[2] The Land Acquisition Act was similarly interpreted by Ramesam and Venkatasubba Rao JJ. in 52 Mad 142,[6] which also had reference to an order of a Subordinate Judge under S. 30. Varadachariar and Burn JJ. followed 52 Mad 142[6] in 40 M L W 37 (S N).[7]

---

[5] Mahalinga Kudumban v. Theetharappa Mudaliar, (1929) 16 AIR Mad 223=115 I C 345=56 M L J 387.

There are three decisions of this Court which are in conflict with those I have mentioned, namely 54 Mad 722,[8] 57 Mad 271[9] and 59 Mad 554.[1] In the first of these cases Wallace and Stone JJ. held that where the Chief Judge of the Court of Small Causes, Madras, had been appointed the special Judicial Officer under S. 3 (d), Land Acquisition Act, he did not constitute a "principal Civil Court of original jurisdiction" within the meaning of that Section, but was a special Court having its own statutory status which did not follow the status of the Court ordinarily presided over by the person who happened to be appointed as its Judge. What the learned Judges here evidently had in mind was that the special judicial officer was the Chief Judge of the Court of Small Causes, a Court governed by a special Act of the Legislature which gives no right of appeal to another Court. An appeal from the decision of a Single Judge lies to a Bench of Judges of the Court of Small Causes and the High Court has only powers of revision. It is not necessary to pause to consider whether the judgment in that case is open to question as different considerations apply from those which apply in the present case. 57 Mad 271[9] was decided by a Full Bench consisting of Madhavan Nair, Jackson and Lakshmana Rao JJ. and the case had reference to the question whether there was appeal to the High Court, either under the Madras Hindu Religious Endowments Act, 1926, or under the Code of Civil Procedure, from an order passed by the District Judge under S. 84 (2), Madras Hindu Religious Endowments Act. The provisions of that Act have nothing really in common with the provisions of the Land Acquisition Act, but in 57 Mad 271[9] the effect of the judgment of the Privy Council in 45 Mad 320[2] was discussed at length, and the respondent places great reliance on the observations made by Madhavan Nair J. as they are to the effect that the Privy Council was only considering whether the order of this Court on appeal constituted a decree within the meaning of the Code of Civil Procedure of 1882. Under the Code of 1882 the word "decree" was defined as

> the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication so far as regards the Court expressing it, decides the suit or appeal.

The words "or appeal" have been omitted from the present Code and the Full Bench considered that the presence of these words made all the difference. If the Court had to decide the present petition in the light of the interpretation in 45 Mad 320[2] in 57 Mad 271[9] we should be bound to hold that an appeal does not lie in a case like the present one. But the matter does not rest there, because in I L R (1939) All 460[3] the Privy Council considered its decision in 45 Mad 320[2] in a case which arose after the Code of 1908 came into force, and it has reaffirmed it. 59 Mad 554[1] was decided by Madhavan Nair and Stone JJ., and the same view of the effect of the decision in 45 Mad 320[2] was taken. The fact that this opinion was expressed in a case relating to the decision of a special judicial officer appointed under S. 3 (d), Land Acquisition Act, led to the conclusion of the Court below that it was binding in the present case.

---

[6] Venkatareddi v. Adinarayana Rao, (1929) 16 A I R Mad 351=119 I C 42=52 Mad 142=56 M L J 357.

[7] Appaswami Vannian v. Velu Vaidyan, (1934) 40 M L W 37 (S N).

[8] Bagavathi Doss v. Sarangaraja Iyengar, (1931) 18 A I R Mad 586=135 I C 460=54 Mad 722 = 61 M L J 312.

[9] Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras, (1934) 21 A I R Mad 103=147 I C 614 = 57 Mad 271 = 66 M L J 43 (F B).

The latest decision of this Court is that of King J. in 49 M L W 238[10] and was decided after the District Judge had dismissed the petitioner's appeal. This was a reference to the Subordinate Judge under S. 30, Land Acquisition Act, relating to dispute between a zamindar and a number of ryots with regard to the distribution of compensation awarded in respect of land which had been acquired. My learned brother King considered that the case was governed by the decision of the Privy Council in 45 Mad 320[2] and held that an appeal lay, an opinion which I share, although had it not been for the decision of the Privy Council in I L R (1939) All 460,[3] I should have felt constrained to hold that the interpretation of 45 Mad 320[2] by the Full Bench in 57 Mad 271[9] was binding on us. In my opinion, all controversy is set at rest by the judgment of the Privy Council in I L R (1939) All 460.[3] The opinion expressed in 45 Mad 320[2] was there reaffirmed, notwithstanding the alteration made by the present Code in the definition of the word "decree." In the light of the recent pronouncement of the Privy Council, 45 Mad 320[2] must be taken to decide that an order, not merely the order on appeal but an order determining a reference under S. 18 or under S. 30—it is admitted that there is no difference in principle between the two Sections—is to be regarded as a decree and not as an award. It follows that the interpretation to 45 Mad 320[2] given by the Full Bench in 57 Mad 271[9] can no longer be regarded as being authoritative.

It has been conceded by Mr. T. M. Krishnaswami Ayyar on behalf of the respondent that a judicial officer appointed under S. 3 (d) cannot be regarded as a persona designata and that he constitutes a Civil Court. But he says that it is a special Court, not one of ordinary civil jurisdiction and therefore a right of appeal must be given by the Act under which the Court is constituted or by some other express provision. That the judicial officer who is appointed by the Provincial Government to take the place of the District Judge constitutes a Civil Court was recognized in 59 Mad 554.[1] In (1913) A C 546[11] Lord Shaw of Dunfermline pointed out that in the general case, when a Court of record becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a Court ensue. The Subordinate Judge who is appointed under S. 3 (d), Land Acquisition Act, to decide a dispute with regard to the allocation of compensation money does not constitute a Court of record, but admittedly he does constitute a Civil Court and on the strength of the decision in (1913) A C 546[11] it might reasonably be argued that the proceedings before him are governed by the provisions of the Civil Procedure Code. Support for this argument is to be obtained from the judgment of the Privy Council in 39 Mad 617.[12] There a claimant whose claim was rejected by the forest settlement officer appealed to the District Court under the Madras Forest Act, 1882, which makes no provision for a second appeal and consequently it was contended that there was no right of further appeal. Their Lordships refused to accept this contention, holding that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees, the ordinary rules of the Civil Procedure Code apply. It is not going much further to say that the same principle applies when an Act like the Land Acquisition Act, provides for reference of disputes to the District Court and gives the Provincial Government power to substitute for the District Judge another judicial officer who admittedly decides the dispute as a Civil Court. The argument that there is here a right of appeal is made all the stronger by the provisions of Ss. 53 and 54 of the Act. Any controversy, however, is settled by the decision of the Privy Council in 45 Mad 320[2] and I L R (1939) All 460.[3] I would allow this petition and remit the case to the District Judge with the direction that he shall hear and decide the petitioner's appeal in accordance with law. The petitioner is entitled to his costs.

King J.—I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./D.S. *Petition allowed.*

---

[10] Raghunatha Duraisingam v. Karuppiah, (1939) 26 A I R Mad 716=49 M L W 238.

[11] National Telephone Co. Ltd. v. His Majesty's Postmaster General, (1913) A C 546=82 L J K B 1197=109 L T 562=57 S J 661=15 Ry. & Can Traff. Cus 109=29 T L R 637.

[12] Secretary of State v. Chelikani Rama Rao, (1916) 3 A I R P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).

A. I. R. 1940 Madras 478

PANDRANG ROW AND
KRISHNASWAMI AYYANGAR JJ.

A. R. R. M. Somasundaram Chettiar — Appellant.

v.

P. P. A. R. R. M. Peria Karuppan Chettiar and others — Respondents.

Appeal No. 237 of 1934 and Civil Misc. Petns. Nos. 2748 and 2749 of 1939, Decided on 1st September 1939, against decree of Sub-Judge (Additional), Devakottah, in O. S. No. 208 of 1932.

Madras Agriculturists Relief Act (4 of 1938), Ss. 7 and 8—Plaintiff's claim dismissed in lower Courts but allowed in appeal to High Court — Application by judgment-debtor under Ss. 7 and 8 after judgment but before decree was drawn up—Application held competent.

The plaintiff's claim having been dismissed in lower Courts was allowed in appeal by the High Court. After the judgment was pronounced but before the appellate decree was drawn up the judgment debtor put in an application under Ss. 7 and 8 for scaling down the debt:

Held that in the circumstances of the case the application was competent. [P 478 C 2]

A. V. Viswanatha Sastry—*for Appellant.*

V. N. Shama Rao, S. Venkatesa Iyengar, T. V. Ramiah, K. S. Venkatarama Iyer and K. S. Rajagopal Iyengar — *for Respondents.*

Pandrang Row J.—Since judgment was pronounced in this appeal, an application has been made on behalf of respondent 4 by his mother and guardian under Ss. 7 and 8, Madras Agriculturists Relief Act, 4 of 1938, for scaling down the debt. The application has been opposed on the preliminary ground that no application of this description lies after a decree has been made. According to this contention, the only application that can be made for amendment of a decree is under S. 19 of the Act which applies only to cases where the decree was made before the commencement of the Act. As there is no other provision in the Act for amendment of decrees, it is contended that the provisions of the Civil Procedure Code alone can apply. It is however not necessary to deal with these contentions in this particular case for the simple reason that in this case no decree has been actually drawn up and an application was made to stop the drafting of the decree pending the disposal of this application. In view of the circumstances of this particular case, namely that the suit originally had been dismissed by the trial Court on the ground of limitation and there was no decree against this 4th respondent or any of the other defendants, there was no necessity for them to make any application for scaling down the debt until the judgment was pronounced allowing the plaintiff's claim. It is only after the judgment was pronounced in the appeal that any necessity could arise for making an application for scaling down the debt or to move the Court even orally to consider the question of scaling down the debt under the provisions of Ss. 7 and 8 of the Act before a decree was made. It is not reasonable to expect a party to put in an application which might never be necessary and it cannot be said that the omission to make an application before the judgment was pronounced debars the petitioner from making this application as early as possible after the judgment was pronounced and before a decree is actually drawn up. The law as laid down in Ss. 7 and 8 of the Act requires debts to be scaled down in a particular manner and if for some reason or other there is no need for any body to apply for scaling down the debt as in this case, till the judgment was pronounced in appeal, it could not be known that the debt was one which was enforceable in law and it would be going against the spirit of the Act which is undoubtedly to give relief to debtors to dismiss applications for relief which the Legislature meant to give to debtors on such a purely technical ground as the fact that there is no particular provision made in the Act for making applications for scaling down under Ss. 7 and 8 of the Act.

We are therefore of opinion that the application is one which ought to be admitted and which has to be inquired into. In accordance with the usual practice, the application will be remitted to the Court below for disposal according to law after due inquiry, and the decree in the appeal will be subject to the final order thereon. It has been contended before us that this application which is presented on behalf of respondent 4 by his mother and guardian is not validly presented. This matter also will be decided by the Court below to whom C. M. P. No. 2749 of 1939, namely the application to appoint the mother as guardian ad litem of respondent 4, will be remanded for disposal.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 479

VENKATARAMANA RAO J.

Minor Anantha Sayana Naidu by next friend Renu Ammal — Appellant.

v.

Kondappa Naidu and others — Respondents.

Second Appeal No. 1205 of 1934, Decided on 24th February 1939, against decree of Sub-Judge, Vellore, in A. S. No. 117 of 1933.

(a) Hindu Law — Will — Absolute estate — Widow — Gift in favour of, by husband— Will conferring powers of gift, mortgage and sale on widow — Widow held took absolute estate — Mere inclusion of words for maintenance in will held did not restrict extent of interest.

Prima facie where powers of absolute disposition are conferred on the donee it is taken as an indication that the testator intended to create an absolute estate on the donee. [P 481 C 1]

Where therefore the will in favour of a widow confers powers of alienation of the widest amplitude, such as gift, mortgage, sale, etc., the language is wide enough to confer power of disposition both testamentary and non-testamentary and therefore the nature of the interest taken by the widow is an absolute estate : *30 All 84 and A I R 1922 P C 193, Rel. on.* [P 481 C 1]

The mere fact that the object is stated to be for maintenance, in view of the unrestricted powers of alienation conferred by the will, cannot restrict the extent of the interest : *23 Cal 670 and A I R 1938 Bom 125, Rel. on.* [P 482 C 1]

(b) Will — Absolute estate — Gift over is invalid — New course of devolution cannot be created by gift.

It is settled law that if an absolute estate is given to a donee, a gift over, on the termination of the life of the donee, of the property remaining undisposed of by the donee is invalid, the principle being that once a property is given absolutely to another, he cannot dispose of another man's property. The principle is sustained on various grounds such as public policy or repugnancy to the prior estate. In short a man cannot create a new course of devolution when a gift is made : *(1875) 6 Ch D 1, Rel. on.* [P 481 C 1, 2]

(c) Will —Construction—Intention of testator should be effectuated and not frustrated.

One cardinal rule of construction in construing a will is to give effect to every word in the will and try to effectuate the intention of the testator as far as possible and not frustrate it : *(1901) 1 Ch 939, Rel. on.* [P 482 C 2]

(d) Will — Absolute estate and life estate with power of appointment —Distinction—Life estate with power of appointment may be conferred by will or inter vivos.

It is open to a person to make a disposition of his property either inter vivos or by will so as to confer on a donee a life estate with a power of appointment : *(1873) 6 Ch D 1; (1901) 1 Ch 939; 5 C W N 800 and 12 C W N 412, Rel. on.* [P 483 C 1]

The law does make a distinction between an absolute estate and a life estate with a power of appointment. In the one case what is conferred is property, that is the interest conferred is capable not only of disposition by the donee but capable of transmission to his heir, and in the case of the other, that is, a life estate with a power of appointment what is conferred is not property but power: *(1887) 17 Q B D 521 Rel. on.* [P 482 C 2]

(e) Will—Construction — Each will must be construed by itself — Value of decisions stated —Court must ascertain expressed intention of testator from words used in will.

Each will must be construed by itself and all the light that can be got from the decisions serves only to show in what manner the principles of reasonable construction have by Judges of high authority been applied to cases more or less similar : *(1873) 8 Ch A 70, Rel. on.* [P 480 C 2]

Therefore it is the duty of the Courts to ascertain what is the expressed intention of the testator and whether there is anything in law to preclude effect being given to the said intention. The intention has to be collected from the words used in the will having regard to the facts and circumstances respecting persons to which the will relates. [P 480 C 2]

K. Rajah Ayyar and T. T. Vijayaraghavan — *for Appellant.*

T. M. Krishnaswamy Iyer and A. Balasubramania Iyer — *for Respondents.*

Judgment. — The question in this second appeal turns upon the construction of a will Ex. 3 dated 27th November 1917 left by one Vijiaraghavalu Naidu. It was his last will and testament. He executed the previous wills Exs. 1 and 2 dated 25th July 1917 and 21st November 1917 respectively. Before July 1917 the testator was ill. He had no male issue. He had only a daughter by name Kuppammal. The persons who were the objects of his affection were his wife Chinnammal, the said daughter Kuppammal and her husband Rangaswami Naidu, defendant 7 in this case. He had properties in four villages, namely Vallam, Nemili, Mazhayur and Vadakkumangalam in the North Arcot District. By his will dated 25th July 1917 he purported to bequeath his properties in the Vallam village to his daughter Kuppammal and the extent of the bequest is thus stated in the said will:

> She shall hold and enjoy the same from generation to generation with powers of alienation by gift, mortgage sale, etc.

By his second will dated 21st November 1917 he purported to make a bequest of the properties both in favour of his daughter and son-in-law, defendant 7. There are two schedules to the said will, A and B. The A schedule properties comprise the properties in the Vallam village, the subject-matter of the prior will, and also the properties in Mazhayur village, and these he gave to his daughter Kuppammal. The B schedule comprises the properties in the village of Nemili and these he gave to his son-in-law, defendant 7. The extent of the bequest is stated thus in the said will :

> They should hold and enjoy the same from generation to generation with powers of alienation by gift, mortgage, sale, etc. If besides these any other properties have been left out, the same shall be got by my daughter Kuppammal.

Six days later he made a third will the construction of which is now in question. It will be seen from the first two wills that no provision was made for his wife Chinnammal and so he purported to make one. It may be necessary to give the terms thereof so far as they may be relevant for the decision of the question in issue. It runs thus :

> I am at present physically weak on account of asthma. As I apprehend that I may not live long, as you are my wife, and as, in the wills previously executed (by me), no mention is made about your maintenance, all the properties that belong to me, that is, all the immovable and moveable properties in these villages, namely Vellam, Vedayamangalam and Mazhayur, shall after my lifetime be enjoyed by you with powers of alienation by gift, mortgage, sale, etc., and after you, the properties then remaining shall, according to the wills executed by me on 25th July 1917 and 21st November 1917, be held and enjoyed by our daughter, Kuppammal, with powers of alienation by gift, mortgage, sale, etc.

On the date of his death Chinnammal, Kuppammal and Rangaswami Naidu were alive. Kuppammal died first in 1924 leaving a daughter Vijialakshmi who died six months later. Chinnammal died after June 1927 having before her death executed three deeds of settlement dated 1st June 1927 in and by which she disposed all the properties that were bequeathed to her under the said will in favour of defendants 1 to 3, defendants 1 and 2 being her brothers and defendant 3 being her sister's son-in-law. The plaintiff is an alienee of a fourth share of the said properties from defendant 7 who claims to succeed thereto on the ground that after the death of Chinnammal he became entitled thereto. His case is that Chinnammal had only a life interest in the said properties and his wife Kuppammal had a vested remainder and that vested remainder on her death vested in her daughter Vijialakshmi and on the latter's death vested in him as her father. The questions for decision in this case are what is the nature and extent of interest taken by Chinnammal under the will and whether the deeds of settlement executed by her are valid. If they are valid the plaintiff's suit fails because no interest would vest in defendant 7 capable of being disposed of by him. The learned District Munsif was of the opinion that Chinnammal had only a life interest in the said property and the settlement deeds executed by her were invalid. The learned Subordinate Judge reversed this decision holding that Chinnammal took an absolute estate and she was competent to dispose of the properties bequeathed to her under the will. It is against this decision this second appeal has been preferred by the plaintiff.

Mr. Rajah Iyer who appeared on his behalf contended that the will conferred only a life interest on Chinnammal and the gift over in favour of her daughter took effect. The contention of Mr. T. M. Krishnaswami Iyer on behalf of defendants 1 and 2 is that Chinnammal took an absolute estate or a life estate with a power of appointment and in either case the settlement deeds were valid. The question is which of these contentions is right. Both the learned counsel relied upon a number of cases, English and Indian, in support of their respective contentions. Before I deal with the said cases, it is better to remember the rule so often laid down that each will must be construed by itself and all the light that can be got from the decisions serves only to show in what manner the principles of reasonable construction have by Judges of high authority been applied to cases more or less similar : *vide* the observations of Lord Chancellor Selborne in (1873) 8 Ch A 70[1] at p. 73. Therefore without reference to cases it is the duty of the Court to ascertain what is the expressed intention of the testator and whether there is anything in law to preclude effect being given to the said intention. The intention has to be collected from the words used in the will having regard to the facts and circumstances respecting persons to which the will relates. The question therefore is, what is the nature and extent of interest conferred on Chinnammal under the terms of Ex. 3 which is the last will and testament? The language used is

> shall after my lifetime be enjoyed by you with powers of alienation by gift, mortgage, sale, etc. and after you, the properties then remaining shall. . . .

If the testator had died intestate Chinnammal would have inherited his property and taken a widow's estate therein. She would be the owner for the time being with a restricted power of alienation, which restriction could only be removed by a power of alienation conferred by her husband. The power of alienation may be partial or absolute. Where he confers an unrestricted absolute power of alienation, she will take an absolute estate unless he intended to confer on her by the language used by him a life estate with such a power. Whatever may have been the view taken in some of the early decisions in regard to the nature of the interest taken by a Hindu widow under a husband's gift or will, since the decision of the Privy Council in 30 All 84,[2] it is settled law that

---

[1] Waite v. Littlewood, (1873) 8 Ch A 70 = 42 L J Ch 216=28 L T 123=21 W R 131.

> if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership were not intended: 46 Bom 153[3] at pp. 159 and 160.

Prima facie, where powers of absolute disposition are conferred on the donee, it is taken as an indication that the testator intended to create an absolute estate on the donee. The will in this case confers powers of alienation of the widest amplitude, such as gift, mortgage, sale, etc. In my opinion the language is wide enough to confer a power of disposition both testamentary and non-testamentary. Therefore, giving the plain grammatical meaning to the said language it would follow that the nature of the interest taken by the widow is an absolute estate. It is settled law that if an absolute estate is given to a donee, a gift over on the termination of the life of the donee of the property remaining undisposed of by the donee is invalid, the principle being that once a property is given absolutely to another, he cannot dispose of another man's property. The principle is sustained on various grounds, such as public policy or repugnancy to the prior estate. It is well expressed by James L. J., in (1875) 6 Ch D 1[4] at page 14 thus :

> It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested de facto in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator.

In short, a man cannot create a new course of devolution when a gift is made. The question therefore is whether there is anything in the will which would prevent effect being given to the language employed by the testator which prima facie confers an absolute estate. It is no doubt true that although the words are absolute in the first instance, subsequently occurring words may be sufficiently strong to cut down the absolute interest to a life interest: *vide* (1898) 1 Ch 438[5] at page 441. But before this is done there must be words sufficiently precise and certain to cut down the said interest. It may at once be stated that there are no words in the will in question conferring expressly an heritable estate nor are there words limiting the gift to a life interest or otherwise, but there are words of wide amplitude to make the estate absolute and therefore heritable. Mr. Rajah Iyer however relied on the following circumstances in support of his argument that what was intended to be conferred was only a life interest: (1) the reason given by the testator for making a provision in favour of his wife is that no mention was made about her maintenance in the prior wills; the use of the word "maintenance" is strongly relied on for the purpose of indicating that it is only a very limited interest that was sought to be conferred on the widow and the power of disposal conferred on her is qualified by this word 'maintenance' so that whatever power she might exercise she could only do for the purpose of maintaining herself; (2) the gift over in favour of the daughter :

> After you, the properties then remaining shall, according to the wills executed by me on 25th July 1917 and 21st November 1917 be held and enjoyed by our daughter Kuppammal with powers of alienation by gift, mortgage, sale, etc.

The argument based on this clause is that the gift over cannot be given effect to unless the prior estate is construed to be a life estate; and (3) having regard to the prior two wills in which the words 'from generation to generation' are used in connexion with the bequest in favour of the daughter and the absence of such expression in the bequest in favour of Chinnammal would connote that what was intended to be conferred on Chinnammal could only be a life interest and what was conferred on the daughter was an absolute heritable interest. In regard to the first ground urged by Mr. Rajah Iyer based on the use of the word 'maintenance,' the context clearly indicates that the words are only expressive of the motive of the gift and did not cut down the interest intended to be conferred on her. Though the testator gave a reason for making provision for her, namely that he omitted to make any provision in the prior wills for her maintenance, the operative portion of the gift is absolutely clear. The power of alienation is not qualified or restricted to any limited purpose; it is unrestricted. In 23 Cal 670[6] where a testator gave a bequest to his widow and son stating the object of the gift to be for their maintenance, having regard to the unrestricted power of alienation given in the later clause of the will, their Lordships of the Privy Council were not inclined to restrict the extent of the interest conferred by the mere fact that the object was stated to be for their maintenance. Lord Watson says:

---

[2] Surajmani v. Rabinath Ojha, (1908) 30 All 84 =35 I A 17=5 A L J 67 (P C).

[3] Bhaidas Shivdas v. Bai Ghulab, (1922) 9 A I R P C 193=65 I C 974 = 46 Bom 153 = 49 I A 1 (P C).

[4] In re Stringer; Shaw v. Ford, (1875) 6 Ch D 1 =46 L J Ch 633=37 L T 233=25 W R 815.

[5] In re Jones; Richards v. Jones, (1898) 1 Ch 438 =67 L J Ch 211=78 L T 74=46 W R 313.

> These words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort and do not necessarily mean that it was to be limited to a bare right of maintenance.

Vide also A I R 1938 Bom 125.[7] The case in (1890) 62 L T 762[8] is distinguishable. The power to use and enjoy the property was expressly qualified by the words "for her maintenance during her lifetime."

I shall now deal with the second ground urged by Mr. Rajah Iyer, namely the argument based on the gift over in favour of the daughter. His contention is that the gifts both in favour of the wife and in favour of the daughter should be construed together and it must be inferred that what was intended to be conferred was a life interest in favour of the wife. In the first instance, the two gifts are independent gifts. The two clauses cannot be read together as forming one gift. Secondly, the fact of a mere gift over should not be taken to cut down a prior absolute interest. The question therefore is, was there an absolute gift to the wife, if so, no question arises with reference to the gift over. It is in this connexion that the question arises whether there is anything in the context or in the surrounding circumstances which would show that the testator while giving power of disposition did not intend to confer an absolute estate in the sense that she would take also a heritable estate. One cardinal rule of construction in construing a will is to give effect to every word in the will and try to effectuate the intention of the testator as far as possible and not frustrate it. As observed by Joyce J. in (1901) 1 Ch 939[9] at pp. 943 and 944:

> The rule is to construe a will *ut res magis valeat, quam pereat* . . . . In a case of obscurity or ambiguity, even when the question is one of invalidity on the ground of remoteness, repugnancy or the like, weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention.

In this connexion the arguments of Mr. Rajah Iyer based on the absence in Ex. 3 of the words 'from generation to generation' used in the wills Exs. 1 and 2 may be relevant. In the gift over it is clearly stated that the property should be held and enjoyed by the daughter according to the wills executed by him on 25th July 1917 and 21st November 1917 with full powers of alienation. The use of the words 'according to the wills executed by him' would show that in the case of the daughter he meant to have a heritable estate to be enjoyed by her from generation to generation. Therefore, if the will were to be construed by giving Chinnammal a life estate with an absolute power of appointment the intention of the testator will be effectuated rather than frustrated. In this view, Chinnammal would not take an absolute estate but a life estate with a power of appointment and the gift over will be valid only with reference to what was left undisposed of by Chinnammal. But Mr. Rajah Iyer contends that either the estate conferred must be an absolute estate or a life estate and to construe a disposition as a life estate with absolute power of appointment is tantamount to construing the disposition as an absolute estate. There is considerable force in the argument of Mr. Rajah Iyer but the law does make a distinction between an absolute estate and a life estate with a power of appointment. In the one case what is conferred is property, that is the interest conferred is capable not only of disposition by the donee but capable of transmission to his heirs and in the case of the other, that is, a life estate with a power of appointment, what is conferred is not property but power. The distinction between a power of appointment over property and property has always been well recognized: *vide* (1887) 17 Q B D 521[10] at p. 526.

---

[6] Jogeshwar Narain Deo v. Ram Chandra Dutt, (1896) 23 Cal 670=23 I A 37=7 Sar 13 (P C).

[7] Hilalsingh Govinda v. Udesingh Vithal Singh, (1938) 25 A I R Bom 125 = 173 I C 963 = 39 Bom L R 1217.

[8] In re Fox; Fox v. Fox, (1890) 62 L T 762.

[9] In re Sanford; Sanford v. Sanford, (1901) 1 Ch 939=70 L J Ch 591=84 L T 456.

No two ideas can well be more distinct the one from the other than those of 'property' and 'power,' as Fry L. J. points out in the same case at p. 531. Both in England and in India it is well settled that it is open to a person to make a disposition of the property either inter vivos or by will so as to confer on a donee a life estate with a power of appointment: *vide* (1875) 6 Ch D 1,[4] (1901) 1 Ch 939,[9] 5 C W N 300[11] and 12 C W N 412.[12] Mr. Rajah Iyer relied on a number of cases where a distinction is drawn between cases where a power of testamentary disposition is conferred and where no such power is conferred for indicating that what was conferred on Chinnammal was only a life estate limited to enjoyment in specie for the bare purpose of maintenance. Having regard to the construction placed by me that the power of disposition conferred in this case would include a testamentary disposition and having regard to the fact also that the dispositions in this case were all inter vivos, I think it unnecessary to deal with those cases. I also think it unnecessary to deal with the question regarding the nature of the estate taken by a Hindu widow on whom the widow's estate with an absolute power of alienation is conferred based on the decision in 68 M L J 707[13] and whether in such a case a gift over will be valid. In this case whatever view is taken, whether it is an absolute estate conferred on Chinnammal or only a life estate with a power of appointment or a widow's estate with a power of appointment, the deeds of settlement are valid. The result is that the plaintiff's suit fails and the second appeal is dismissed with costs. Leave to appeal granted.

C.R.K./G.N. *Appeal dismissed.*

---

[10] Ex parte Gilchrist, (1887) 17 Q B D 521 = 55 L J Q B 578=55 L T 538.

[11] Saroda Sundari Dasi v. Krishto Jiban Pal, (1901) 5 C W N 300.

[12] Hara Kumari v. Mohim Chandra Sarkar, (1908) 12 C W N 412=7 C L J 540.

[13] Thayali Achi v. Kannammal, (1935) 22 A I R Mad 704=156 I C 846=68 M L J 707.

---

* * A. I. R. 1940 Madras 483

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Vattipalle Eswariah — Appellant.

v.

Vattipalle Rameswarayya — Respondent.

Second Appeal No. 921 of 1936, Decided on 4th March 1940.

*** * Civil P. C. (1908), O. 41, R. 11—Court cannot admit appeal in part only :** *S. A. No. 1141 of 1934, Overruled.*

By virtue of R. 11 the Appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily, it must, by virtue of R. 12 (1), fix a day for hearing 'the appeal.' There is nothing in either rule which suggests that the Court may admit the appeal in part. There are only two courses open to the Court namely to dismiss or admit the appeal as a whole : *Case law referred ; S. A. No. 1141 of 1934,* **Overruled.** [P 484 C 1]

V. S. Narasimhachar — *for Appellant.*

N. Appu Rao and Ch. Raghava Rao — *for Respondent.*

Leach C. J. — This second appeal has been placed before this Full Bench as it raises the important question whether the Court in dealing with an appeal under O. 41, R. 11, Civil P. C., can direct that it be admitted in part only. The appeal arises out of a suit filed in the Court of the District Munsif of Nandalur for the partition of 72 items of property held in common by eight people. Respondent 1 in the appeal was the plaintiff. A decree for partition was granted by the District Munsif who gave his decision on the claims of the parties to the various items of property. The appellant and respondent 3 appealed to the Subordinate Judge of Cuddapah. The Subordinate Judge set aside the allotments of the District Munsif and made fresh allotments. The appellant was dissatisfied with the Subordinate Judge's decision in so far as it related to items 29, 30, 31, 33, 37 and 38 of the properties and he filed the present appeal which was placed before Gentle J. on the question of admission. The learned Judge passed an order admitting the appeal only in respect of item 30. In my opinion, the learned Judge erred in admitting the appeal only in part. As he considered that there was a question which called for an answer he had no discretion in the matter in view of the wording of O. 41, Rr. 11 and 12 (1). Rule 11 says :

> (1) The Appellate Court, after sending for the record, if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.
>
> (2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.
>
> (3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Rule 12 (1) is in these words:

> Unless the Appellate Court dismisses the appeal under R. 11, it shall fix a day for hearing the appeal.

By virtue of R. 11 the Appellate Court may dismiss the appeal without serving notice on the respondent, but if it does not dismiss the appeal summarily, it must, by virtue of R. 12 (1), fix a day for hearing "the appeal." There is nothing in either Rule which suggests that the Court may admit the appeal in part. This question has been raised before in this Court and also in the Calcutta, Bombay and Patna High Courts. It was raised apparently for the first time in the Calcutta High Court. In 15 C W N 921,[1] a Bench of that Court held that it was not competent for a Court of Appeal to restrict the appeal to some specified grounds. Once the appeal is admitted all points in the memorandum are open to the appellant. This decision was affirmed in 43 Cal 178.[2] A Full Bench of the Bombay High Court considered the matter in 58 Bom 406.[3] The Court expressed agreement with the view of the Calcutta High Court in 15 C W N 921[1] and 43 Cal 178,[2] that it was not open to a Judge to admit an appeal and at the same time to restrict the grounds on which it was to be heard, but it was of the opinion that if the appeal involved questions which were severable the Judge could dismiss the appeal in part and admit it in part under O. 41, R. 11, "just as at the final hearing, the Court may dismiss the appeal in part and allow it in part." There is nothing in O. 41 which permits of severance and therefore I do not share this opinion. It may be desirable to provide for such a course but as the question has to be decided on the present wording of O. 41 in my judgment there are only two courses open to the Court, namely to dismiss or admit the appeal as a whole. In 15 Pat 96,[4] the Patna High Court saw no objection, if at the time when the appeal is admitted the Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that grounds other than those specified are not fit to be urged in appeal, to the Court making a note of the fact. Making a note of the fact is quite a different thing from passing a substantive order. Relying on the Calcutta cases the Patna High Court held that an appeal cannot be admitted on a limited ground.

There are two decisions of this Court but neither has been reported. The first decision is S. A. No. 2198 of 1912.[5] There Seshagiri Iyer and Kumaraswami Sastri JJ. followed the decision in 15 C W N 921.[1] It was pointed out that the direction to the appellant to confine his arguments to particular points while placing him at a disadvantage was calculated to interfere with the prerogative of the Bench hearing the appeal and on principle the Court thought that the restriction was unsustainable. The second case is S. A. No. 1141 of 1934,[6] which was decided by Wadsworth J. The learned Judge appears to have accepted the Bombay opinion that an appeal can be dismissed in part provided that there is an express order of dismissal in part. I have indicated that in my opinion this view is not justified by the terms of O. 41, Rr. 11 and 12. I hold that the appellant is not confined in his appeal to the question raised with regard to item 30 but is at liberty to challenge the decree on all the grounds mentioned in his memorandum of appeal.

The Subordinate Judge has omitted to deal with item 30 and it is agreed that the appellant is entitled to a one-third share in this piece of property and that respondent 1 to a one-sixth share. The appeal however fails in respect of the other items. The appellant has omitted to print the whole of the record and from the parts of the record which he has printed he is unable to show that the Subordinate Judge erred in not giving him a greater share in those items. Respondent 1 has filed a memorandum of objections in respect of items 32, 34 and 47, but this must also be dismissed as the printed record does not provide material for supporting the objections. The result is that the decree of the Subordinate Court will be modified by granting the appellant a one-third share in item 30 and respondent 1 a one-sixth share in it. The value of item 30 is only Rs. 2-4-0. The appellant has substantially failed and must therefore pay the costs of respondent 3. There will be no order as to costs on the memorandum of objections.

---

[1] Lakhi Narain v. Sri Ram Chandra, (1911) 15 C W N 921=11 I C 212=14 C L J 146.

[2] Janaki Nath v. Prabasini Dassee, (1916) 3 A I R Cal 741=30 I C 898=43 Cal 178=22 C L J 99 =19 C W N 1077.

[3] Krishnaji Shrinivas Jalvadi v. Madhusa Appansa Ladaba, (1934) 21 A I R Bom 207=149 I C 885=58 Bom 406=36 Bom L R 451 (F B).

[4] Rekha Thakur v. Ramnandan Rai, (1936) 23 A I R Pat 7=160 I C 984 = 15 Pat 96 = 16 P L T 803.

[5] Nagalingam Chetti v. Pichu Chetty, Second Appeal No. 2198 of 1912.

[6] Pyuda Suryanarayanamurthy v. Vuppuloori Kamayya Sastry, Second Appeal No. 1141 of 1934.

Mockett J.—I agree.

Krishnaswami Ayyengar J. — I agree.

C.R.K./D.S. *Decree modified.*

A. I. R. 1940 Madras 485

VENKATARAMANA RAO J.

V. Sreenivasachariar and another — Applicants.

v.

R. Krishniah Chetty and others — Respondents.

Appln. No. 1147 of 1938, in C. S. No. 42 of 1933, Decided on 4th September 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8 —Principal and interest due—Payment by debtor without specification—Creditor after appropriating payment towards total amount due towards interest and principal claiming balance —He must be deemed to have appropriated payment first towards interest and then towards principal.

Where principal and interest is due and a payment is made by a debtor without indicating whether it is for interest or for principal and the creditor after appropriating the amount paid towards the total amount due to him towards interest and principal, claims the balance, he must be deemed to have appropriated the amount first in payment of interest and then in payment of the principal : *A I R 1922 P C 233*; *(1898) 2 Q B 460 and 32 S L R 415 (P C), Rel. on.* [P 487 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 9 — Word "incurred" includes liabilities arising under decree — Decree passed after 1st October 1937 may be governed by Section 9 ***(Obiter).***

The Act does recognize a decree debt as a species of debt and it cannot be disputed that a decree debt is in law so. [P 488 C 2]

The word "incurred" in S. 9 is not confined only to contractual liabilities but even to liabilities arising under a decree of Court and a decree passed after 1st October 1937 may be governed by S. 9 : *A I R 1939 Mad 471, Rel. on.* [P 488 C 2]

S. Panchapagesa Sastri and U. C. Gopalan — *for Applicants.*

C. Venugopalachari and T. A. Rangachari — *for Respondents.*

Order. — This is an application under the Madras Agriculturists' Relief Act (4 of 1938) and the two substantial reliefs prayed for are (1) that the sale of the property held in execution of the decree on 5th November 1937 of lands forming Lot No. 2 of A schedule to the plaint be set aside and (2) that the mortgage debt be scaled down under the provisions of the Act and satisfaction of the debt entered up. So far as the sale is concerned, it is agreed that it should be set aside and I accordingly set it aside. The main contest centred on the second relief to be given to the judgment-debtors under the Act. By an order dated 22nd September 1938 the matter was referred to the Official Referee to report on the following matters :

(1) Whether the applicants are agriculturists within the meaning of the Act;

(2) the debts and the dates on which they were incurred and the amount of principal and interest agreed;

(3) amounts with dates of payments in respect of (a) principal and (b) interest; and

(4) whether any amount is still outstanding, and, if so, how much in respect of principal and how much in respect of interest.

The Official Referee has submitted his report to the effect that the applicants are agriculturists within the meaning of the Act. His finding in regard thereto is not challenged. He has annexed a statement to his report giving the details called for. His finding as to the amount due on 1st October 1937 is Rs. 4490-5-0 for principal and the amount due with interest from 1st October 1937 to 30th November 1938 is Rs. 4804-10-0. The decree-holder has not filed objections to the report of the Official Referee; but the judgment-debtors have. Before dealing with the contentions raised on their behalf it is necessary to state a few facts which are not in dispute. The suit was based on a mortgage dated 30th August 1925 in favour of one M. A. Thirunarayanachariar. The principal amount secured thereunder was Rs. 7500 the rate of interest being 9 per cent. per annum. Thirunarayanachariar assigned the deed of mortgage in favour of one Jagannadham Chettiar on 3rd May 1932. Jagannadham Chettiar filed a suit claiming a sum of Rs. 11,608 for principal and interest thereunder. A preliminary decree was passed by my learned brother Lakshmana Rao J. declaring that the sum due and payable by the judgment-debtors on 31st January 1935 was Rupees 11,139-6-0 made up as follows : Rs. 7500, the principal sum secured under the mortgage, Rs. 3301-14-0, the interest due up to 31st July 1934, and Rs. 337-8-0, the interest due up to 31st January 1935. He directed the costs to be taxed and the amount taxed was found to be Rs. 1515-8-0. He ordered and decreed that if the defendants failed to pay the sum of Rs. 11,139-6-0 and also the sum of Rs. 1515-8-0 with interest at six per cent. per annum from the date of taxation on or before 31st January 1935, the plaintiff would be at liberty to apply for a final decree for the sale of the mortgaged properties and that on such application the mortgaged properties might be sold and the net proceeds applied in payment of the said sums together with subsequent interest at six per cent. per annum and such further costs as might be allowed to the plaintiff by the Court. The defendants committed default in the payment of the said amount as directed by the decree and a final decree was passed on 12th February 1935. The plaintiff brought the properties to sale and the sale proclamation which was published on 3rd May 1935 stated that there would be due under the decree on 9th August 1935 a sum of Rs. 13,077-1-11 made up as follows: Rs. 11,139-6-0 the amount decreed, Rs. 1515-8-0, the taxed costs; Rupees 422-3-11 interest on the amount decreed, and costs at 6 per cent. per annum upto 9th August 1935.

Before the property was actually sold, at the instance of the judgment-debtors an order was passed by the Court giving leave to raise a sum of Rs. 8500 on the mortgage of one of the properties, namely house and ground No. 3, Singarachari Street. Triplicane. This order was passed on 9th October 1935 and in pursuance of the said order on 14th November the defendants executed a mortgage in favour of the United India Life Assurance Co., and thereby paid a sum of Rs. 8500 to the plaintiff in part satisfaction of the amount due under the decree. On 13th August 1936 another sum of Rs. 500 was paid to the plaintiff under orders of Court. It was brought to the notice of the Court that on 19th June 1936 the plaintiff herein had assigned the decree in favour of one Bysani Krishnayya Chetti and by an order dated 20th November 1936 the said Bysani Krishnayya Chetti was brought on record as the transferee decree-holder. On 16th April 1937 the decree-holder entered part satisfaction of the decree and after doing so applied to bring the properties to sale for the balance still due to him. From the sale proclamation, which was published on 16th September 1937, it will be seen that after giving credit to the sum of Rs. 9000 already paid as aforesaid, the decree-holder claimed Rs. 4725-4-0 as the balance that would be due and payable to him on 4th November 1937. The contention of the defendants is that the sum of Rs. 9000 paid by them should be adjusted as follows in accordance with the provisions of the Act, namely Rupees 1515-8-0, towards the cost of suit and the balance of Rs. 7484-8-0 towards the principal and the debt if so scaled down will be found to be completely discharged.

The contention of the decree-holder, which has been accepted by the Official Referee, is that the sum of Rs. 9000 has been adjusted by him first towards the costs of suit, secondly towards all interest which accrued up to September 1936 and the balance that remained after such appropriation was appropriated to the principal amount, and it was after making such appropriation the claim of Rs. 4725-4-0 as being due to him in the proclamation of sale was made. He therefore contends that all interest until September 1936 was paid off and what remained outstanding on 1st October 1937 was only the interest from September 1936 to 1st October 1937 which only could be wiped out if the provisions of the Act are applicable; and if the interest is so wiped out according to him, the balance due under the decree would be Rs. 4500 or thereabouts. As already stated, the finding of the Official Referee is that the amount of the principal due on 1st October 1937 is the sum of Rs. 4490-5-0. The decree-holder has also raised an alternative contention that the provisions of S. 8 of the Act are not applicable to the case and that if at all S. 9 only would apply. Apart from the provisions of the Act, it seems to me that the contention of the decree-holder in regard to the appropriation of moneys paid by the judgment-debtors in the manner alleged is well founded and if at all what was outstanding on 1st October 1937 was the interest due and payable from September 1936 to 1st October 1937.

But Mr. Panchapakesa Sastri contends that there is nothing to indicate that the decree-holder has appropriated the amounts towards interest since he credited the amounts paid towards the total amount due without indicating whether the amounts paid were appropriated towards principal or interest and the defendants are entitled now to fall back upon the provisions of the Act and contend that interest must still be deemed to be outstanding within the meaning of S. 8 of the Act and the provisions of the Act must be given effect to. The question here is whether there has been a valid appropriation by the decree-holder as contended for by him. The law as to appropriation is clear. In the case of a debt of the nature in question, it is the duty of the debtor to indicate when he makes a payment what his intention is, namely whether the amount paid should first be appropriated towards principal or towards interest and then the balance towards the principal. If he omits to indicate his intention, and there are no circumstances from which his intention can be inferred, he loses his right to have the amount appropriated in the manner he would like to have and the creditor has got the right to appropriate the amount in the manner best advantageous to him ; he can either appropriate the amount towards interest in the first instance and the balance towards the principal or the entire amount towards the principal. But when there is no declaration by the creditor of his intention in what manner he appropriates and an appropriation is made, the law presumes that it has been made in the manner most advantageous to himself. In 44 Mad 570,[1] their Lordships of the Judicial Committee at p. 573 lay down the rule thus :

> There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied, in payment of the capital.

As further pointed out by them citing a passage from the judgment of Rigby L. J., in (1898) 2 Q B 460[2] at p. 466, "that rule where it is applicable, is only common justice." In 44 Mad 570[1] the facts were as follows: The suit was for partition of a certain estate, the plaintiff claiming a third share therein. He was declared entitled to that share by the High Court. There was an appeal to the Privy Council from that decree by the adverse claimants. Pending the decision of the Privy Council in pursuance of the order of the High Court the plaintiff drew various sums of money appertaining to his share from the receiver appinted by the Court. The Privy Council reversed the decree of the High Court and in conseqnence the plaintiff became obliged to restore the moneys he had received and there was an order for restitution with interest by the Court. Various sums were paid by the plaintiff in pursuance of the order without indicating whether it was for interest or for principal. The successful claimants who received the moneys did not expressly declare whether they were appropriating the same for interest or for the principal, but they made out an account showing how they appropriated it by crediting the sums paid with interest thereon and striking out the balance due. It was contended that as each sum paid by the plaintiff was charged with interest by the claimants it must be deemed that money was appropriated by them towards the principal and it was not open to them to contend that they appropriated the moneys paid first towards interest and then towards the principal. The High Court acceded to the contention, but it was negatived by their Lordships of the Privy Council and the following remarks of theirs are instructive :

> The reason given by the learned Judges for their judgment was that they regarded the payments already made as shown in an account filed by the defendants in the District Court on 25th August 1915, as payments that had in fact been appropriated by the defendants as against principal and that from such appropriation there was no opportunity for them to recede. The account referred to is set out in the record in these proceedings and it shows that as each sum of money was received it was charged with interest at the rate of 9 per cent. and carried forward until the end of the year, when the total amount so found was credited as against the total amount which was due. At no time did the sums so credited do more than cover the claim for interest, and it therefore seems impossible to understand why it was that the money received was regarded as definitely appropriated in respect of the principal (pp. 572 and 573).

Where therefore at the time of the payment by a debtor there is an amount due towards interest and the creditor after appropriating the amount paid towards the total amount due to him towards interest and principal, claims the balance, he must be deemed to have appropriated the amount first in payment of interest and then in payment of the principal. A recent decision of their Lordships of the Privy Council reported in 47 M L W 606[3] lends support to this view. In that case, during the course of execution of a decree, there was a compromise between the decree-holder and the judgment-debtor, which was recorded under O. 21, R. 2 and S. 47, Civil P. C. Under the terms of the compromise, it was found that the principal amount due and payable under the decree was Rs. 84,000, that interest due thereon was Rs. 24,400 and costs of execution Rs. 307-6-9, in all, a total sum of Rs. 1,08,707-6-9. The judgment-debtor paid a sum of Rs. 8000 and the balance that was found due and payable under the compromise was fixed at Rs. 1,00,707-6-9 and this sum was agreed to be paid in seven instalments with a certain rate of interest on the principal sum. Two instalments were paid under the compromise, and the third instalment with interest was not paid. Thereupon, the decree-holders applied for execution. One of the contentions raised by the judgment-debtor was that the decree was barred by limitation. In answer thereto, the decree-holder relied upon a payment of Rs. 825 made on a prior date, namely 15th February 1929. If that payment was taken to be one for interest as such within the meaning of S. 20, Limitation Act, the execution application would not be barred by limitation. In dealing with this question their Lordships observed as follows:

---

[1] **Venkatadri Appa Rao v. Parthasarathi Appa Rao (1922) 9 A I R P C 233=61 I C 31=44 Mad 570=48 I A 150 (P C).**

[2] **Parr's Banking Co. v. Yates, (1898) 2 Q B 460 =67 L J Q B 851=47 W R 42.**

[3] **Het Ram Bodh Raj v. Aya Ram Tola Ram, (1937) 32 S L R 415=172 I C 999=47 M L W 606 (P C).**

> The payment was made and necessarily made in respect of principal and interest. It was therefore a payment of interest on a debt as such by the person liable to pay the debt. There could be little doubt in view of the many subsequent payments that a fresh period of limitation could if necessary be shown to start at a much later date, but a period commencing on 15th February 1929 is sufficient to cover the present application.

The application was not therefore barred by limitation. This case is therefore an authority for the position that where principal and interest is due and a payment is made by a debtor without indicating whether it is for interest or for principal, it must be deemed to be a payment towards interest as such. It follows that when appropriation in such circumstances is made by a creditor and a balance is claimed, it must be taken that he has appropriated the payment made first towards interest and then towards the principal. If this principle is applied, there can be no question that the contention of the decree-holder is well founded. It cannot be denied that an appropriation has been made by the decree-holder because it is only the balance after appropriation that has been claimed; and he has also entered part satisfaction of the decree which means that the debt to the extent mentioned in the application for satisfaction has been wiped out. Mr. Panchapagesa Sastri contended that in such circumstances the amount paid should at least be appropriated proportionately towards principal and interest, but he has not been able to cite any authority in support of his contention. The alternative contention raised on behalf of the decree-holder relates to the non-applicability of S. 8 of the Act to the present case. His contention is that the decree having been passed after 1st October 1937, it is governed by S. 9 of the Act and that principal sum within the meaning of the Act is the sum of Rs. 11,000 odd. There is a good deal of force in the contention advanced. The Act does recognize a decree debt as a species of debt and it cannot be disputed that a decree debt is in law so. A debt of record has always been considered to be the highest form of debt on which under the old English law an action of debt was maintained: *vide* Ellis, Blackburn and Ellis 885. Even now, if the debt is evidenced by a foreign judgment an action is maintainable thereon. Cl. (3) of S. 3 of the Act clearly says that debt means any

> liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a Civil or Revenue Court.

Section 7 relates to all debts including decree debts. The word 'incurred' in S. 9 of the Act, as pointed out by Varadachariar J. in 1939 M W N 279[4] is not confined only to contractual liabilities but even to liabilities arising under a decree of Court. Where the Court consolidates both principal and interest up to the date of the decree and awards interest thereon, as it usually happens in the case of mortgage decrees, it may be contended that the aggregate of the principal and interest is the principal payable under the decree, but in view of the fact that the decree-holder not having objected to the finding of the learned Official Referee has accepted the figure as arrived at by him, I do not think it necessary to go into this question. I must remark that contentions like the one advanced are rendered possible by the language of the various provisions of the Act. The Act is one of the most ill-drafted enactments now existing on the statute book. Every Section bristles with difficulties and it is no wonder that the Act has become a fruitful source of litigation.

In the result the report of the Official Referee is confirmed and the decree holder is given leave to proceed with the execution for the amount of Rs. 4804-10-0 as found by the Official Referee as due on 30th November 1938 and subsequent interest. As regards costs, I think the plaintiff is entitled to the costs of the proceedings before the Official Referee and before me, which I fix at Rs. 200.

C.R.K./G.N. *Order accordingly.*

---

[4] Mottai Meera v. Abdul Kadir, (1939) 26 AIR Mad 471=186 I C 214=IL R (1939) Mad 525 =(1939) 1 M L J 528=1939 M W N 279.

A. I. R. 1940 Madras 489

PATANJALI SASTRI J.

Yarlagadda Venkatasubbayya — Appellant.

v.

Gajjala Satyanarayanamurthy and others — Respondents.

Second Appeals Nos. 602 and 603 of 1936, Decided on 8th December 1939, against decrees of Sub-Judge, Masulipatam, in A. S. Nos. 56 and 57 of 1935, respectively.

Conversion—Principal and agent — For relief on ground of conversion title to property and right to present possession must be shown —Agent himself advancing purchase money for goods purchased on account of principal — Principal has neither title to nor right to present possession of goods until he pays price —No question of conversion arises.

It is well established that to entitle a person to claim relief on the ground of conversion or trover, he must show not only title to the property concerned but also a right to present possession thereof. [P 490 C 1]

Where the agent himself advances the purchase money in respect of the goods purchased by him on account of the principal, the property in the goods cannot be said to have passed to the principal until the amount advanced by the agent for the purchase of the goods is paid to him and therefore no question of conversion by the agent in respect of property title to which remains vested in him can arise. Moreover the agent by reason of his having purchased the goods on his own responsibility, though on account of the principal is *vis a vis* the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The principal is not therefore entitled to possession of the goods even if the agent, notwithstanding the non-payment of the balance of the purchase money, had intended that the property in the goods should pass to the principal: *(1874) 9 Ex 54, Rel. on.* [P 490 C 1, 2]

A. Lakshmayya — *for Appellant.*

P. Somasundaram and P. Suryanarayana — *for Respondents.*

Judgment.—These two connected second appeals arise out of a suit and a cross suit brought in the District Munsif's Court, Masulipatam. O. S. No. 17 of 1934 was a suit by the appellant for an account of dealings in groundnuts with the respondents, a firm of Commission Agents and O. S. No. 81 of 1934 was by the Commission Agents against the appellant for recovery of Rs. 856-7-0 said to be due to them on those dealings. The question for determination in both the suits being the same, they were heard and disposed of together by a common judgment in both the Courts below. Both the suits having been decided against the appellant in the lower Appellate Court, he has preferred these appeals. As respondent 1 has been the principal contesting party throughout, he is hereinafter referred to as the respondent. The facts of the case may be briefly stated. The appellant who is a groundnut merchant entered into an agreement in October 1932 with the respondent whereby he was to purchase groundnuts and sell the same as per instructions of the appellant, stocking them in the meanwhile in godowns which he rented for the purpose. The appellant advanced Rupees 1000 as cover against any possible loss that might result from the transaction. The respondent was to purchase the groundnuts in the market advancing the purchase money himself or making himself personally responsible for the purchase money to the vendors. When the goods were sold, the respondent was to deduct the purchase money paid by him less the advance received with interest as well as godown rents and commission at the agreed rate and pay the balance of the proceeds, if any, to the appellant. Purchases were made in pursuance of this agreement in November and December 1932 and the goods were stocked in a godown. On 1st March 1933, however, owing to financial embarrassment, the respondent pledged these goods as well as other goods with the Andhra Bank Ltd., at Masulipatam and obtained a loan. This loan was repaid and the pledge redeemed some time in May 1933.

It is in evidence—and it was not disputed —that the market began to decline from January 1933. The appellant did not send any instructions to the respondent to sell the goods till September 1933 when the respondent wrote Ex. III to the appellant calling upon him to pay the amounts due to him and take the goods. As there was no reply, he wrote another letter (Ex. III-a) to the same effect on 19th October 1933. To this letter, the appellant sent a reply (Ex. X) dated 20th October 1933 in which he stated that on coming to know of the pledge of the goods by the respondent, he had raised objection and that the respondent had then agreed to take the groundnuts himself and settle the account by paying the appellant Rs. 3-2-0 a bag. The appellant thus repudiated the claim made by the respondent in Ex. III and III-a and a turn, called upon him to pay the amount due to the appellant at Rs. 3-2-0 a bag in accordance with the settlement referred to above. The respondent treated this letter as a breach of the contract by the appellant and sold the goods and after giving credit to the sale proceeds and the original advance received, claimed a sum of Rs. 856-7-0 as due to him in O. S. No. 81 of 1934 while the appellant claimed in his suit O. S. No. 17 of 1934 an account of the dealings on the basis of the agreement which he put forward in his letter (Ex. X). The lower Appellate Court found that the agreement put forward by the appellant was not true and as stated above, rejected his claim and decreed that of the respondent.

The appellant's learned counsel did not contest—as indeed he could not in second appeal—the finding of the lower Appellate Court that there was no settlement between the parties in March 1933 as alleged by the appellant. But the learned counsel argued as a matter of law that the respondent's pledge of the goods purchased by him on account of the appellant without the latter's authority amounted to a conversion of the goods and that the respondent was therefore liable to pay damages for conversion according to the rates prevailing in the market at the time of the pledge. This contention cannot be acceeptd for two reasons: first, the respondent having himself advanced the purchase money in respect of the goods purchased by him on account of the appellant, the property in the goods cannot be said to have passed to the appellant until the amount advanced by the respondent for the purchase of the goods is paid to him. The law is thus stated in Bowstead on Agency:

> Where an agent, by contracting personally renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass, and the agent has the same rights with regard to the disposal of the goods, and with regard to stopping them in transitu as he would have had if the relation between him and his principal had been that of seller and buyer. (Art. 76).

In this view, the correctness of which has not been disputed, the very foundation of the appellant's contention fails, as obviously, there could be no question of conversion by the respondent in respect of property title to which still remained vested in him. Secondly, it is well established that to entitle a person to claim relief on the ground of conversion or trover, he must show not only title to the property concerned but also a right to the present possession thereof. But one who has not paid the purchase money in respect of goods purchased by him has no right to claim possession of the goods before paying the whole of the purchase money due as the seller has a lien on the goods for the unpaid purchase money. It has thus been held in (1874) 9 Ex 54[1] that a purchaser of goods which continued in the possession of the vendor subject to his lien for unpaid purchase money cannot sue a third person for a conversion of the goods. The plaintiff there purchased two lots of cotton at an auction sale but paid only the deposit required and so had to leave the cotton in the field where the auction had been held. One of the lots was removed by mistake by the defendant who had also bought some lots at the sale and the plaintiff brought the action for damages for conversion. The Court of Exchequer held that the plaintiff not having paid the residue of the purchase money had no right of present possession in respect of the goods purchased by him, such right being still in the vendor by virtue of his lien and that therefore the plaintiff was not entitled to maintain an action for the tortuous removal of the goods. Now according to the authority cited above, the respondent by reason of his having purchased the goods on his own responsibility, though on account of the appellant was vis a vis the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The appellant was not therefore entitled to possession of the goods even if the respondent, notwithstanding the nonpayment of the balance of the purchase money, had intended that the property in the goods should pass to the appellant of which however there is absolutely no evidence in the case.

The learned counsel for the respondent also contended that the respondent must be deemed to be a tacit pledgee, having paid the purchase money for the goods out of his own pocket, and was therefore entitled to repledge the goods and relied upon A I R 1928 Lah 747[2] while the learned counsel for the appellant challenged that position on the authority in 28 M L W 204.[3] It is unnecessary however to consider this point as the appeals fail on the other grounds indicated above. Both the appeals are therefore dismissed. The appellant will pay the costs of respondent 1 in S. A. No. 602 of

---

1. Lord v. Price, (1874) 9 Ex 54=43 L J Ex 49=30 L T 271=22 W R 318.
2. Bar Dukan v. Gopal Singh, (1928) 15 A I R Lah 747=112 I C 642.
3. Tejpal Jamna Das v. E. V. David, (1928) 15 A I R P C 219=111 I C 240=28 M L W 204 (P C).

1936. No order as to costs in S. A. No. 603 of 1936.

Leave refused.

C.R.K./G.N. *Appeals dismissed.*

A. I. R. 1940 Madras 491

VENKATARAMANA RAO J.

Hariharayyar and another—Appellants.

v.

Ahammadunni and others—Respondents.

Second Appeal No. 1110 of 1934, Decided on 16th December 1938, against decree of Sub-Judge, Ottapalam, in A. S. No. 68 of 1933.

Transfer of Property Act (1882), S. 44 — Mortgagee is not entitled to sue for partition where partition is not necessary to give effect to mortgage.

Under S. 44, not only a transferee of a share but also of any interest therein can sue for partition, but the Section imposes a limitation, namely, it must be necessary to give effect to the transfer : *3 ALJ 474 and 27 Mad 361, Rel. on.* [P 492 C 1]

Where the mortgage is not usufructuary and the mortgagee is not entitled to possession of the mortgaged property, and the terms of the mortgage deed do not disclose any ground for effecting a partition, it cannot be said that partition is necessary for giving possession to the mortgagee and therefore he is not entitled to sue for partition. Even if the mortgage deed confers a right on the mortgagee to sue for partition, that would not entitle him to sue for partition if in law he is not entitled to it. [P 492 C 1]

T. S. Anantharaman — *for Appellants.*

P. Govinda Menon — *for Respondents.*

Judgment.—The question raised in this second appeal is whether a mortgagee of the share of a tenant-in-common is entitled to maintain a suit for partition. The plaintiffs claim to be the mortgagee under a deed of mortgage dated 12th April 1926 from one Kunhi Muhammad. By the said deed Kunhi Muhammad purported to mortgage all his rights in and to certain moveable and immovable properties which he obtained by purchase under a deed of sale dated 15th August 1919 from one Kadir Kunhi's son Ahmed and also his claim to certain chit moneys under a chit conducted by two stakeholders. The present action is for partition of certain items of property which Kunhi Muhammad obtained under the deed of sale. The properties comprised in the deed of sale related to a certain undivided share which the vendors Kadir Kunhi and his son were entitled to get in right of one Kochu Kathija in the estate of her father one Makkar. It is the case of the plaintiffs that the suit properties formed part of the estate of Makkar, father of defendants 1 and 2 and Kochu Kathija, that after the death of Makkar the property devolved on defendants 1 and 2, Kochu Kathija and Ayisumma, the widow of Makkar, that Kochu Kathija died on 17th December 1918 leaving her surviving her husband Kadir Kunhi's son Ahmed, defendant 21 in the suit, and her minor son Kunhi Makkar and her mother Ayisumma, that Ahmed assigned the shares due to him and his minor son by the said deed dated 15th August 1919 to Kunhi Muhammad and that the said right was mortgaged by the latter to the present plaintiffs by the deed of mortgage aforesaid, Ex. G. The main defence was that Kochu Kathija died before Makkar and she did not leave any male issue and that in law the plaintiffs as mortgagees are not entitled to sue for partition. The learned District Munsif found that Kochu Kathija predeceased Makkar and she did not leave any male issue and dismissed the suit. On appeal the learned Subordinate Judge came to a different conclusion. He held on the evidence that Kochu Kathija died after Makkar and she left a son one Kunhi Makkar. He however took the view that the plaintiffs as mortgagees are not entitled to sue for partition and therefore affirmed the decision of the learned District Munsif dismissing the suit. It is against this decision the plaintiffs have preferred this second appeal.

The only question for decision is whether the view taken by the learned Subordinate Judge is sound. At the outset, it may be stated that as a general principle of law it cannot be said that a mortgagee of an undivided share of property from a tenant-in-common is not entitled to sue for partition. An alienee from a tenant-in-common can sue his co-tenant for partition and delivery of the share which the alienor is entitled to. The alienation need not be of the entire interest of the tenant-in-common; it may also be of a limited interest. The interest may be that of a lessee or mortgagee but the tenant-in-common must be entitled to an estate in possession and not to a remainder or a reversion. These principles are well recognised in English law and S. 44, T. P. Act, only embodies those principles. The said Section, so far as it is relevant for the present discussion, runs thus:

> Where one of two or more co-owners of immovable property, legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect

to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

It is thus clear that under this Section not only a transferee of a share but also of any interest therein can sue for partition but the Section imposes a limitation, namely, it must be necessary to give effect to the transfer: *vide* 3 A L J 474[1] and 27 Mad 361[2] at p. 367. In both the cases it will be seen that a lessee from a tenant-in-common of an undivided share was held entitled to sue for partition. The question therefore in this case is whether it is necessary to have a partition to give effect to the transfer, that is, the mortgage in favour of the plaintiffs. The mortgage in this case is not usufructuary and the plaintiffs are not entitled to possession of the mortgage property. Partition therefore is not necessary for giving possession to the mortgagee. The question again is, is it otherwise necessary to give effect to the mortgage to have a partition? The terms of the deed of mortgage do not disclose any ground for effecting a partition. No doubt the mortgage deed confers a right on the plaintiffs to sue for partition but that would not entitle them to sue for partition if in law they are not entitled to. The only interest which the plaintiffs get under the deed of mortgage is to have a sale of the property mortgaged to them. In fact, this is emphasized in the deed itself by the following covenant:

> I agree that the amounts due as above hereon, inclusive of the costs of such litigation may be recovered by sale of my right to items 1 to 76 of the schedule properties in pursuance of this hypothecation thereof to you.

No doubt in addition to this the option to sue for partition of the properties mortgaged is given to them, but the right that is really conferred is the right to sell the property mortgaged, and it is also the right which the plaintiffs are ordinarily entitled to under the law. As it is not necessary to give effect to the mortgage to enforce a partition, the plaintiffs are not entitled to sue for partition and the suit has been rightly dismissed. In the result, the second appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[1] Muhammad Jafar Khan v. Mazharul Hasan, (1906) 3 A L J 474=1906 A W N 199.

[2] Ramasami Chetti v, Alagirisami Chetti, (1904) 27 Mad 361=14 M L J 14.

A. I. R. 1940 Madras 492

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

K. Dasaradharama Reddy — Petitioner.

v.

Syed Rahimtulla Hussani and another — Respondents.

Civil Misc. Petn. No. 2270 of 1939, Decided on 15th December 1939, to issue a writ of certiorari.

Provincial Insolvency Act (1920), S. 28 (2) —Application by undischarged insolvent to Debt Conciliation Board without leave of Insolvency Court—Board has no jurisdiction to entertain application.

An application by an insolvent debtor, who has not obtained his discharge, to the Debt Conciliation Board without the consent of the Insolvency Court is in direct contravention of S. 28 (2). The debtor's estate having become vested in the Official Receiver, the Act requires that it shall be administered by the Insolvency Court. An insolvency takes away the jurisdiction of the Debt Conciliation Board: *A I R 1938 Mad 808, Rel. on.*

[P 492 C 2; P 492 C 1]

P. Chandra Reddy — *for Petitioner.*

Govt. Pleader — *for the Government.*

Leach C. J. — The rule nisi must be made absolute. The respondent Board has entirely misconceived the law. On 15th March 1935 one Rahimtulla Hussani was adjudicated in the Court of the Subordinate Judge of Nellore. On 28th June 1938 he filed an application to the respondent Board for settlement of his debts under S. 4 (1), Madras Debt Conciliation Act, 1936. The applicant had not obtained his discharge and is still an insolvent. The petitioner objected to the Board entertaining the application on the ground that the appellant's estate had vested in the Official Receiver. The leave of the Insolvency Court had not been obtained for the filing of the petition and the Official Receiver was not a party to it. Thereupon, the Board directed notice to be issued to the Official Receiver who replied that he could not be made a party to the application as the applicant had not obtained the consent of the insolvency Court.

The Board overruled the objection and refused to accept the decision of this Court in 1938 M W N 667,[1] which was in point. In that case Pandrang Row J. held that an application to a Debt Conciliation Board, when the debtor was an insolvent and the Insolvency Court had not given its consent, was in direct contravention of S. 28 (2), Provincial Insolvency Act. The applicant happened to be a creditor and the respondent Board considered that that made all the difference. This is an opinion which certainly cannot be accepted. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. The debtor's estate has become vested in the Official Receiver and the Provincial Insolvency Act requires that it shall be administered by the Insolvency Court. An insolvency takes away the jurisdiction of the Debt Conciliation Board. The order of the Board contains other statements which are equally open to objection but it is not necessary to discuss them. It is sufficient to say that in the circumstances the Board had no jurisdiction to accept the petition and the proceedings must be quashed. The petitioner is entitled to his costs and we fix the advocate's fee at Rs. 50.

---

[1] Venkayya v. Sambayya, (1938) 25 A I R Mad 808=179 I C 47=(1938) 2 M L J 93 = 1938 M W N 667.

C.R.K./G.N. *Rule made absolute.*

A. I. R. 1940 Madras 493

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Ramanatha Gurukkal — Appellant.

v.

V. V. R. Arunachalam Chettiar, Manager, Tirupalathurai Siva Devasthanam, and another — Respondents.

Letters Patent Appeal No. 75 of 1938, Decided on 22nd November 1939, against the judgment of Wadsworth J., *Reported in A I R 1938 Mad 972.*

(a) Right of Suit — Right can only be taken away by statute.

The right of the subject to appeal to the Court to redress a simple wrong can only be taken away by statute. The ordinary rule is that, where a person's liberty or property is interfered with under colour of statutory power, he has a cause of action which the Civil Courts are bound to entertain, unless a bar to such an entertainment has been enacted expressly or at least by necessary implication: *A I R 1936 Mad 269, Rel. on.* [P 494 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), Ss. 43, 53 and 54—Jurisdiction of Civil Court is barred by Ss. 43, 53 and 54 — Archaka of temple dismissed by trustee has no right of suit.

There is nothing in S. 43 which gives an indication that the word "final" is used in a different sense to what it is used in Ss. 53 and 54 and therefore it must be held that it is intended to be final to the extent even of excluding the right of an office-holder or servant to challenge the decision in a Court of law. S. 43 does not stand alone and when the scheme of the Act and the provisions of Ss. 53 and 54 are considered, no reasonable doubt can exist that the Legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The scheme of the Act is to put under the control and management of the Board matters relating to temples in the Province of Madras. [P 494 C 1, 2]

T. V. Muthukrishna Ayyar — *for Appellant.*

N. Sivaramakrishna Ayyar — *for Respondents.*

Leach C. J. — This appeal raises the question whether an archaka of a temple who has been dismissed from his office by the trustee has a right to challenge the correctness of the trustee's action in a Court of law or whether his remedy is limited by S. 43, Madras Hindu Religious Endowments Act, 1926, to an appeal to the temple committee or to the Religious Endowments Board as the case may be. The appellant is admittedly a hereditary archaka of the Thirupalathurai temple in the Trichinopoly District. He is suffering from leucoderma and he was dismissed from his office by the trustee, ostensibly on this ground, but it would appear from the findings of both the lower Courts that the trustee was actuated by ill-will towards the appellant. S. 43 (1) of the Act states:

> All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee, and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause.

By sub-s. (2) an office-holder or servant of a temple other than an excepted temple may appeal to the committee whose decision shall, in the case of a non-hereditary office holder or servant, be final. By sub-s. (3), a hereditary office-holder or servant of a temple other than an excepted temple may prefer an appeal to the Board against the order of the committee on appeal under sub-s. (2) and the decision of the Board shall be final. The temple of which the appellant was an archaka is a non-excepted temple, but the appellant did not then appeal to the committee against his dismissal by the trustee, but instituted a suit in the Court of the District Munsif, Kulitalai, for an injunction restraining the trustee from interfering with the appellant's exercise of his office. The District Munsif held that the suit could be maintained and granted an injunction restraining the trustee from interfering with the discharge of the duties of his office. An appeal was filed in the Court of the Subordinate Judge of Trichinopoly, who held that the appellant had no right of suit, and this decision was accepted by Wadsworth J. on second appeal.

The right of the subject to appeal to the Court to redress a simple wrong can only be taken away by statute. As Varadachariar J. observed in 69 M L J 695,[1] the ordinary rule is where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain, unless a bar to such entertainment has been enacted expressly or at least by necessary implication. It is said on behalf of the trustee that the right of the appellant to have recourse to the Court is taken away by S. 43. It is also said that S. 73 operates as a bar to the suit.

It is not necessary to consider the arguments which have been based on the wording of S. 73, because we accept the argument of the respondent that S. 43 must be read as taking away the right of the appellant to file a suit. If S. 43 stood alone, there would be much to be said for the appellant's argument that his right to sue had not been taken away. It might be said that the word "final" in S. 43 was only to be read as meaning final so far as an appeal under the Act was concerned and not as intended to shut out the jurisdiction of the Court as was said in 38 Mad 41,[2] a case which arose under the Madras City Municipal Act of 1904. But S. 43 does not stand alone, and when the scheme of the Act and the provisions of Ss. 53 and 54 are considered, no reasonable doubt can exist that the Legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The scheme of the Act is to put under the control and management of the Board matters relating to temples in this Province. S. 53 gives the temple Committee, which is under the control of the Board power to suspend, remove or dismiss the trustee of a temple. A trustee against whom action has been taken under this Section may appeal to the Board, but a hereditary trustee may, in lieu of appealing to the Board, apply to the Court to modify or cancel the order of the Committee. The order of the Committee shall when there has been no appeal to the Board be final, and when an appeal is preferred or an application is made to the Court the order of the Board or of the Court shall be final. S. 54 states :

> (1) A non-hereditary trustee shall cease to hold his office, if he, (a) is sentenced by a Court to such punishment as is described in sub-s. (2) of S. 26 and subject to the proviso contained therein ; (b) applies to be adjudicated or is adjudicated an insolvent ; or (c) ceases to profess the Hindu religion.
>
> (2) A hereditary trustee shall cease to hold his office if he ceases to profess the Hindu religion.
>
> (3) If a hereditary trustee becomes subject to any of the disqualifications described in cl. (a) or cl. (b) of sub-s. (1), the Committee may supersede him and appoint a fit person to administer the temple until the disability of the trustee ceases to exist or another trustee succeeds to the office.
>
> (4) The Board shall, in cases of dispute or doubt, determine whether a trustee is disqualified under this Section and its decision shall be final.

There can be no doubt that in a case falling under S. 53 or S. 54 the decision of the Board ousts the jurisdiction of the Court, and unless there is something in S. 43 which compels us to place a different meaning on the word "final" used in that Section from the meaning attaching to it in Ss. 53 and 54, we must hold that it is intended to be final to the extent even of excluding the right of an office-holder or servant to challenge the decision in a Court of law. There is nothing in the wording of S. 43 which gives any indication that the word "final" is used in a different sense to what it is used in Ss. 53 and 54. The Court will naturally be averse to closing its doors to a litigant who seeks a hearing but where the Legislature has used language which clearly indicates its intention to take away the right of recourse to Court, effect must be given to the intention. For the reasons indicated, we consider that S. 43, of the Act does preclude the appellant from challenging the trustee's action in a Court of law. His remedy is in an appeal to the Committee and we understand that such an appeal has since been filed. The present appeal must be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[1] Kamararaja Pandya Naicker v. Secy. of State, (1936) 23 A I R Mad 269 = 162 I C 419 = 69 M L J 695.

[2] Valli Ammal v. Corporation of Madras, (1916) 3 A I R Mad 1119=16 I C 971=23 M L J 531 =38 Mad 41.

A. I. R. 1940 Madras 494

HORWILL J.

Pothukuchi Mahalakshmi — Appellant.

v.

Modali Suryakanta Manikyamba and others — Respondents.

Second Appeals Nos. 705 and 751 and Misc. Appeal No. 388 of 1936, Decided on 31st October 1939, against decree of Sub-Judge, Ellore, in A. S. No. 255 of 1935.

Hindu Law — Stridhan — Inheritance to anwadhyeka stridhanam property — Widowed

daughter is to be preferred to daughter's daughter.

In Madras Presidency, on the question of the inheritance of stridhana property, the Mitakshara is to be preferred to Smritichandrika. Daughter in this text of the Mitakshara includes a widowed daughter and hence a widowed daughter is to be preferred to a daughter's daughter in the matter of inheriting anwadhyeka stridhanam property: *Case law referred.* [P 495 C 1, 2]

M. S. Ramachandra Rao—*for Appellant.*

K. Kameswara Rao and M. Appa Rao — *for Respondents.*

Judgment. — The only question that arises in second Appeal No. 705 of 1936 is whether a daughter's daughter is to be preferred to a widowed daughter in the matter of inheriting anwadhyeka stridhanam property. Both the lower Courts have held that the widowed daughter was to be preferred. One of the granddaughters (plaintiff 1) has appealed. The contest between the widowed daughter and the grand daughter arises because of a difference of opinion with regard to this matter, in the Mitakshara and the Smritichandrika. The Smritichandrika says that bhartridatta and anwadhyeka stridhana pass to sons and daughters, all inheriting together in equal shares and that daughters include maiden daughters and married daughters whose husbands are alive, but not widowed daughters. The order of inheritance given by the Mitakshara with regard to the same class of property is (1) unmarried daughter; (2) married daughter who is unprovided for; (3) married daughter who is provided for; daughter's son, son, and others coming later. The question whether with regard to the inheritance of stridhana property, the Mitakshara is to be preferred to the Smritichandrika was carefully considered by Muthuswami Ayyar J. in 3 Mad 265[1] and he has given cogent reasons for prefering the Mitakshara on this point. He says that all commentators other than the Smritichandrika have followed the Mitakshara and that the Smritichandrika stands alone in its interpretation, which Ghose in his Hindu Law says is due to a misapprehension of the text of Katyayana.

The precise problem presented in this appeal has not been decided; but the same texts have been considered not only in 3 Mad 265[1] but in a number of other cases, including 7 Mad 387,[2] and 21 Mad 58.[3] Muthuswami Ayyar J. was also a party to the decision in 7 Mad 387[2] which naturally follows 3 Mad 265.[1] Both in 21 Mad 58[3] and in 29 Mad 358,[4] it has been made clear that in the presidency of Madras Mitakshara is the paramount authority. 3 Mad H C R 312[5] is the only case in which the Smritichandrika seems to have been preferred to the Mitakshara and that was because it was found that the particular text of the Mitakshara under consideration was based on a mistake and all the other authorities were unanimous in giving a different interpretation. If the Mitakshara is the prevailing authority on the point raised in this appeal, there can be no doubt that the fact that the daughter is a widow makes no difference. All the text books agree that daughter in this text of Mitakshara includes a widowed daughter and one of the reasons for this is that the order of preference among the daughter depends largely upon their indigence. Just as an unprovided married daughter is preferred to a married provided daughter, so a married daughter who had lost the support of her husband is preferred to a married daughter who has not. Second Appeal No. 705 of 1936 therefore fails and is dismissed with costs. S. A. No. 751 of 1936, which raises inter alia the same point, is from the judgment of the Government Agent, East Godawari. As the appeals are from judgments of different Courts, there should, I think, be separate costs, especially as there is another point in this appeal which would have had to be argued if the above point of law had been decided otherwise. S. A. No. 751 of 1936 is therefore dismissed with costs also. C. M. A. No. 388 of 1936, for similar reasons, is dismissed but without costs. (Leave refused).

C.R.K./D.S. *Appeals dismissed.*

---

[1] Simmani Ammal v. Muthammal, (1881) 3 Mad 265.

[2] Bhujanga v. Ramayamma, (1884) 7 Mad 387.

[3] Muthappudayan v. Ammani Ammal, (1898) 21 Mad 58=8 M L J 9.

[4] Rajugramani v. Ammani Ammal, (1906) 29 Mad 358.

[5] Sengamalathammal v. Velayudha Mudaly, (1866) 3 M H C R 312.

✻ A. I. R. 1940 Madras 495

MOCKETT J.

Boda Subba Rao — Petitioner.

v.

Kandregula Narsiah — Respondent.

Civil Revn. Petn. No. 214 of 1937, Decided on 8th December 1939, to revise decree of Dist. Munsif, Ramachandrapur, in S. C. S. No. 162 of 1936.

(a) Civil P. C. (1908), S. 15—S. 15 does not apply to suit cognizable by Village Munsif under Madras Village Courts Act.

The Village Munsif under Madras Village Courts Act is not regulated by the provisions of Civil P. C. Hence it is not right to apply S. 15, Civil P. C., to suit cognizable by Village Munsif : *A I R 1916 Mad 544, Rel. on.* [P 496 C 2]

☆ **(b) Limitation Act (1908), S. 4 — District Munsif's Court closed during vacation—Person having right to sue in that Court is entitled to benefit of S. 4—Fact that Village Munsif's Court under Madras Village Courts Act has concurrent jurisdiction and is open during vacation does not deprive plaintiff of benefit of S. 4.**

Where normally a person has right to sue in District Munsif's Court he is entitled to the benefit of the period allowed by S. 4, Limitation Act, if the District Munsif's Court is closed during vacation. The fact that Village Munsif's Court under Madras Village Courts Act has concurrent jurisdiction to try the suit and is open during vacation does not deprive the plaintiff of the benefit of S. 4. [P 496 C 2]

N. Bapiraju — *for Petitioner.*

M. S. Ramachandra Rao — *for Respondent.*

Order. — A short point is raised in this petition on which there is no authority whatever. The plaintiff-petitioner sued the defendant on the balance of a promissory note for Rs. 20. The promissory note is dated 5th July 1927, renewed by payment on 13th June 1930 and again on 12th June 1933 so that it would become barred on 12th June 1936. The District Munsif's Court of Ramachandrapur was closed for the long vacation from 9th May 1936 to 19th June 1936. The 20th was the penultimate Saturday and the 21st was a Sunday, and so the petitioner filed his suit on 22nd June 1936. It is not contended that under ordinary circumstances the suit would be within time; but the point was taken before the learned District Munsif that this was a suit which is cognizable by a Village Court under S. 13, Madras Village Courts Act. That is so. It is therefore argued that this suit could have been filed in the Court of the Village Munsif which was open during the vacation of the Court of the District Munsif and that it became barred on 12th June 1936 and any period subsequent thereto is not available to the plaintiff. The District Munsif took the view that the plea of limitation on which the defendant relied before him was well founded. He rested that finding on the fact that

> normally the suit ought to have been filed in the Village Court and simply because the suit is barred by time the plaintiff cannot take advantage of the concurrent jurisdiction of this Court to try suits which are primarily triable by Village Courts.

Before me reliance has been placed by both sides on S. 20 (a), Madras Village Courts Act, which states that if a suit which is triable by a Village Court is instituted in the Court of a District Munsif, he may, unless sufficient reasons exist to the contrary, transfer it to the Village Court. I may also refer to sub-s. (2). It is argued that the spirit of the Act is that suits of this value should in the first place be tried under the Village Courts Act. There are of course two great differences between the two tribunals. The District Munsif's Court is regulated by the provisions of the Code of Civil Procedure. The Court of the Village Munsif is not. The latter view seems to me to be the effect of the decision in 29 M L J 474.[1] If that is so I think it is right not to apply S. 15, Civil P. C., to a suit of this sort. S. 15, Civil P. C., says : "Every suit shall be instituted in the Court of the lowest grade competent to try it," and I think that must refer to Courts subject to the Code. The procedure of the Village Courts is very special and decidedly of a comprehensive character. I notice however that although the provisions of the Limitation Act will apply to suits under the Village Courts Act (S. 20), there is no provision applying the Code of Civil Procedure to such suits.

The point which I have to decide appears to have behind it no authority—that I have already indicated—and I must therefore decide the question as a matter of first impression after hearing the interesting arguments of learned counsel on either side. In the absence of authority I do not consider that the period allowed by S. 4, Limitation Act, was intended to be cut down. I do not think that I ought to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature—the Village Court—happened to be open to him. To take away the right given by the Limitation Act requires, I think, some more substantial basis than implication. Prima facie, the plaintiff is entitled to sue in the District Munsif's Court. There is no compulsion to go to the Village Munsif's Court. Prima facie, owing to the long vacation of the District Munsif's Court and the dates of the promissory note the plaintiff was entitled under S. 4, Limitation Act, to wait until 22nd June before filing the suit. In the absence of authority I see no reason why that right should be curtailed.

The result is in my view this petition should be allowed with costs in this Court;

---

[1] Augustus Brothers v. Fernandez, (1916) 3 A I R Mad 544=31 I C 59=29 M L J 474.

but in the lower Court each side will bear its own costs. The matter will go back for decision by the District Munsif. It will be open to the defendant to raise any points other than the point that the plaintiff had agreed to give up his claim which has already been decided. The defendant indicates that he will rely upon the terms of the Madras Agriculturists' Relief Act.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 497

HORWILL J.

Pichakkari and others — Petitioners.

v.

Shivagnana Nachiar — Respondent.

Civil Revn. No. 1570 of 1936, Decided on 17th October 1939, to revise decree of Sub-Judge, Tinnevelly, in S. C. S. No. 224 of 1935.

(a) Madras Land Revenue Assessment Act (1 of 1875), S. 4 — Suit for contribution for peishkush paid after portion of estate has passed into other hands — Jurisdiction of Civil Court is not barred.

Section 4 makes it clear that, until the assessment has been apportioned, the Government look only to the old registered holder for the peishkush and after the apportionment Government look partly to the old registered holder and partly to the new registered holder for the shares of the peishkush apportioned to them. This Act deprives the parties from recourse to a Civil Court with regard to the amount fixed for peishkush; but there is nothing in this Act or in the Rent Recovery Act which prevents a party from coming to a Civil Court for contribution for peishkush paid after a portion of the estate has passed into other hands. [P 497 C 2]

(b) Provincial Small Cause Courts Act (1887), Art. 41—Applicability—Art. 41 does not apply to suit for contribution for peishkush under S. 4, Madras Land Revenue Assessment Act, after portion of estate has passed into hands of other party.

Article 41 prohibits suits for contribution by a sharer in joint property. But where the properties of the parties are separate and because apportionment has not been made, the owner of one separated portion of land is obliged to pay the whole of the peishkush, a suit for contribution by him cannot be said to fall under Art. 41 and the suit must therefore be deemed to have been properly filed in the Small Cause Court. [P 497 C 2]

K. S. Rajagopalachari — *for Petitioners.*

K. S. Ramabhadra Iyer—*for Respondent.*

Order.—The defendants obtained a portion of the estate registered in the name of the plaintiff; and the plaintiff and the defendants put in a joint application to the Collector (Ex. A) for an apportionment of the peishkush payable on the two portions of the estate. According to that agreement they prayed the Collector to fix the amount payable by the defendants as Rs. 145. The Collector separately registered the portion of the estate belonging to the defendants, but at the time of filing the suit he had not apportioned the assessment. In order to fix the assessment some inquiry is necessary, and although the plaintiff contended that the Collector had apportioned the assessment, the lower Court held that there was no evidence to that effect. The plaintiff brought this suit on Ex. A praying for contribution of peishkush from the defendants. He was obliged to bring this suit now because otherwise the suit for the suit faslis would have been barred by limitation.

In revision it is argued that under the Madras Land Revenue Assessment Act no suit lies in Civil Court. The petitioners also contend that the suit is not of a small cause nature and, finally, that the lower Court did not fix the proper rate. S. 4, Madras Land Revenue Assessment Act, makes it clear that, until the assessment has been apportioned, the Government look only to the old registered holder for the peishkush and after the apportionment Government look partly to the old registered holder and partly to the new registered holder for the shares of the peishkush apportioned to them. This Act deprives the parties from recourse to a Civil Court with regard to the amount fixed for peishkush; but there is nothing in this Act or in the Rent Recovery Act which prevents a party from coming to a Civil Court for contribution for peishkush paid after a portion of the estate has passed into other hands. Various Sections of the Small Cause Courts Act have been referred to; but the one that is now relied on in this petition as barring a decision by a Small Cause Court is Art. 41. Art. 41 prohibits suits for contribution by a sharer in joint property; but this is not a suit for contribution by a sharer in joint property. The properties of the parties are separate; but because apportionment has not been made, the owner of one separated portion of land was obliged to pay the whole of the peishkush. The suit was therefore properly filed in the Small Cause Court.

With regard to the amount fixed, even though Ex. A was not an agreement, the Court rightly placed great reliance on a figure that had been agreed upon by the holders of the two parts of the estate; and I find no reason to think that the decision of the lower Court on the facts is incorrect. Nothing that the Court has decided in this suit will, of course, preclude the Collector from fixing what he considers to be the proper amount of peishkush payable by the plaintiff and by the defendants respectively. If the parties have any grievance with regard to the rates fixed by the Collector, their remedy is by way of an appeal to the Board of Revenue. This revision petition is dismissed with costs. A memorandum of cross-objections has been filed, contending that there was material before the Court or, at any rate, there could have been material before the lower Court, sufficient to prove that the Collector had passed an order apportioning the peishkush. It is not necessary to consider this memo of cross-objections and it is dismissed without costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 498

VENKATARAMANA RAO AND
KUNHI RAMAN JJ.

Eswara Krishna Iyer and another — Appellants.

v.

Mariya Susai Reddiar and others — Respondents.

Appeal No. 298 of 1936, Decided on 9th November 1939, against decree of Dist. Court, South Arcot, D/- 25th September 1936.

(a) Transfer of Property Act (1882), S. 60, last clause — Words "share of mortgagor" in S. 60, last clause—Meaning—Manner of acquisition of equity of redemption is immaterial.

The last clause of S. 60 is based on the principle that a mortgage is indivisible and it has to be redeemed entirely or not at all. Where there is a mortgage for an entire sum and properties belonging to one or several owners are secured thereunder, it is not open to a mortgagor or one of several mortgagors to redeem an item or his share only on payment of a proportionate part of the debt because there is only 'one mortgage, one debt and one entire right against all', whether against persons or properties. The only exception provided by the clause is where a mortgagee acquires the share of the mortgagor. Two conditions are necessary for the exception to operate, namely (1) the acquisition must be as a mortgagee, that is, as holder of the mortgage, and (2) what is acquired should be the share of the mortgagor. The words "share of the mortgagor" in the clause only mean the interest of the mortgagor outstanding after the creation of the mortgage, that is the ownership of the property minus the interest vested in the mortgagee and according to legal phraseology it would be equity of redemption that is, a right to redeem a particular mortgage. The equity of redemption is a relative term and will vary according as there are one or more mortgages of the same property. Thus, according to the plain meaning of the language of the clause there must be an acquisition of the equity of redemption in the mortgaged property or part thereof by a mortgagee qua mortgagee. The principle of the clause applies in whatever manner the equity of redemption is acquired by the mortgagee whether by purchase in execution of a decree, by private treaty, inheritance or device: *22 All 284 (F B) ; A I R 1920 Mad 375 (F B)* ; *12 C W N 745 and 31 All 335, Rel. on.*

[P 501 C 1, 2; P 502 C 1]

(b) Transfer of Property Act (1882), S. 60, last clause—Applicability.

The plain meaning of the clause suggests that it is only applicable to cases where the mortgaged property is owned or becomes absolutely owned by several cosharers or owned in distinct and separate ownerships by more than one mortgagor. In the case of a single mortgagor where rights of third parties do not intervene whether it is a single individual or a group of individuals constituting an entity the application of the clause presents no difficulty. It is only in the former class of cases questions really do arise in regard to the rights in the mortgage property becoming vested in more than one person. [P 501 C 1, 2]

(c) Transfer of Property Act (1882), S. 60—*A* and *B* distinct owners of properties X and Y mortgaging same to *C*—*C* subsequently purchasing property Y free from mortgage in consideration of other liability of *B* to *C* — S. 60, last clause has no application and *C* is entitled to recover entire debt from property X—*A*'s right of contribution is not affected.

The principle underlying the last clause of S. 60 applies only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding in the mortgagor. Therefore if before or at the time of acquisition the mortgagee renounces his character of mortgagee and purchases the property, the last clause of S. 60 would have no application. It is open to the mortgagor to agree that the amount paid for the purchase might go in reduction of any debt due to the mortgagee unconnected with the mortgage: *24 Mad 96 and A I R 1918 Mad 1030, Rel. on; A I R 1923 Cal 681, Expl.; 15 C W N 800, Not foll.*

[P 503 C 2]

Therefore where *A* and *B* distinct owners of properties X and Y mortgage the same to *C* who subsequently purchases the property Y free from mortgage in consideration of some other liability of *B* to *C*, the last clause of S. 60 has no application and therefore *C* is entitled to recover the entirety of the debt from the rest of the mortgaged property. But that does not affect *A*'s right of contribution against person in possession of property Y. [P 504 C 1]

T. M. Krishnaswami Ayyar and K. V. Ramchandra Ayyar — *for Appellants.*

V. V. Srinivasa Ayyangar, C. Padhmanabha Iyengar and T. E. Ramabhadra Chariar — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment of the learned District Judge of South Arcot in a suit to enforce a mortgage dated 29th November 1919 executed by defendants 1 to 3 in favour of defendant 5. This deed of mortgage Ex. A, was assigned by a deed of assignment Ex. C, dated 9th January 1932 in favour of plaintiff 3 who was a benamidar for plaintiffs 1 and 2. Defendant 4 is the son of defendant 1; defendant 6 is defendant 5's wife; defendant 7 is the undivided son of defendant 5; and defendant 8 is a purchaser in court auction of the suit properties in execution of a money decree against defendants 1 and 2 subsequent to the date of the mortgage. Defendant 9 is the Official Receiver who was added as a party since the date of the suit as the representative of defendant 1 who was adjudged an insolvent. The sum sought to be recovered in the suit was Rs. 20,000 which is the amount secured under the said mortgage. The main defence of defendant 8 who became the purchaser of the right, title and interest of defendant 1 in the suit properties in execution of a money decree was that the plaintiffs were not entitled to recover a sum of Rs. 20,000 but only Rs. 11,111-1-9. The defence of defendants 5 to 7 was that they were not liable for the suit claim. To understand the plea of defendant 8 a few facts are necessary. The mortgage Ex. A comprises two sets of properties: (1) the properties situate in the village of Orathur which belonged to defendants 1 and 2, and (2) the properties in Perumbakkam village which belonged to defendant 3. The mortgage is usufructuary and provided that the mortgagee should enjoy the properties in lieu of interest and there is a clause which provides for redemption to this effect:

> We shall pay the said sum in any month of Chitrai when you may choose to ask for the amount, or when we desire to pay the amount and redeem the properties. In default, we agree that the amount may be received by process of Court.

On 25th November 1922 by a registered lease the said properties were leased to the mortgagors for a period of five years stipulating an annual rent of Rs. 2109. In default of payment of rent, it was provided in the deed that the lessor was entitled to recover the balance of the amount due and payable with interest at one per cent. per mensem from the lessees personally and also from and out of the properties leased, but by a later clause the personal liability of defendants 2 and 4 was excluded and it was stipulated that only the properties would be liable. There can be no doubt that this document creates a charge over the properties leased, that is the properties mortgaged under Ex. A, for the rent that may be due and payable thereunder. It is also stated that an intermediate charge was created over the property in favour of defendant 5's son-in-law benami for defendant 5 but it does not appear from the record what the nature of that charge was and when it was redeemed, and for the purpose of this appeal we have to proceed upon the footing that on the same properties there was a mortgage and a subsequent charge created by the mortgagors in favour of the same plaintiff under the said lease. Any decision that we give here will be without prejudice to the rights and obligations that may be enforceable under any such intermediate charge if any subsisting. It appears that although the property was leased to all the mortgagors, only defendant 3 enjoyed the income from the mortgaged property. But he failed to pay the rent and on 27th September 1929, there was a sum of Rupees 19,700 due and payable. For a sum of Rs. 15,000, part of the said sum of Rs. 19,700, defendant 3 sold all the lands in Perumbakkam village by a sale deed Ex. I, dated 27th September 1929 mortgaged under Ex. A to defendant 5 absolutely. The operative portion of the said deed runs thus:

> Deducting the balance due to you is Rs. 19,700. Out of this amount you have agreed to give credit to a portion namely, Rs. 15,000. As I have received the said sum in that manner, I have in lieu thereof hereby sold to you absolutely the undermentioned properties belonging to me and in my possession and have delivered possession. You shall hold and enjoy the undermentioned properties from this day forwards with rights of alienation such as gift and sale. To this effect have I executed this deed of absolute sale with consent.

On a perusal of the deed there can be no doubt that defendant 3 conveyed the said property to defendant 5 free from encumbrances to be enjoyed by defendant 5 with full powers of alienation. What the effect of this conveyance on the rights of the parties is we shall consider later. On 9th January 1932 defendant 6, the wife of defendant 5, purchased from Maria Susai Reddiar and his son plaintiffs 1 and 2 herein certain properties for a sum of Rs. 35,000. Part of the consideration, namely a sum of Rs. 15,000 was paid by way of execution of a promissory note by defendant 5 in favour of the vendors. In regard to the balance of Rs. 20,000 the consideration was said to have been paid thus:

> I have also received Rs. 20,000 in respect of the assignment of the usufructuary mortgage debt bond for Rs. 20,000 executed this day by your husband Eswara Krishna Ayyar in favour of my wife Rose Mari Ammal at my instance the said usufructuary mortgage debt bond having been executed on 29th November 1919 by Orathur Duraiswami Reddiar and others in the name of your husband for Rs. 20,000.

It is conceded that defendant 6 was only a benamidar for defendant 5. The usufructuary mortgage in favour of defendant 5 was assigned in favour of the wife of Susai Reddiar as part of the consideration of Rs. 20,000. This was effected by a deed of assignment Ex. C, bearing the same date. In the deed of assignment, it is clearly stated that the properties in Perambakkam were excluded and the operative portion of the assignment deed ran thus :

> I have assigned to you the undermentioned usufructuary mortgage bond and have given to you my rights under the said usufructuary bond as per its terms excepting the properties in Perumbakkam village . . . . You shall yourself enjoy the undermentioned properties from this day forward.

It is on the strength of Ex. C, that the present suit was filed. The contention of defendant 8 that he is not liable to pay the sum of Rs. 20,000 is thus stated by him in paras. 5 and 6 of his written statement :

> 5. Since defendant 5 under whom the present plaintiffs claim a right to the suit mortgage has purchased a portion of the mortgaged property as stated in para. 4 above even before the date of the alleged assignment, the suit mortgage as well as the mortgage referred to in para. 3 have become split up and portions of the mortgage debts (in proportion to the value of the properties purchased by defendant 5) have become extinguished.
>
> 6. On the date of the suit mortgage, and on the date of the mortgage referred to in para. 3 above, items 1 to 89 were worth Rs. 20,000 ; 4/9th of the suit debt became therefore extinguished and so only 5/9th of the amount, namely Rs. 11,111-1-9 only can be recovered out of items 1 to 89 in Sch. II-A. In any event irrespective of the question as to whether any portion of the debt became extinguished since the mortgage has split up for the reasons stated in para. 5 above, the plaintiffs will not be entitled to recover the whole amount from items 1 to 89 only. The plaintiffs can recover from these items only the proportionate amount of the debt, namely 5/9th which amounts to Rs. 11,111-1-9.

In effect the substance of the contention is that by defendant 5 purchasing the Perumbakkam properties the integrity of the mortgage was broken up and there was a pro tanto extinction of the debt and the mortgagors, defendants 1 and 2, were entitled to redeem the suit property only on payment of a proportionate amount namely Rs. 11,111-1-9. The learned District Judge has given effect to this contention and given a mortgage decree against the suit properties only for a sum of Rs. 11,000 odd and in respect of the balance he gave a decree against defendant 5 on the ground that there was a covenant for title under Ex. C in and by which he covenanted that Rs. 20,000 was recoverable from the suit properties and as there was a breach of that covenant the plaintiffs were entitled to get the balance from defendant 5. This appeal is preferred by defendants 5 and 7. Two contentions have been advanced by Mr. T. M. Krishnaswami Ayyar, the learned counsel : (1) the purchase by defendant 5 under Ex. 1 of the Perumbakkam properties from defendant 3 was a purchase for full value of the entirety of the property free of the mortgage under Ex. A and not merely of the equity of redemption and therefore the last clause of S. 60, T. P. Act, would not apply so as to entitle defendants 1 and 2 to claim redemption of their property on payment of only a proportionate part of the debt and the plaintiffs would therefore be entitled to recover the entire amount of the mortgage from the suit properties ; and (2) the decree against defendant 5 is wrong because there was no covenant for title given by him under the assignment Ex. C. In regard to the first contention Mr. Krishnaswami Ayyar put his case thus : Where the mortgagee does not acquire merely the equity of redemption but acquires the full ownership in a part of security, whether its full value or part thereof is or is not utilised for the reduction of the mortgage debt, the part security having fetched its full value from the mortgagee-purchaser, the remedies of the mortgagee as such regarding the balance due are not affected at all either as regards the mortgage amount that may remain payable or the entirety of the remainder of the properties left as security against which he may proceed ; S. 60 has no application to such cases. He also urged that it is open to the mortgagee to release his mortgage right over any portion of the security and the substance of the transaction evidenced by Ex. I must amount to a release of the mortgage right under Ex. A and purchase of the property free of that mortgage right in full satisfaction of a debt which is common to both the mortgagors and whatever rights of contribution defendants 1 and 2 may have in respect of Perumbakkam properties the rights of the mortgagee and therefore of his assignee to proceed against the properties of defendants 1 and 2 cannot be affected by defendant 5's purchase. The contention of Mr. V. V. Srinivasa Ayyangar on behalf of defendant 8 is that a right of partial redemption conferred under the last clause of S. 60, T. P. Act, is separate altogether from any question about the amount on the payment of which alone such partial redemption could be obtained and the moment in any manner or by any means a share in the equity of redemption becomes vested by acquisition in the mortgagee, the mortgagor or any one of the mortgagors gets the right of asking for and obtaining partial redemption. Before dealing with the soundness of these contentions it will be necessary to examine the scope of the last clause of S. 60, T. P. Act, which runs thus:

> Nothing in this Section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor.

This clause is based on the principle that a mortgage is indivisible and it has to be redeemed entirely or not at all. Where there is a mortgage for an entire sum and properties belonging to one or several owners are secured thereunder, it is not open to a mortgagor or one of several mortgagors to redeem an item or his share only on payment of a proportionate part of the debt because there is only 'one mortgage, one debt and one entire right against all', whether against persons or properties. The only exception provided by the clause is where a mortgagee acquires the share of the mortgagor. Two conditions are necessary for the exception to operate, namely, (1) the acquisition must be as a mortgagee, that is, as holder of the mortgage, and (2) what is acquired should be the share of the mortgagor.

The question is what is meant by the words 'share of the mortgagor' in the clause. In the context it can only mean the interest of the mortgagor outstanding after the creation of the mortgage, that is, the ownership of the property minus the interest vested in the mortgagee and according to legal phraseology it would be the equity of redemption that is, a right to redeem a particular mortgage. The equity of redemption is a relative term and will vary according as there are one or more mortgages of the same property. Thus, according to the plain meaning of the language of the clause, there must be an acquisition of the equity of redemption in the mortgaged property or part thereof by a mortgagee qua mortgagee. In the case of such acquisition, the clause provides that a person interested in a share of the mortgaged property can redeem his share on payment of a proportionate part of the debt. Here the question arises who is meant by a person interested in a share of the mortgaged property? Again, the plain meaning of the clause suggests that it is only applicable to cases where the mortgaged property is owned or becomes absolutely owned by several cosharers or owned in distinct and separate ownerships by more than one mortgagor. In the case of a single mortgagor where rights of third parties do not intervene whether it is a single individual or a group of individuals constituting an entity the application of the clause presents no difficulty. It is only in the former class of cases questions really do arise in regard to the rights in the mortgage property becoming vested in more than one person. It may be necessary in this connexion to examine the reason why an exception is made to the general rule that the redemption must be of an entirety of the property in cases where the mortgagee acquires a share of the mortgagor. When the mortgagee acquires the equity of redemption he steps into the shoes of the mortgagor in respect of the property purchased subject to the mortgage in his favour.

There is thus a fusion of interest of both the mortgagor and the mortgagee and the mortgage becomes extinguished. The result of the extinguishment is that the mortgage debt over that property is wiped out, though every parcel of the mortgaged property so far as the mortgagee is concerned is liable for the entire mortgage debt but as between the mortgage properties they are liable to contribute rateably to the debt (S. 82, T. P. Act). This principle would apply as between the mortgagors inter se. As the mortgagee by purchase of the equity of redemption becomes a mortgagor in respect of the property purchased, the principle would apply also against him by virtue of taking the character of a mortgagor in respect of a portion of the property. The extent of the debt that is wiped out will be proportionate to the relative value of the property purchased. In the case of a single mortgagor, or where there is more than one mortgagor with their consent, when the mortgagee purchases the equity of redemption in an item or a part of the property, no question of partial or piecemeal redemption would arise because the rest of the property would still be owned by the mortgagor or mortgagors and it would be liable for the remainder of the mortgage debt. It may be said that the rest of the property is 'the share of the mortgagor' within the meaning of the Section. It does not matter whether the equity of redemption is purchased in execution of a decree against a mortgagor or by private treaty. The principle applicable would be the same in both cases: *vide* 22

All 284[1] (execution sale), 43 Mad 372[2] (execution sale) and 12 C W N 745[3] (private treaty). Where a person interested in the mortgaged property is not the mortgagor alone and before the purchase of equity of redemption portions of the mortgaged property become vested in third parties or where the mortgagee purchases from a cosharer his share or an item of property from an owner who held it in distinct ownership, not only is the debt pro tanto extinguished but the owners of different items will be entitled to redeem the properties on payment of the proportionate part of the debt. There is no doubt about the applicability of this rule. The same principle would apply in whatsoever manner the equity of redemption is acquired by the mortgagee, that is by inheritance, 31 All 335,[4] or by device.

The next question arises in the case of a mortgagee purchasing the entire interest in the mortgaged property free of the mortgage. Mookerjee J. in 15 C W N 800[5] expressed the opinion that if the sale was of the property, freed of the mortgage and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the mortgage debt and the purchase money should be applied in redemption of his dues, it would obviously be erroneous to maintain that the mortgagee was still bound to apportion the debt. There he was dealing with a case where the purchase was by the mortgagee from the mortgagor when the rights of no third parties intervened. Applying the principle which he enunciated he remarked thus:

> In the case before us it is clear from the conveyance executed by the mortgagors in favour of the mortgagee that the price paid by the latter was intended to represent the value of the entire interest and not merely of the equity of redemption. It was further intended that this purchase-money should be applied in reduction of the debt and that the mortgagees should hold the property purchased free from the mortgage lien. It is not open to the mortgagors therefore to claim credit for a larger amount than what was fixed as the purchase money and as between the mortgagors and the mortgagee, the latter is entitled to hold the property exempt from the mortgage lien. The appellants who are purchasers of the interest of the mortgagors in the other properties stand in no higher position; they have consequently no legitimate ground for complaining that the mortgagee seeks to throw the burden of the remainder of the mortgage debt upon the properties in their hands.

No doubt in that case the agreement between the mortgagor and the mortgagee was that the purchase money should go in the reduction of the mortgage debt. It was open to the mortgagor and the mortgagee to come to any agreement in regard to the satisfaction of the debt. Therefore, where the transaction is solely between the mortgagor and the mortgagee, it may be, there is no scope for the apportionment of the debt as the matter rests on contract between the parties. But the question is, can the principle enunciated by Mookerjee J. be extended even to a case where the matter does not rest between the mortgagor and the mortgagee and third parties such as co-mortgagors or purchasers of the equity of redemption of a portion of the mortgaged property interested in the mortgaged property? When a mortgagee purchases the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were an unencumbered property paying the full value therefor.

The acquisition by the mortgagee in such a case would be not as a mortgagee. If the acquisition is viewed as an acquisition by the mortgagee in the character of a mortgagee it would mean that the mortgagee was also purchasing his own interest. Therefore, the transaction can only be viewed as a release of his mortgage right and then a purchase by him. Mookerjee J. in 15 C W N 800[5] was inclined to the view that when the rights of third parties intervene, it is not open to a mortgagee to give up his mortgage right over any portion of the mortgaged property. But our High Court has taken a different view. In the Full Bench decision in 40 Mad 968,[6] it was definitely ruled that it is open to a mortgagee to release his right over any portion of the mortgaged property and proceed against the rest of the mortgaged property for the entirety of the debt though the effect of such a release would not affect the right of contribution which the owners of several portions of the mortgaged properties will have under the law, and the fact that third parties are interested in the property would not affect the right of the mortgagee to do so.

---

[1] Bisheshur Dial v. Ram Sarup, (1900) 22 All 284=1900 A W N 69 (F B).

[2] Ponnambala Pillai v. Annamalai Chettiar, (1920) 7 A I R Mad 375=55 I C 666=43 Mad 372=38 M L J 239 (F B).

[3] Mutty Lal Pal v. Nandu Lal Neogi, (1908) 12 C W N 745=8 C L J 92.

[4] Hamida Bibi v. Ahmed Hussain, (1909) 31 All 335=1 I C 779=6 A L J 387.

[5] Mir Eusuff Ali Haji v. Panchanam Chatterjee, (1911) 15 C W N 800=6 I C 842=11 C L J 639.

[6] Perumal Pillai v. Raman Chettiar, (1918) 5 A I R Mad 1030=42 I C 352=40 Mad 968=33 M L J 211 (F B).

It was conceded at the Bar that it is open to a mortgagee to release his right in respect of an item or part of the property and some time later become a purchaser of that item or part in which case no question of pro tanto extinguishment of the debt would arise at all. The principle is that once the right of the mortgagee is released, the property ceases to be the subject of the mortgage and the acquisition by the mortgagee would therefore be just like an acquisition by any other stranger acquiring the property. In 24 Mad 96[7] there was a purchase by a second mortgagee of a portion of the mortgaged property held in distinct ownership by more than one mortgagor in execution of a decree on a prior mortgage over the said property. It was held that by such acquisition the integrity of his mortgage was not broken. In the course of the judgment it was observed thus :

> It being granted that the plaintiffs (second mortgage) with regard to their purchase at the sale of Rangayya Goundan's decree (first mortgage) must be treated as strangers and the whole property free from encumbrance and free from the plaintiffs' right of redemption was put up to for sale and bought, we can see no ground for holding that their claim under their mortgage is in any way impaired.

The learned Judges explain the principle thus:

> The cases in which the property has been sold and bought subject to the mortgage which it is sought to enforce are clearly distinguishable from the present case in which the purchasers, though they happened to be mortgagees must be taken to have paid the full value of the unencumbered property.

No doubt it may be contended that when a purchase is made in execution of a first mortgage and when all the persons interested in the mortgaged property are parties to it, the sale will be of the entire interest in the property, namely not only the first mortgagee's interest in the property but also the interest of the mortgagor which was outstanding on that mortgage which would include also the rights of the second mortgagee who must be taken to stand in the shoes of the mortgagor so far as the first mortgage is concerned. The purchase may in effect be said to be in derogation of the second mortgagee's right and not as second mortgagee. But, if the Section were to be interpreted literally as contended for by Mr. V. V. Srinivasa Ayyangar, the second mortgagee must be deemed to have acquired the share of the mortgagor within the meaning of the Section. Therefore the principle underlying the decision shows that it is not in every case a purchaser acquiring the mortgaged property or a portion thereof must be deemed to be acquiring the share of the mortgagor within the meaning of S. 60 but it is only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding in the mortgagor. Therefore if before or at the time of acquisition the mortgagee renounces his character of mortgagee and purchases the property, the last clause of Section 60 would have no application. The principle enunciated by Mookerjee J. need not be confined only to cases where the agreement between the mortgagor and the mortgagee is that the amount paid should go in satisfaction of the mortgage debt. It would be open to the mortgagor to agree that the amount paid for the purchase might go in reduction of any debt due to the mortgagee unconnected with the mortgage. 27 C W N 763[8] is a case in point. In that case a certain property was acquired by Government under the Land Acquisition Act and the compensation money was deposited into Court. With the consent of the mortgagors the amount was allowed to be appropriated in respect of their unsecured debts and Ghose J. in the course of the judgment explained the substance of the transaction thus:

> Before any third person had acquired any interest in any portion of the mortgaged property the mortgagees were entitled, if they so desired, to pay the whole amount of the compensation money to the mortgagors. They would thereby have reduced their own security and the interest of no other person would have been affected in any way. What happened in this case practically amounts to this that the mortgagees made over a part of the compensation money to the mortgagors and the mortgagors paid it back to the mortgagees in satisfaction of their unsecured debts.

In effect what the learned Judge says is that the mortgagees must be deemed to have released their rights over the mortgage property and received the compensation money from the mortgagors. No doubt Ghose J. says that this could not be done where third parties are interested because the view of the Calcutta High Court as already stated is that it is not open to the mortgagee to release a portion of the mortgaged property when the rights of third parties intervene. But as that is not the law so far as this presidency is concerned the principle of the decision would apply without any qualification suggested by Ghose J. No doubt the mortgagee in possession of the property as owner thereof would not be in a position to resist a suit for contribution at the instance of a co-mortgagor or a person owning other portions of the mortgaged property. But that would not affect the right of the mortgagee to recover the entirety of the debt from the rest of the mortgaged property and if he can do so there is nothing to prevent him assigning that right and the assignee by virtue of the assignment recovering the entirety of the debt from the rest of the mortgaged property. If the mortgagee sues, a claim for contribution by way of set off may be open against him.

---

[7] Sesha Ayyar v. Krishna Ayyangar, (1901) 24 Mad 96.

[8] Kushtia Loan Office Ltd. v. Ananda Charan, (1923) 10 A I R Cal 681 = 77 I C 26 = 27 C W N 763.

Having regard to these principles, the question in this case will have to be dealt with. Under Ex. I there can be no doubt that defendant 5 purchased the property free from encumbrances from defendant 3. The purchase was in effect free not only of the mortgage under Ex. A but also free of the charge under the lease. Defendant 5 must therefore be deemed to have released his right under Ex. A over the said property. No doubt his liability for contribution as owner of the Perumbakkam property to defendants 1 and 2 as owners of Orathur property will remain unaffected. But defendant 5's right as mortgagee to release the entirety of the debt cannot be questioned and whatever rights he had under Ex. A he assigned them under Ex. C. In our opinion therefore the assignee plaintiff 3 would be entitled to recover and realize the entire amount of Rs. 20,000 from the Orathur property. We are also of the opinion that if the mortgage property be found insufficient, plaintiff 3 would be entitled to realize the balance personally from defendants 1 to 3. Though defendant 5 has given up his right over the Perumbakkam village, still the right of defendant 3 to personally pay the mortgage money under Ex. A has not been released and he will be bound to pay the balance. In this view, it is unnecessary now to consider the extent of the obligations of defendant 5 under Ex. C. Our decision in this case would leave unaffected the right of defendants 1, 2 and 8 to claim contribution from defendant 5 by reason of his being the owner of the Perumbakkam properties. All these matters will have to be adjudged in a separate suit. We are of the opinion that it is not open to defendants 1 and 2 to claim redemption by paying only a proportionate part of the debt nor for defendant 8 who has purchased their right and interest to resist the plaintiffs' claim for the recovery of the entire sum from the properties in his possession.

We accordingly allow the appeal, set aside the decree against defendants 5 and 7 and modify the decree of the learned District Judge against defendants 1 to 3 and 8 by granting a mortgage decree against them for the amount claimed in the plaint, but in the circumstances of this case we are not inclined to allow any costs to the appellants.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 504

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Mahadevi — Petitioner.

v.

P. P. Sankara Menon — Respondent.

Civil Revn. Petn. No. 1292 of 1936, Decided on 11th October 1939.

(a) Provincial Small Cause Courts Act (1887), Art. 31—Merely because suit involves taking of accounts it does not become suit for account—Suit by agent for indemnity against principal held not suit for account.

A suit for an account is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action. Suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant : *24 M L J 693; A I R 1938 Mad 707 and 28 Mad 394, Rel. on; A I R 1938 Mad 799, Dissent.* [P 505 C 1]

An agent of a stanam appointed to collect the rents due to the stanam and to meet all proper expenses in connection with the estate was dismissed. He brought a suit against the principal to recover certain amount. His case was that after taking into account what he had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the principal was liable in the sum mentioned :

Held that the suit was for indemnity against principal and not a suit for account within the meaning of Art. 31. The suit was therefore not excluded from small cause jurisdiction. [P 505 C 2]

(b) Principal and Agent — Agent cannot call upon principal for account.

An employer can call upon his agent for an account, but an agent cannot call upon his employer for an account. [P 505 C 2]

P. Govinda Menon — *for Petitioner.*

D. A. Krishna Variar — *for Respondent.*

Leach C. J. — The question involved in this petition is whether the District Munsif of Calicut exercising small cause jurisdiction was right in entertaining the suit filed by the respondent against the peti-

tioner. The respondent was the agent of a stanam and it was his duty as such to collect the rents due to the stanam and to meet all proper expenses in connection with the estate. He was appointed as the agent on 17th September 1931. For reasons which have not been disclosed, and in any event would not be material, he was suspended from his duties on 21st August 1932. His suspension was followed by his dismissal on 17th December 1932. The respondent filed the suit out of which this petition arises to recover from the petitioner a sum of Rs. 189-9-9. His case was that after taking into account what he had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the petitioner was liable in the sum mentioned. The petitioner objected to the jurisdiction of the Court on the ground that this was a suit for an account within the meaning of Art. 31, Sch. 2 to the Provincial Small Cause Courts Act, 1887. Art. 31 excludes from small cause jurisdiction a suit for an account. The District Munsif held that this was not a suit for an account within the meaning of Art. 31 and passed a decree for Rs. 106-5-0 with interest and costs.

It is manifest that the District Munsif was right in holding that he had jurisdiction to try the suit. As was pointed out by a Bench of this Court in 28 Mad 394,[1] a suit for an account is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action. I may add that a suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant. If he establishes the right the defendant is called upon to submit an account and if he fails to comply he does so at his own risk. If the account is submitted the plaintiff may file objections. When the preliminaries are completed the account is taken by the Court, usually through an officer appointed for the purpose.

A similar decision to that in 28 Mad 394[1] was given by another Bench of this Court in 24 M L J 693.[2] 28 Mad 394[1] was followed by Abdur Rahman J. in (1938) 2 M L J 112.[3] A dissentient note was, however, sounded by Venkatasubba Rao J. in (1938) 2 M L J 76.[4] The learned Judge considered that the substance of the suit had to be looked into and if it involved the taking of an account it was a suit for an account within the meaning of Art. 31. The learned Judge referred to the decision in 28 Mad 394,[1] by which he was bound but he did not follow it. The opinion which Venkatasubba Rao J. expressed is not only contrary to the authorities which were binding on him, but is clearly one which cannot be supported. In the present case the respondent was in effect suing for an indemnity against his principal. S. 222, Contract Act, says that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. An employer can call upon his agent for an account, but an agent cannot call upon his employer for an account. The decision of the District Munsif that he had jurisdiction to entertain the suit was right. The petition therefore fails and must be dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

---

[1] Konduru Runga Reddi v. Subbiah Chetty, (1905) 28 Mad 394.

[2] Varadarajulu v. Narayanaswami, (1913) 24 M L J 693=20 I C 518=1913 M W N 879.

[3] Ramachandra Madhavadoss & Co v. Moidunkutti Birankutti and Bros., (1938) 25 A I R Mad 707=177 I C 631=(1938) 2 M L J 112.

[4] Abdul Rahiman v. Jamalluddin Sahib and Co., (1938) 25 A I R Mad 799=176 I C 806=(1938) 2 M L J 76.

A. I. R. 1940 Madras 505

VARADACHARIAR AND
ABDUR RAHMAN JJ.

T. Pr. Sm. Somasundaram Chettiar — Appellant.

v.

V. Rm. Sevugan Chettiar and another— Respondents.

Appeal No. 218 of 1933, Decided on 1st December 1938.

Partnership Act (1932), S. 13 (c) — Suit for accounts—Interest on capital contributed by partner cannot be allowed after dissolution—Interest on capital is payable only out of profits in absence of contract to contrary.

The right to interest on capital contributed by one of the partners even when there is stipulation for payment of such interest ordinarily ceases at the date of dissolution and in taking of accounts between the parties no interest under this head can be allowed after dissolution. It is only out of the profits, if any, that the capital contributing partner can be expected to take his stipulated interest under S. 13 (c). The law may recognise an exception to this rule where the contract expressly provides for payment of interest regardless of profits. [P 506 C 2; P 507 C 1]

K. V. Krishnaswamy Iyer and T. N. Sundaresa Ayyer — *for Appellant.*

N. G. Krishna Ayyangar, T. M. Ramaswami Ayyar and K. P. Mahadeva Iyer — *for Respondents.*

Judgment.—This is an appeal by defendant 1 against the final decree in a suit for the taking of the accounts of a partnership business carried on in Mandalay under the V. R. M. Vilasam in which the parties to the suit were partners. The plaintiff and defendant 2 are the sons of one Ramanathan Chetti and both of them together are entitled to a half share in the profits of the business. Defendant 1 is Ramanath's sister's son and had also married Ramanatha's wife's sister. He was entitled to the other half share of the profits. But it is admitted that Ramanatha alone contributed capital to the business and that Ramanatha was entitled to take interest in respect of that capital. The firm was dissolved by a notice Ex. A, dated 27th May 1927.

In pursuance of the direction given in the preliminary decree accounts were taken by a commissioner and after deciding some of the objections raised in connexion with the commissioner's report the lower Court has passed a decree directing defendant 1 to pay into Court a sum of Rs. 41,532-4-6 with further interest and directing the said sum to be disbursed in the manner provided for in the later clauses in the decree. It is against this decree that defendant 1 has appealed. Though a number of items in the account were objected to in the memorandum of appeal, only two points have been pressed before us. Respondent 2 who was defendant 2 has filed a memorandum of objections taking exception to the lower Court's decision as regards one of the items in dispute between the parties. (After discussing the facts of the case, their Lordships proceeded.) The only other point argued in the appeal relates to the calculation of interest, in taking the accounts between the parties.

Mr. Krishnaswami Iyer contends that in respect of capital contributed by Ramanatha he would have been entitled to interest only if and when profits had been made and in any event only up to the date of the dissolution of the partnership and that the lower Court was not justified in crediting the respondents with interest on this capital amount throughout the accounting period. This question has not been dealt with in the lower Court and we gather from an order of the lower Court dated 27th February 1933 that when the question was brought forward before the learned Subordinate Judge before he had delivered the judgment, he dismissed it on the ground that the petition raising it was premature. This order is scarcely intelligible. But we see no objection to deal with the question on its merits now. Mr. Krishnaswami Iyer seems to us to be right in both his contentions on this question of interest. As observed in Lindley on Partnership, at p. 465 of Edn. 10, the right to interest on capital contributed by one of the partners even when there is a stipulation for payment of such interest ordinarily ceases at the date of dissolution and in the taking of accounts between the parties no interest under this head should be allowed in respondent's favour after 27th May 1927. We also agree with him that interest on capital is payable only out of profits. We are informed by him that according to the commissioner's report there has been only a loss and no profits throughout the account taking period. This is not conceded by the other side and as the question has not been examined by the lower Court, we are not able to come to one conclusion or the other, on the materials now before us. We can therefore only indicate the principle and send the case back to the lower Court for determination of this question.

Mr. Ramaswami Iyer on behalf of the respondents contended that the admission contained in Somasundara's notice Ex. A is wide enough to cover an agreement to pay interest whether profits were made or not. That does not seem to us to be a correct reading of Ex. A. The words used are that Ramanatha was entitled to take interest. This naturally suggests that he was to take it out of the gross income, i. e., as a deduction from the gross income before profits divisible between the partners could be ascertained. It seems to us only reasonable that when the non-contributing partner is not to be personally liable for the capital contributed by the other partner in the event of loss, he equally could not be liable for interest on such capital in the event of loss. It is only out of the profits, if any, of the business that the capital contributing partner could be expected to take his stipulated interest. This seems to be the principle adopted by the Indian Legislature in S. 13 (c) of the Indian Partnership Act and by Parliament in S. 24, cl. 4 of the English Partnership Act. The law may recognise an exception to this rule where the contract expressly provides for payment of interest regardless of profits but as already stated we are unable to read Ex. A as evidencing any such express contract and there is no other evidence in favour of any such express contract. To this extent the appeal is allowed; as the parties are not able to agree upon the necessary alterations in the figures, the case must go back to the lower Court for revising the accounts in the light of the above directions as regards the calculation of interest. In other respects the decree of the lower Court is confirmed. There will be no order as to costs in the memorandum of objections. In the appeal the appellant will pay the respondents' costs—one set only.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 507

VENKATARAMANA RAO J.

Nyapati Vizia Rama Murti — Plaintiff — Appellant.

v.

Nyapati Suryanarayana Murti and others — Defendants — Respondents.

Second Appeals Nos. 812 to 840 of 1934, Decided on 12th December 1938, against decrees of Dist. Court Ganjam at Berhampore, in A. S. Nos. 382 to 410 of 1930.

Provincial Small Cause Courts Act (1887), S. 23 and Sch. 2, Art. 7 — Suits for rent of small cause nature—Plaintiff's co-sharers added as defendants — Suits involving question of title as shares of cosharers came up for determination —Suits held ceased to be of small cause nature —Suits fall under Sch. 2, Art. 7.

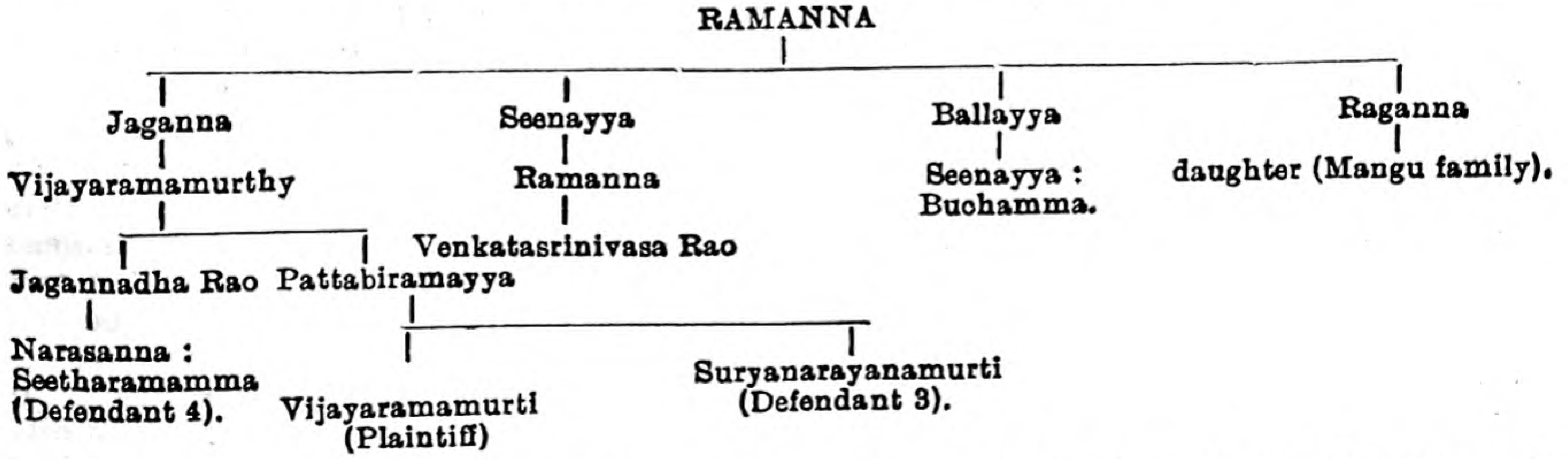
The suits instituted by the landlord against his tenants for rent were admittedly of a small cause nature but on objection being raised by the tenants as to the right of the plaintiff to the rent the plaintiff's cosharers were also added as defendants:

Held that though at the inception the suits were for rent, after the joinder of co-sharers they ceased to be suits merely for rent and the declaration of title to the plaintiff's share became really a substantial question for decision. For, as against the cosharers the suits could not be of a small cause nature because the question in issue between them was one of title, that is, to what shares in the lands were each entitled to? Therefore the nature of the suits must be judged after the joinder of the parties in considering whether a second appeal would lie or not. As the suits ceased to be merely for rent and the declaration of title was not merely an incidental relief but also a substantial relief on which the consequential relief as to the amount of rent that the plaintiff would be entitled to depended, the suits ceased to be of a small cause nature. They were virtually suits involving an apportionment of rent of immoveable property within the meaning of Sch. 2, Art 7 : *A I R 1918 Mad 557, Ref.*; *A I R 1926 Mad 656, Expl.*; *A I R 1918 Mad 162; A I R 1929 Mad 389 and 23 M L J 517, Disting.* [P 508 C 1, 2 ; P 509 C 1]

V. Govindarajachari — *for Appellant.*

B. Jagannadha Doss — *for Respondents.*

Judgment. — This batch of 29 second appeals arises out of suits instituted by the plaintiff-appellant for recovery of rent from various tenants in the occupation of the lands in the two villages of Jagannadhapuram and Venkatarayapuram, in the Ganjam district. The lands comprise three varieties, (1) Kaniyal (2) Kondholo and (3) Bogodo. The plaintiff is one of the co-sharers along with Nyapati Seetharamamma and Nyapati Suryanarayanamurthi. The relationship of these three sharers will appear from the following pedigree :



It will be seen from the above that Sitaramamma is the widow of Narasanna whose father Jagannadha Rao was the brother of Pattabiramayya, the father of the plaintiff, and that Suryanarayanamurti is the brother of the plaintiff being the other son of Pattabiramayya. The plaintiff claimed half a share in the Kaniya lands and three fourth share in the Kondolo and Bogodo lands. In the Kaniya lands he admitted that Sitaramamma was entitled to a fourth share and Suryanarayanamurti another fourth share. In the Kondolo and Bogodo lands he admitted that Suryanarayanamurti was entitled to a fourth share but denied that Sitaramamma had any share therein. The Kaniya lands are lands which have been from time immemorial under cultivation and Kondolo and Bogodo lands originally waste lands but subsequently brought under cultivation. The plaintiffs did not first implead Seetaramamma and Suryanarayanamurti as parties to the suit but on objection raised by the tenants they were added as defendants in the suits. After they were impleaded as parties they disputed the claim of the plaintiff in regard to the shares. Sitaramamma alleged that she was entitled to a half share in all the Kaniya, Kondolo and Bogodo lands. Suryanarayanamurti admitted that he was entitled only to a one-fourth share in the Kaniya lands but stated that he was entitled to a half share in the Kondolo and Bogodo lands denying the title of Sitaramamma to any share therein. Both the lower Courts concurrently found in favour of the claim set up by Sitaramamma, that is, they held that the plaintiff and Suryanarayanamurti were each entitled only to a fourth share in the suit properties and that Sitaramamma was entitled to a half share. Hence these second appeals by the plaintiff. Both the tenants as well as Sitaramamma and Suryanarayanamurti are respondents to the appeals.

Mr. Jagannadha Das on behalf of the respondents raised a preliminary objection that no second appeal would lie, the suits being one for rent and of a small cause nature having regard to the valuation in the plaints by virtue of S. 102, Civil P. C. He relied on a number of cases for the purpose of showing that the mere fact that a question of title has been adjudicated upon will not make the suits any the less suits of a nature cognizable by the Court of small causes, because the adjudication as to title is only incidental to the main relief claimed in the suits. All the cases referred to by him are cases where the conflict was only between landlord and tenant but where the question arises as to the proper share which a landlord will be entitled to in a piece of land and for the purpose of determination of that share the co-sharers are made parties, it would seem to me that so far as the co-sharers are concerned, the suits are in substance for a declaration of the plaintiff's share to the land. That being so, the suits cannot be of a small cause nature. In this case, though at the inception the suits were for rent, after the joinder of Sitaramamma and Suryanarayanamurti, they ceased to be suits merely for rent and the declaration of title to the plaintiff's share became really a substantial question for decision. I will now briefly refer to the decisions relied on by Mr. Jagannadha Das and Mr. Govindarajachari in support of their respective contentions. 35 M L J 377[1] was the first case referred to by Mr. Jagannadha Das. In that case the suit was admittedly one of a small cause nature when it was filed. At the date of the second appeal, by the amendment of the Provincial Small Cause Courts Act, the suit ceased to be of a small cause nature. The question therefore was whether a second appeal would lie in view of the fact that there has been an amendment to the Act.

It was held that a second appeal would not lie on the principle that a vested right to the finality of the judgment accrued to the successful party and the amendment of the Act could not affect that vested right. In A I R 1929 Mad 389[2] the suit was for use and occupation of the land against an inamdar. The question of title was raised by the defendant in his written statement and the suit which was originally filed in a Small Cause Court was transferred under S. 23, Provincial Small Cause Courts Act, to the original side of the Court, before which the suit was pending. It was held that the question of title was only incidental and the suit did not cease to be one of a small cause nature and no second appeal would lie. Similarly, in 23 M L J 517[3] the suit was for rent by a landlord against his tenant and there was a prayer for a declaration that the plaintiff was entitled to melwaram. It was held that the declaration of a right to receive the melwaram was only incidental and the suit was therefore one of a small cause nature and no second appeal would lie. The case relied on by Mr. Govindarajachari (AIR 1926 Mad 656[4]) does not throw much light on the matter. There is an observation to the effect that where the plaint and written statement show that the issue to be fought out and decided is one of title, the suit cannot be considered to be one of a small cause nature. Nobody need dispute this proposition. In this case the suit was for rent and admittedly one of a small cause nature against the defendants tenants.

---

1. Subramania Iyer v. Namasivaya Asari, (1918) 5 A I R Mad 162=45 I C 11=35 M L J 377.
2. Bapayya v. Viswa Sundara, (1929) 16 AIR Mad 389=116 I C 114.
3. Veeraraghava Iyengar v. Villai Moopai, (1912) 23 M L J 517=17 I C 704.
4. Prayaga Doss Jeevaru v. Doraiswami Iyengar, (1926) 13 A I R Mad 656=92 I C 899.

But, as against the co-sharers, the suit could not be one of a small cause nature because the question in issue between them was one of title, that is, to what shares in the lands are each entitled to? Therefore the nature of the suit must be judged after the joinder of the parties in considering whether a second appeal would lie or not. As the suits ceased to be merely for rent and the declaration of title is not merely an incidental relief but also a substantial relief on which the consequential relief as to the amount of rent that the plaintiff would be entitled to would depend, the suits ceased to be of a small cause nature. They would virtually be suits involving an apportionment of rent of immovable property within the meaning of Art. 7 of Sch. 2 to the Provincial Small Cause Courts Act : *cf.* 41 Mad 370.[5] The second appeals would therefore lie. I therefore overrule the contention of Mr. Jagannadha Das. (His Lordship then discussed the merits of the case.)

* * * *

On a consideration of the entire evidence and the probabilities of the case, I am of the opinion that the view taken by both the Courts that the plaintiff has not succeeded in proving his exclusive title to Buchamma's share of the lands by adverse possession is correct. Of course, in regard to Bogodo and Kondolo lands of the family, adverse possession was set up but it could hardly be maintained in the face of the decree in O. S. No. 21 of 1890. I have therefore come to the conclusion that the finding of both the lower Courts that the plaintiff is only entitled to a fourth share in Kaniya, Bogodo and Kondolo lands is correct and must be affirmed. The second appeals accordingly fail and are dismissed with costs. Advocate's fee Rs. 200 for all the appeals. Leave to appeal refused.

C.R.K./G.N. *Appeals dismissed.*

---

[5] **Rangiah Chetti v. Vajravelu Mudaliar, (1918) 5 A I R Mad 557=43 I C 78=41 Mad 370=33 M L J 618.**

A. I. R. 1940 Madras 509

PANDRANG ROW AND HORWILL JJ.

In re Boya Lingadu — Accused.

Reference No. 6 of 1939, Decided on 3rd January 1940, reference by Sess. Judge, Anantapur in Case No. 28 of 1939.

(a) Criminal Trial — Jury — Verdict of not guilty by jury—Fact that record does not disclose reason for disbelieving prosecution witnesses or Judge disagrees with jury's opinion does not render verdict perverse or unreasonable.

Where a jury returns a verdict of not guilty, it cannot be said that simply because there is no reason to be found in the record for disbelieving the evidence of the prosecution witnesses the jury's verdict must be regarded as perverse or unreasonable. The jury is entitled to form and express their own opinion as regards the reliability of the witnesses, and one cannot exclude the possibility that they might have formed an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record and the mere fact that the opinion is one with which the Judge does not agree, does not make the jury's opinion perverse or unreasonable. [P 509 C 2 ; P 510 C 1]

(b) Criminal Trial—Joinder of charges—Two distinct offences of theft at two separate houses and also charges under S. 411, Penal Code, tried at one trial — Trial is illegal as joinder is bad.

Where two distinct offences of theft in two separate houses are tried at one and the same trial, and the alternative charges under S. 411, Penal Code, are also in respect of each of those transactions, the trial is not according to law on account of the wrong joinder of charges. [P 510 C 1]

Public Prosecutor — *for the Crown.*

Pandrang Row J. — This is a reference made by the Sessions Judge of Anantapur in respect of a verdict of not guilty returned by the jury on a charge of theft and in the alternative of retention of stolen property knowing it to be stolen. The case was a very simple one. The only evidence incriminating the accused was that certain articles were produced by the accused before the police officer who investigated the case and another witness. The ownership of the articles was proved by the persons in whose houses the thefts had taken place. The suggestion in the cross-examination of the police officer was that the articles said to have been produced by the accused were really handed over to the police by the complainants themselves, and it is possible that the jury thought there was some truth in this suggestion. The jury's verdict was unanimous, and it cannot be said that simply because there is no reason to be found in the record for disbelieving the evidence of these two witnesses the jury's verdict must be regarded as perverse or unreasonable. The jury were entitled to form and express their own opinion as regards the reliability of these two witnesses, and one cannot exclude the possibility that they might have formed an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record. It can hardly be urged that the jury was not competent to decide the simple question whether the evidence regarding the production of these properties by the accused was reliable or not, and the mere fact that the opinion is one with which the learned trial Judge does not agree, does not make the jury's opinion a perverse or unreasonable one. Apart from this, there is the fact that the trial itself was not according to law because the charges were wrongly joined. Two distinct offences of theft in two separate houses were tried at one and the same trial, and the alternative charges under S. 411, I. P. C., were also in respect of each of these transactions. In other words, there were two charges under S. 411 in respect of the properties stolen from the two houses. We see no reason to accept the reference. The records are therefore returned to the Sessions Judge. The accused is acquitted and he should be set at liberty unless liable to be detained for some other cause.

C.R.K./G.N. *Order accordingly.*

✻ A. I. R. 1940 Madras 510

MOCKETT J.

Mrs. T. R. Manjula Bai — Petitioner.

v.

K. Janoji Rao — Respondent.

Original Matrimonial Suit No. 1 of 1939, Decided on 27th September 1939.

✻ Divorce Act (1869), S. 10—Decree for judicial separation on ground of cruelty — Subsequent petition for dissolution of marriage on ground of cruelty and adultery—Applicant can rely on decree for proving cruelty and prove adultery only.

Where the wife obtains a decree allowing judicial separation on the ground of cruelty and subsequently files a petition for dissolution of marriage under S. 10 on the ground of cruelty and adultery, she can rely on the decree for proving cruelty and may prove adultery only : *(1866) L R 1 P D 237, Foll.* [P 510 C 2]

T. Muniswami Reddi — *for Petitioner.*

Order. — This is a wife's petition for dissolution of marriage on the grounds of adultery and cruelty. She filed O. M. S. No. 17 of 1937 claiming the same relief on the grounds of cruelty and adultery. The learned Judge, on 6th September 1938, refused a decree for dissolution of marriage on the ground that adultery had not been proved. But he allowed the petitioner to amend her petition by adding a prayer for an order for judicial separation on the ground of cruelty which had been proved. The petitioner before me relies so far as cruelty is concerned on the decree and judgment of Gentle J., and so far as adultery is concerned has brought evidence to show that since November of last year the respondent, her husband, has been living with another woman at Trichinopoly. No evidence of cruelty was called before me. Is this procedure correct? I think the petitioner was entitled to adopt this course. Under S. 7, Divorce Act, the Courts in India act and give relief on principles and rules which, in the opinion of the said Courts, are as near as may be conformable to the principles and rules on which the English Courts act. No decision in India exactly on the question before me has been cited but I have no doubt whatever that the procedure laid down in (1866) L R 1 P D 237,[1] a case exactly in point should be followed here. In that case there had (as in this case) been a decree for judicial separation on the ground of cruelty in a previous petition, and in the petition before the Court the following procedure was followed (page 238):

> Proof was given of the marriage, and of adultery committed by the respondent subsequent to the decree for judicial separation. The original decree for judicial separation on the ground of cruelty was before the Court, and evidence was given of the respondent's identity with the respondent in the suit for judicial separation.

That procedure has been followed before me and I find that there is proof, for the purposes of this petition, of cruelty. So far as the adultery is concerned, there is the evidence of the wife, confirmed by the evidence of the husband's landlord, one Sambasivam Pillai, that these people have been living together as husband and wife and are still living together in the same house. The case reported in 56 Cal 166,[2] has no bearing upon this case, except that the procedure in (1866) L R 1 P D 237[1] is noted by Rankin C. J. I would respectfully agree with the decision in 56 Cal 166,[2] which is to the effect that a petitioner, in the absence of a fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. As the learned Chief Justice points out, the Courts could not possibly countenance a petitioner who had material for dissolution, refraining from claiming it in his petition and obtaining only a decree for judicial separation, and then later on, when he thought it convenient, coming to the Court to repeat the same evidence all over again and asking for a decree for dissolution. In this case there is besides the decree for judicial separation, entirely fresh evidence of adultery. The

---

1. Bland v. Bland, (1866) L R 1 P D 237.
2. Collins v. Collins, (1928) 15 A I R Cal 806 = 115 I C 599=56 Cal 166=32 C W N 932.

provisions of the Act have therefore been complied with. That being so, the petitioner will have a decree nisi with costs.

O.R.K./G.N. *Application allowed.*

---

* A. I. R. 1940 Madras 511

WADSWORTH J.

Prerepa Bhagavat Sastrulu and another — Appellants.

v.

Saridey Lakshmikantam — Respondent.

Appeal No. 349 of 1936, Decided on 2nd October 1939, against order of Sub-Judge, Ellore, D/- 19th September 1935.

*** (a) Hindu Law—Maintenance—Concubine — Concubine is entitled to maintenance even though she be childless.**

Existence of children is not a condition precedent to the right of maintenance of a permanently kept concubine of a Hindu. She is entitled to maintenance even though she is childless: View of Spencer J. in *AIR 1925 Mad 230, Dissent.; 10 Bom H C R 381 and A I R 1926 P C 73, Expl.* [P 512 C 1]

(b) Practice—Remand — General rule stated — It is undesirable to remand case in order to enable both parties to adduce evidence which might and ought to have been put before trial Court — Remand held justified.

As a general rule it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury. [P 512 C 2]

But where the Appellate Court found that a concubine of a deceased Hindu was entitled to maintenance and having regard to the facts that she had got a decree in a connected suit for a certain debt due from the estate of the deceased and that there was another claim for maintenance against the same estate brought by a widow of the deceased which had been remanded for taking further evidence as to the quantum of the assets and liabilities of the estate, remanded the case of the concubine also for further evidence on the same point, the evidence in both cases to be taken in common, the remand was held justified and proper. [P 512 C 2]

V. Govindarajachari and K. Kameswara Rao — *for Appellants.*

P. Somasundaram and S. Ramamurthi — *for Respondent.*

Judgment. — This appeal raises a question regarding the right of the permanently kept concubine of a deceased Hindu to claim maintenance when she has not had a child by the deceased. It is a question upon which authority is meagre. The only definite pronouncement is contained in an obiter dictum of Spencer J., at p. 810 in the case in 48 Mad 805.[1] The learned Judge was dealing with a case of a claim by a concubine who in fact had a daughter by her deceased paramour. In laying down the conditions upon which a concubine may be entitled to maintenance he observes:

> Another condition that has been put on the right of a concubine to be maintained is that she should be the mother of illegitimate children,

quoting as authorities the case in 10 Bom H C R 381[2] and Strange's Hindu Law, Chap. 8, p. 174. The other learned Judge while agreeing generally with the conclusion of Spencer J., says nothing about the question whether the right of maintenance depends upon the existence of children by the concubine. Turning to the authorities for this pronouncement I find that the case in 10 Bom H C R 381[2] does not lay down any rule that a concubine who has no children is disentitled to maintenance. The judgment is very short and the essential point is found in one sentence which is:

> We also agree with the Judge in thinking that as the mother of the illegitimate children of Ranchor, i. e. as his concubine, she is entitled to maintenance.

The judgment quotes as authority Strange's Hindu Law and West and Buhler. This passage may well be an indication that the essential criterion is not whether the claimant is the mother of illegitimate children but whether she was a regularly kept concubine of the deceased. When we turn to the passage in Strange, Vol. 1, p. 174 we find the learned author after referring to the rights of illegitimate children to maintenance adds the sentence, "the mothers of such children also have a like claim." The contrary proposition that concubines who are not the mothers of illegitimate children have no claim to maintenance is not stated. I have not been able to verify the passage in the old edition of West and Buhler quoted by the learned Chief Justice in *Khemkor's case.*[2] Turning to the original texts in the Mitakshara upon which the right of a concubine to maintenance is built, we find very little assistance. Chap. II, S. 1, para. 27 contains the following: "It is said by Katyayana, 'heirless property goes to the King, deducting however a subsistence for the females.'" Then in para. 28:

> This relates to women kept in concubinage, for the term employed is "females" (yoshid). The text of Narada likewise relates to concubines.

There is nothing in these texts to indicate that the question whether or not a concubine has children has any bearing on her right to maintenance. The learned editor of the latest edition of Mayne's Hindu Law, p. 824 points out the lack of authority for the pronouncement of Spencer J. to which I have referred and expresses the opinion that a barren concubine is entitled to maintenance just as much as a barren widow. In the case in 50 Bom 604[3] the Privy Council had occasion to deal at length with the question of the right of a concubine to maintenance, particularly with reference to what is required to bring a concubine within the category of *avarudha stri*. That was a case in which the woman in question had a child and their Lordships do not consider whether the right of maintenance is or is not affected by the existence or absence of children. But they do lay down that a woman may be an *avarudha stri* under modern conditions even if she is not living with the family of her paramour, thus overruling one of the conditions which Spencer J. accepts as necessary to support the claim of a concubine to maintenance. The argument from silence is, of course, dangerous, but it may be remarked that the judgment contains no reference to any limitation of the right to maintenance to concubines who have children. It seems to me with great respect that the proposition laid down in the obiter dictum of Spencer J. is one which has been constructed on an erroneous inference from the sentence in Strange's Hindu Law and the sentence in 10 Bom H C R 381[2] to which I have referred, that it is unsupported by any text and that it cannot be held to be authoritative. There is no apparent logical or moral basis for the alleged rule and it has not been shown to have the support of custom. I therefore come to the conclusion that a permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless. This disposes of the main question in the present appeal.

---

[1] Rama Raja Thevar v. Papammal, (1925) 12 A I R Mad 1230=90 I C 983=48 Mad 805=49 M L J 848.

[2] Khemkor v. Umaishankar, (1873) 10 Bom H C R 381.

The subsidiary question relates to the propriety of the order of remand. The learned District Munsif did record a finding as to the proper rate of maintenance when holding that the plaintiff was not entitled to maintenance at all. He records however that there is practically no evidence regarding the income of the estate of the deceased paramour of the plaintiff. When hearing the appeal the learned Subordinate Judge found that the plaintiff was entitled to maintenance and having regard to the fact that the plaintiff had got a decree in a connected suit for a certain debt due from the estate of the deceased and that there was another claim for maintenance against the same estate brought by a widow of the deceased which had been remanded for taking further evidence as to the quantum of the assets and liabilities of the estate, the learned Subordinate Judge came to the conclusion that it was desirable to remand this suit also for further evidence on the same point, the evidence in both suits to be taken in common. The parties agreed to the latter course. But, it is contended in appeal that there was no justification for the remand having regard to the fact that the amount of maintenance had already been decided on the evidence available by the trial Judge. With some hesitation I come to the conclusion that there are no sufficient grounds for interfering with the remand order. As a general rule, it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury.

But in the circumstances of the present case there was something to be said for the remand. The claim for maintenance of the plaintiff and the claim for maintenance of the widow in the connected suit both had to be borne by the estate of the deceased which also had to meet the decree in the present appellant's other suit. In order to arrive at the correct rate of maintenance to the widow and to the concubine it was desirable to consider both claims with reference to the available assets and the demands legitimately made upon such assets. From this point of view there is a good deal to be said for deciding the two maintenance claims contemporaneously after a full enquiry regarding the available assets. I do not therefore think it necessary to interfere with the order of remand and I uphold the learned Subordinate Judge's view as to the legality of the plaintiff's claim for maintenance. In the result therefore the appeal is dismissed with costs. (Leave to appeal granted.)

C.R.K./G.N. *Appeal dismissed.*

---

[3] **Nagubai v. Monghibhai, (1926) 13 A I R P C 73=96 I C 20=50 Bom 604=53 I A 153 (P C).**

* A. I. R. 1940 Madras 513

MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Goona Durgaprasada Rao and another — Appellants.

v.

Goona Sudarsanaswami and others — Respondents.

Appeal No. 190 of 1936, Decided on 27th October 1939, against decree of Dist. Court, Ganjam, D/- 24th October 1935.

*** (a) Hindu Law — Conversion of Hindu Christian to Hinduism — No particular form of expiatory ceremony is necessary for valid conversion in absence of custom to that effect in convert's caste— Acceptance by his community as Hindu is enough.**

(Per *Krishnaswami Ayyangar J.*) — Where on the evidence it is shown that in fact the Hindu Christian returned to Hinduism after contracting a second marriage during the lifetime of his first wife and remained and died a Hindu and was accepted as such by his community and co-religionists without demur and no evidence is led to show that the caste insisted on any rituals in such matters, the Court cannot treat him as having continued to remain Christian and his second marriage invalid on account of the absence of a ceremony or re-conversion or any other expiatory ceremony. That society might get into a state of flux and confusion if a formal abandonment followed by the performance of expiatory ceremonies is not insisted on, is scarcely a sound reason for the Court lending its support to maintain a social order in which the society concerned has itself lost faith. [P 515 C 2; P 517 C 1; P 519 C 1]

(Per *Mockett J.*) :— Although no gesture or declaration can change a man's religion, but when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion and lived and died and was cremated in that religion, the absence of some formality cannot negative what is an actual fact : *33 Mad 342; A I R 1934 Mad 630 and A I R 1937 Mad 172, Rel. on; A I R 1928 Mad 1279, Expl.* [P 515 C 1]

(b) Hindu law—Apostate from Hinduism can revert to it.

That a Hindu having renounced Hinduism once can revert back to it scarcely admits of doubt : *3 M H C R App VII; 30 Cal 999 and A I R 1928 Mad 1279, Rel. on.* [P 518 C 1]

B. Jagannadha Das and C. V. Dikshitalu — *for Appellants.*

C. Sambasiva Rao and S. Suryaprakasa Rao — *for Respondents.*

Mockett J.—I concur generally with the judgment which my learned brother is about to deliver, and I am not proposing to re-state the facts which are clearly set out in the judgments of the learned trial Judge and of my learned brother. I desire, however, to deal with the important question raised by issue 11 in this case which is: "Whether the late G. M. Appalaswami Naidu was a Roman Catholic, not governed by Hindu law at the time of his death?" The evidence in support of the contention that he was then a Roman Catholic is curious. One would expect that the local priest and members of his Church congregation would have been forthcoming to speak to his following the Roman Catholic religion. Father Gangloof who seems to have been intimately associated with the deceased was alive at the time of the trial but was not called. It is incredible that no members of his congregation are available. There was a Roman Catholic priest, Rev. Ferier, who gave evidence, but he of course was a priest in the locality after Appalaswami's death. He was called to prove the signature of Father Gangloof to Ex. 7 which is addressed : "My dear Mary Sousai." It was suggested that the identity of Appalaswami with Mary Sousai had not been proved. But it is quite evident to me that in the lower Court the fact that Mary Sousai was the name under which Appalaswami was known was not in dispute. Ex. 7, if admissible, shows that Father Gangloof was corresponding with Appalaswami about the Church, but in the absence of the writer being called, I do not see how this letter is admissible. Ex. 7-a, dated 31st January 1921 is, however, signed by Appalaswami, and this shows his association with the Church. Exs. 6 and 6-a, are also documents signed by Appalaswami. Ex. 6, dated 19th February 1922 and Ex. 6-a, dated 19th May 1915 lead to the same inference, namely that he was interested in the Roman Catholic Church because he was contributing funds for the mali and the purchase of oil for the sanctuary lamp. Ex. 8 dated 9th August 1898 shows that Zitama, Appalaswami's first wife, was baptised a Christian in 1898, and Ex. 8-a is an extract from the Marriage Register dated the same day, 9th August 1898.

D. W. 2, Appalaswami's clerk, proves no more than that between 1905 to 1912 Appalaswami used to go to Church now and then. He can give no further information about Appalaswami's affairs except that he attended his funeral and that Appalaswami was cremated and not buried. That, of course, was in 1921. D. W. 3, the head clerk in the Tea Estate Labour Association with which Appalaswami was associated, is of little, if any, assistance to the defence. He says that he does not know if Appalaswami became a Christian at any time, and he did not see him going to Church. He adds that he had a golden chain round his neck with a pendant which he used to call a cross. The witness never saw the pendant himself. He does say, however, that from his dress he thought he was a Hindu. Against this evidence, which, as I indicated, is more noteworthy by reason of its omissions, than its affirmative proof, there are a number of witnesses to prove that in 1913 Appalaswami married Appalanarasamma according to Hindu rites. These witnesses also prove that Appalaswami was attending temples and in every way, to quote P. W. 9, "he was a Hindu like any of us" (meaning thereby the witnesses). Appalaswami was taken to the cremation ground in a sitting posture and there cremated. The assertion of P. W. 1, Appalanarasamma, that Appalaswami was never a Christian cannot be true and is negatived by the evidence in the case. He was baptized when he was a child of twelve or thirteen and he was no doubt married first in Christian form when he was seventeen, and it would appear from Exs. 6 and 6-a, that he was contributing to Church funds upto May 1913. But the whole evidence points to the conclusion that so far as he was concerned—and I use that expression advisedly—he abandoned the Christian religion at the time of his marriage to Appalanarasamma in 1913 and lived and worshipped as a Hindu upto the time of his death and was cremated. None of the defendants has gone into the witness box to deny the facts proved by the plaintiff, and it must be emphasized that it has never been suggested from the Bar, although we asked the question, that this was a suit in which the plaintiff and defendant were colluding together to defeat alienees. We obtained that definite assurance because it naturally would be an important element in weighing the evidence in the case. The learned trial Judge too arrived at the conclusion in para. 19 of his judgment,

> that Goona Appalaswami was what is known in some of the southern districts as a caste Christian, that is a Christian by religion but following Hindu customs, manners and habits.

On the evidence in this case, I am not prepared to agree with that finding. The evidence, virtually uncontradicted, shows that Appalaswami from 1913 went far beyond clinging to Hindu customs and associations. He worshipped as a Hindu. There is no suggestion in the evidence that he ever entered a Church after 1913. There is, however, uncontradicted evidence that he attended temples. It would seem, however, that the ratio decidendi of the lower Court in this case amounts to this. On the decisions, says the learned Judge,

> there must be a renunciation or renouncement of the new religion and a readmission into the old. Without something definitely done in both these directions, it cannot be said that a Christian can become a Hindu or vice versa.

This is of course a case not of conversion to Hinduism but of a Hindu reverting to his original faith. The learned trial Judge takes the view apparently that there must be proof of some formal abandonment of one religion and the adoption of another. We have been referred to the decisions bearing on this topic : 9 Mad 466,[1] is a judgment of Parker J. In dealing with the possible readmission of one Kristanammal to Brahminism, the learned Judge makes the following remarks :

> His conversion to Christianity according to the Hindu law, rendered him an outcaste and degraded. But according to that law, the degradation might have been atoned for, and the convert readmitted to his status as a Brahmin, had he at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste.

It seems to me that that statement remains as it is, if the words "if any" are added at the end of the sentence. In 1934, Varadachariar, J. decided a case in 67 M L J 389[2] and he states :

> The language used in 9 Mad 466[1] merely refers to the expiatory ceremonies enjoined by the practice of the community in question; and with reference to the class of people we are now concerned with, no suggestion has anywhere been made in the course of the evidence that any particular expiatory ceremonies are observed amongst them. No particular ceremonies are prescribed for them by the Smriti writers nor have they got to perform any Homas. One has therefore only to look at the sense of the community and from that point of view it is of particular significance that the community was prepared to receive Vedanayaga and defendant 5 as man and wife and their issue as legitimate.

Varadachariar J. also deals with the decisions on this matter so far as the law of bigamy is concerned. I do not consider the criminal aspect of this matter assists except to the extent that, as is obvious, conversions or reconversions are recognized by the Courts. I respectfully agree with Varadachariar J. that because in 52 Mad 160,[3] Venkatasubba Rao J. referred to several facts as proved and relied upon as establishing a conversion, it is erroneous to hold

---

1. Administrator General of Madras v. Anandachari, (1886) 9 Mad 466.
2. Gurusami Nadar v. Irulappa Konar, (1934) 21 A I R Mad 630=155 I C 708=67 M L J 389.
3. Ratansi D. Morarji v. Administrator General of Madras, (1928) 15 A I R Mad 1279=111 I C 364=55 M L J 478=52 Mad 160.

that it has been laid down by the learned Judge that all those facts must be proved to exist before the Court could give a finding in favour of a conversion. Indeed in 44 M L W 854,[4] Venkatasubba Rao J. himself has made this quite clear. No general law has been cited to us with regard to any particular ceremonial being necessary before a conversion or reconversion is validated. That in many castes they insist upon such ceremonies is probable, but that is a question rather of custom than of law. It seems to me that no special test could be laid down as applicable to all cases. On the other hand, I consider whether there has been a conversion or reconversion must be a question of fact in each particular case and it may well be that in any particular case the consideration whether any essential ceremonial has been performed may be of importance. We have had no evidence before us of the necessity of any ceremonial in Vada Baliji fisherman community of Gopalpur and this decision deals with readmission to that community. On the other hand, it is clear that Appalaswami Naidu was admitted to caste and worship by his castemen. I entirely agree that no gesture or declaration can change a man's religion, but equally I cannot see why, when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion, and lived, died and was cremated in that religion, the absence of some formality should negative what is an actual fact. It seems to me somewhat analogous to the legal position with regard to change of domicile which must always be a question of fact in every particular case. I naturally differ from the experienced Judge who has tried this cass with great hesitation on a topic of this sort, but it seems to me that his decision rests on the absence of a formal renunciation of religion and the absence of proof of performance of expiatory ceremonies, and there is no warrant for holding that either of these two ingredients is essential in all cases. My conclusion in short is that on the evidence it is shown that in fact Appalaswami returned to Hinduism at the time of his marriage in 1913 and remained and died a Hindu and was accepted as such by his co-religionists without demur and that the probabilities are that this caste does not insist on any ritual in such matters. On the other matters which have been argued before us, I generally agree with my learned brother.

This appeal is allowed and the decree of the lower Court set aside as against respondents 1 to 5. As against the other respondents, the decree is confirmed. The suit is remanded to the lower Court for disposal according to law. The appellants will have their costs in the trial Court against respondents 1 to 4 and also against respondents 11-15, 17, 18, 21-26 and 28, but in this Court the appellants will bear their own costs so far as these respondents (1 to 4) are concerned. The appellants will pay the court-fee due to Government both here and in the lower Court in the first instance, but the amount will come out of the estate and will be provided for in the final decree in proportion to the parties' respective shares. The appellants must pay the costs of respondents 6, 10 and 29.

Krishnaswami Ayyangar J. — A question of some importance and difficulty arises for decision in this appeal. It is whether a Hindu convert to Christianity can, without the performance of a formal expiatory ceremony, come back to Hinduism under the Hindu law. It is extremely doubtful whether the ancient Hindu law and the texts and Smrithis permitted the return into the fold of an apostate who had wilfully and deliberately chosen to abandon the religion of his birth to become a convert to an alien faith, which holds the Hindu religion in contempt. Apostasy was a sin which was probably regarded as not capable of condonation or expiation by mere Prayaschittic ceremonies. The Hindu society of old, had it been governed purely by the Smrithis and Dharma Sastras might in all probability have refused to re-admit the convert to social or religious communion. Before us, however, no Hindu law texts were cited as governing the matter or tending to throw any light on the question. In fact, the examination of the few cases bearing on the subject has left the impression that the consideration of the topic has to be approached not from the point of view of strict religion on the views of ancient law-givers, but on a fair appreciation of the current sentiments and usages of the particular community into which the convert seeks re-admission.

It is not necessary except very briefly to refer to the facts established. The two appellants claim a share in the properties left by one Goona Appalaswami who died in 1921 at the age of 40. He was born in a community of Hindu fishermen, of the caste called Vada Balijis of Gopalpur. At a very young age when he was barely 12, he seems to have been converted to the Roman Catholic faith. This event took place in 1893 and is evidenced by a baptismal certificate Ex. X-b. In 1898, his first marriage took place with defendant 5 in the suit out of which this appeal has arisen. The marriage was according to the Christian form, the bride embracing Christianity on the same day as the marriage, probably a little earlier. There were four sons of this marriage and they were defendants 1 to 4 in the Court below and have been joined as respondents 1 to 4 here, though they have been unrepresented before us. There is no question raised about the validity of this marriage either here or in the trial Court. It is obvious and it is scarcely likely that Appalaswami took to Christianity out of religious conviction. His age at the time and his life and conduct afterwards suggest the contrary, though down to 1913, there is reason for thinking he kept contact with the Padrees and the Church. It is however undeniable that his outward bearing and habits almost from the beginning were more those of a Hindu than a Christian and as he advanced in life, he drifted more and more to his old faith which was the faith of most of his relations and friends. It is difficult to fix any point of time at which he could be said to have definitely abjured Christianity and re-entered the religion of his forefathers. It is certain, however, that no formal ceremonies of any kind were undergone by him such as are sometimes resorted to in the present day, when a non-Hindu desires to become a convert to the Hindu religion.

---

[4] Ramayya v. Josephine Elizabeth, (1937) 24 A I R Mad 172=167 I C 488=44 M L W 854.

In 1913 Appalaswami married his deceased younger brother Aiyappa's widow, Appalanarasamma as his second wife while the first wife was still living with him and the marriage with her yet in force. The appellants are the sons of Appalaswami by this second wife Appalanarasamma. The deceased brother Aiyappa had himself been converted to Christianity in 1899, and it was as a Christian that he had married according to Christian rites Appalanarasamma who had also been by that time converted to the same faith. It is plain that if Appalaswami had continued to be a Christian, the objection to what would have amounted to a bigamous alliance would have been insuperable. If, however, he had turned Hindu, the way would have been smoothed for a valid second marriage, with the aid of the custom of his caste which would have come to his rescue in overcoming the objection to marrying a brother's widow abhorrent to ordinary Hindu law and sentiment. The appellants' case which is supported by the uncontradicted evidence of their mother Appalanarasamma is that she was married not in the Christian form but according to the form prevalent in the Baliji community and this, in our opinion, is satisfactorily established. There is evidence sufficient to justify us in holding that the relationship between Appalaswami and Appalanarasamma was similar to that subsisting between married spouses living in lawful wedlock and it was so regarded by the members of his family no less by his caste. If it was the intention of Appalaswami to take Appalanarasamma as his wedded wife—we think it was—it is clear that by the date of the marriage, if not before, he must have definitely made up his mind to abjure Christianity for good and become a Hindu in every respect. Otherwise, it would have been impossible for him to confer on Appalanarasamma the status of a married wife. In fact the entire evidence fits in with this view of the facts. There is no proof of any contact with the Church or the Padrees after the marriage.

On the contrary, as the learned Judge has pointed out, Appalaswami was in habits and worship a Hindu, observing the Hindu usages and forms of worship at home and on special occasions. He used to wear a big namam on his forehead, attended the local temples and the jatras, observed Hindu vratams and festivals, worshipped idols and the sacred Tulasi, and listened with interest to the Puranas and took vows for Hindu gods. The birth certificates of the appellants describe them as Hindus. The sons of the first wife married in Hindu families and according to Hindu rites and customs. The whole Baliji community seems to have accepted the entire family as still in the caste and finally when the brothers Aiyappa and Appalaswami died, they were both without doubt cremated and brindavans erected over their ashes. It is in fact difficult to conceive of a more complete reversion to Hinduism or a clearer abandonment of Christianity. The plaintiffs and their mother, not to mention the other members of the family, were throughout over a fairly long period received and treated by the entire Hindu community as Hindus without the slightest trace of any objection or dissent. These facts make it apparent that the case before us is not in any way similar to the kind of life lived by certain Catholic Christians in Tinnevelly or South Kanara. With them, the old customs and associations may persist to some extent in the matter of dress, manners and even as regards social barriers of caste unknown to Christian society; but in essential matters they hold fast to Christianity in faith and will not be allowed to swerve from it. They attend service in the Church, and do not, and will not be allowed to attend Hindu temples or worship Hindu deities. There can be no question of course of intermarriages with Hindus. What is remarkable in this case is that there is not the slightest evidence after 1912 or 1913 of Appalaswami or any of the members of his family having ever evinced any interest in Christianity or done anything to indicate that they paid even formal allegiance to its tenets or observances. The learned Judge is inclined to accept the case of the appellants in this regard but is of opinion that he could not uphold the validity of the marriage of their mother with Appalaswami, as Appalaswami could not become a Hindu without formally renouncing Christianity and securing re-admission into Hindu society by the performance of expiatory ceremonies.

The only point for consideration is whether the learned Judge is right in this view. We are not inclined to attach weight in themselves to reasons of policy or convenience which appear to have influenced the mind of the learned Judge. That society might get into a state of flux and confusion if a formal abandonment followed by the performance of expiatory ceremonies is not insisted on, is scarcely a sound reason for the Court lending its support to maintain a social order if the society concerned has itself lost faith in it. In matters affecting the well-being or composition of a caste, the caste itself is the supreme judge. If a caste is found to have given up certain old notions and practices and adopted new ones not in any way repugnant to morality, such usages should be respected. The function of the Court is merely to ascertain the law, or the effect of usages having the force of law, and to apply it without being involved in the tangles of policies and expediencies. Any other course would lead to disastrous results, and introduce uncertainty and confusion into the administration of justice. The Hindu law of to-day is after all but a bundle of customs and usages approximating more or less to certain ancient standards fixed by wise men of an ancient age. At no time did those standards and the rules in which they found expression attain to universal acceptance in the country, even among communities professing the Hindu faith. Among the lower castes in particular there have been usages of an alien origin which have persisted through the ages, and for that reason consistently upheld by the Courts. We cannot shut our eyes to changes almost revolutionary in character and extent which have been for a considerable time past taking place in the structure of the Hindu social order and in the ideas and sentiments which govern it. The old sanctions seem to have all but disappeared sweeping away before them the old faith and the old institutions which did constitute in the past an integral condition of the indigenous social fabric. The attitude of neutrality on the part of the Government in matters appertaining to religion and religious belief which is now of course a thing of the past, while it did not start, did not restrain the forces of disintegration which began early to assert themselves. Members even of the higher castes accustomed to strict discipline chafed under the old restrictions which to them had ceased to have a meaning and threw them off with impunity. Liberties were taken by individuals and almost silently acquiesced in by society, tending naturally to destroy faith in the time-old articles. In view of the forces at work it is no surprise that as early as 1903, the Privy Council refused to permit a departure from the orthodox standards in matters of diet or ceremonial observances to affect the status and civil rights of the erring individual: 31 Cal 11[5] at p. 33. Expiations for many transgressions which in the past would have been insisted, were and are now scarcely considered necessary or perhaps considered unnecessary. A true and genuine change of heart, rather than the adoption of mere formalism is the consideration that would in modern conditions appeal most to the modern mind. These observations are made not for the purpose of comment or criticism on current social trends, but only for furnishing the necessary background against which the learned Judge's opinion has to be viewed. Considerations such as these seem to my mind to have been in fact, at the back of the mind of the learned Judges who were responsible for the weighty pronouncements in the cases, to be presently noticed. The subject received the most careful and elaborate consideration at the hands of Sankaran Nair J. in 33 Mad 342.[6] He expressed the opinion which has never since been departed from in this Court that a marriage contracted according to Hindu rites by a Hindu with a Christian woman who before marriage had been converted to Hinduism is valid if such marriages are common among and recognized as valid by the custom of the caste to which the man belongs — though not in strict conformity with orthodox Hindu religion. He declared in effect that where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the Court will not condemn it as invalid unless it is repugnant to the ordinary notions of morality. The correct test to be applied is contained in the following observation namely that,

---

[5] Bhagwan Koer v. Bose, (1904) 31 Cal 11=30 I A 249=8 Sar 543=84 P R 1903 (P C).

> if according to the usage of the community a marriage is valid or the community recognize a marriage as valid, then in the absence of any statutory prohibition, I fail to see why it should not be recognized as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu law unless it offends against rules which would render any other marriage invalid.

The importance of this clear statement of the law in relation to the present case is not to be ignored. Indeed, it furnishes the clue. Emphasis is therefore to be laid on the prevailing sentiment and usages of the community and it is its approval and disapproval which should be the governing factor. There is, it may at once be mentioned, not a vestige of disapproval of the marriage by the community in the present case, but on the contrary it seems to have set its stamp of complete approval on it. What is of supreme importance is that not even a suggestion is to be found in the evidence about the necessity for expiatory ceremonies in the Baliji caste, before a convert is received back into its fold. It is hardly right for the Court to erect a barrier which the autonomy of the caste does not see fit to do simply because in some other caste or some other community, it might be considered proper that an expiatory ceremony should be performed. That a Hindu having renounced Hinduism once, can revert back to it scarcely admits of doubt : 3 M H C R App vii[7], 30 Cal 999,[8] 52 Mad 160.[3] It cannot be denied that many tribes of old, of non-Aryan origin and descent merged into the Hindu population accepting the Hindu religion. It is certain that large hordes of Scythians, Yavanas, Kirathas, Kambhojas and Persians entered India in ancient times, but their identity has now been completely lost. They have been in fact assimilated into one or other of the component parts of Hindu society, even as the descendants of the old Buddhists who at one time formed the dominant element in the land, have been absorbed by it. The process of absorption is still active with Arya Samajists taking the lead with their Sudhi movement, the only new factor being the entry of political considerations into the field.

Modern instances of even European or American Christians being converted into Hinduism, shows the degree of tolerance and accommodation that Hindu society has shown itself to be capable of. 52 Mad 160[3] furnishes a recent illustration, where the admission into the Hindu fold of a lady, Austrian by birth, and British by domicile was upheld and the succession to her estate was allowed to be regulated on the footing that she had become a Hindu. Venkatasubba Rao J., held that it is a question of fact in each case whether a given person is a Hindu or not. In coming to a conclusion on that question he took note among other things of the formal ceremony of conversion which the lady had undergone. But he never meant to lay it down as a proposition of law that a ceremony of conversion or any form of expiatory ceremony was an essential preliminary to a valid conversion. The error of this view has been pointed out by Varadachariar J. in 67 M L J 389[2] and by Venkatasubba Rao J. himself in 44 M L W 854.[4] In the former case, the learned Judge after pointing out that no particular expiatory ceremonies were prescribed in the community in question in that case emphasized the necessity for looking to the sense of the community and considering whether it was prepared to receive back the convert into its fold. According to him a formal ceremony would not be insisted on except possibly in the twice-born castes. In the latter case, Venkatasubba Rao J. had his own prior decision quoted to him in support of the contention that expiatory ceremony was necessary, but he definitely ruled that a formal conversion is not a pre-requisite to a person becoming a Hindu. The learned Judge in the Court below did not have the advantage of this explanation, and was in-

---

6. Muthuswami Mudaliar v. Masilamani, (1910) 33 Mad 342=5 I C 42=20 M L J 49.
7. Proceedings dated 8th November 1866, (1866) 3 Mad H C R App vii.
8. Kusum Kumari Roy v. Satya Ranjan Das, (1903) 30 Cal 999=7 C W N 784.

clined in its absence to treat the views of Varadachariar J. as obiter. It is now patent that he fell into an error in so doing. We must accordingly hold that there is no authority in support of the learned District Judge's view that on account of the absence of a ceremony of reconversion or any other expiatory ceremony, the Court is bound to treat Appalaswami as having continued to remain a Christian, and his marriage with Appalanarasamma as invalid.

The result is that the appeal has to be allowed and the decree of the lower Court set aside as regards respondents 1 to 5. Respondents 6, 10, 12 and 29 are the alienees of portions of the properties left by the deceased Appalaswami. The alienations in their favour have been rightly upheld by the Court below, and not seriously challenged before us. The suit is remanded for a preliminary decree to be passed by the lower Court and further steps to be taken according to law for giving effect to the rights of the appellants as the legitimate sons of Appalaswami to shares in the estate left by him.

Further Judgment. — Our attention was not drawn, at the time when we delivered our judgment, to the three alienations which were challenged by the appellants and two of which were held not binding on them by the trial Judge. The suit was however dismissed by the District Judge as a result of his finding that the appellants were not the legitimate sons of Appalaswami. Now that we have found in favour of their legitimacy, it follows that the appellants are entitled to a declaration that the following two alienations are not binding upon them, namely (1) Ex. 2 (e), a sale deed dated 24th December 1923 under which respondents 11, 12, 13, 14, 15, 17, and 18 claimed. (2) A sale deed dated 31st July 1923 which was not exhibited in the case, by which item 6, Sch. B was sold to defendants 23 to 28 and 30. The third is evidenced by Ex. 12, a deed of simple mortgage dated 30th September 1929 under which defendants 21 and 22 are claiming. This alienation formed the subject-matter of O. S. No. 9 of 1934 which was pending on the file of the lower Court at the date when it pronounced judgment in the present suit. The question of the validity of that mortgage was left open to be dealt with in that suit. That direction still stands. As regards the properties covered by the first two alienations mentioned above, the appellants are entitled to partition and recovery of their shares therein. This note will be appended to the judgment and the necessary modifications will be carried in the decree.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 519

GENTLE J.

M. Raghavachariar — Appellant.

v.

Ponnuswami Mudali — Respondent.

Second Appeal No. 752 of 1935, Decided on 21st February 1939, against decree of Dist. Court, Chingleput, in A. S. No. 306 of 1934.

Costs—Discretionary with Court —Mortgage suit—Purchaser of part of mortgaged property undertaking to pay off mortgage money —On default of payment mortgagee suing mortgagor and impleading purchaser — Purchaser held liable for costs.

Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law. And before a decision in regard to costs is reversed, it must be shown that the order has been made contrary to a proper exercise of discretion and general principles of law. [P 520 C 2]

Where the purchaser of a part of mortgaged property undertakes to pay off the entire mortgage money and on default in payment the mortgagee institutes a suit upon the mortgage against the mortgagor and the purchaser, the latter is liable for the costs of the suit, although there is no privity of contract as between him and the mortgagee, since it is through his failure to carry out the terms of the agreement that the mortgagee is compelled to sue. [P 520 C 2]

M. S. Venkatarama Ayyar — *for Appellant.*

K. Venkataramani — *for Respondent.*

Judgment. — This is an appeal by the plaintiff in the suit against the order of the lower Appellate Court which reversed the order of the trial Court directing defendant 5 personally to pay the costs of the suit. The facts are as follows: Defendant 1 as mortgagor executed on 29th October 1921 a mortgage in favour of the plaintiff. On 15th November 1923 defendant 5 bought one item of the mortgaged property which had been put up for sale, the purchase price being Rs. 1434 and the vendor being the mortgagor. Defendant 5 as purchaser gave an undertaking to the vendor to pay to the plaintiff the sum of Rs. 1240 out of the purchase price to be devoted towards the mortgage debt. There was no contract or privity of contract between the mortgagee and defendant 5 as purchaser. Defendant 5 gave to the mortgagee (plaintiff) a promissory note for Rs. 340 in 1924 and subsequently made a small payment of Rs. 105.

In order to enforce the promissory note the plaintiff was compelled to sue and obtain a decree against defendant 5 upon that instrument. No other payments were made although the purchase was made by defendant 5 in 1923. In his evidence he stated that he refrained from making any further payments to the mortgagee since he had been informed by some rumour in the village where he lives that defendant 1 was becoming insolvent and that he might find himself in difficulties if he made payments to one person when another person was leagally entitled to the money. This rumour reached him only about 1930, that is to say about 7 years after he had bought the property and long after time when he should have paid for this purchase. It may also be mentioned that he never made any payment to the mortgagor and remained in occupation and enjoyment of the property. The suit in the Court below was filed in October 1933, the claim being upon the mortgage debt for a decree to be satisfied within a specified time, failing which the property to be put up for sale and the sale proceeds devoted towards the mortgage debt and for a decree for any balance left over against the mortgagor and the members of his family who would be responsible. The plaintiff as mortgagee was entitled to ask in the suit for a personal decree against the mortgagor and those responsible and that failing discharge the property should be put up for sale. Defendant 5 was in occupation and it follows that he was a necessary party to the suit. In drafting the decree the learned District Munsif directed, as was claimed in the plaint, that defendant 5 personally should bear the costs of the suit since through his conduct the mortgagee was forced to take proceedings in the suit. Defendant 5 appealed against the decision of the trial Court and the learned District Judge on appeal reversed the trial Court's finding and directed that the costs should not be borne by defendant 5.

The main contest appears to have been that since the plaintiff was not a party to the arrangement or understanding between defendant 5 and the mortgagor that the sale price of the property should be paid to the mortgagee, the plaintiff, no order for costs should be made against defendant 5. It is quite clear that no claim could be made by the plaintiff against defendant 5 in pursuance of an arrangement made between the latter and the mortgagor. The learned District Munsif by whom the suit was tried appears to have examined the matter very fully when he was making up his mind whether defendant 5 should bear the costs of the suit. Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law. Undoubtedly, and it is conceded, defendant 5 was a necessary party to the suit and upon the facts disclosed and on information before all Courts the suit itself was occasioned only by the conduct of defendant 5, not that he failed to carry out any contract as between himself and the plaintiff but that having purchased this property he promised the vendor to pay the price to the plaintiff. He did not carry out that promise nor did he pay his vendor the price which he had bargained to give for the property, possession of which he took. It was his failure to carry out his contract of purchase and pay the purchase price that occasioned these proceedings. The lower Appellate Court has reversed the learned District Munsif principally, it would appear, on the ground that since there was no privity of contract between defendant 5 and the plaintiff (mortgagee) no order for costs should be made against the former in respect of the suit transaction. Before a decision in regard to costs is reversed it must be shown that the order has been made contrary to a proper exercise of discretion and general principles of law. I cannot say that the learned District Munsif has acted improperly or contrary to general principles and has exercised his discretion in a wrong way. In my view the order which he made was the correct one or at any rate one which in the exercise of his discretion he was entitled to make and it has not been shown that he exercised his discretion wrongly. It follows that the reversal of his decision by the learned District Judge was wrong. Defendant 5 has himself alone to blame and that was the reason which operated in the mind of the learned District Munsif when he exercised his discretion.

This appeal is accordingly allowed with costs both here and in the lower Appellate Court and the order of the trial Court is restored. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

* A. I. R. 1940 Madras 521

WADSWORTH AND PATANJALI SASTRI JJ.

Nainalasetti Veera Raju — Appellant.

v.

Secretary of State — Respondent.

Second Appeal No. 510 of 1936, Decided on 26th October 1939, against decree of Court of Sub-Judge, Coconada, in A. S. No. 75 of 1935.

*** (a) Madras Irrigation Cess Act (7 of 1865), S. 1 (b) —Irrigation from private reservoir fed from authorized source is not from source different from or in addition to that authorized within meaning of proviso 2 to S. 1 (b)— Such irrigation cannot be penalised — Fact that water stored in private reservoir causes detriment to others is immaterial.**

Impounding of water on private land flowing on to that land from the registered source in the authorized manner cannot be held to create a different or additional source other than that authorized by the revenue authorities. Therefore the use of water for irrigation from a private reservoir fed from the authorized source is not the use of water from a source different from or in addition to that authorized, within the meaning of proviso 2 to S. 1 (b) and such use of water cannot be penalised. [P 522 C 1]

The charge being levied by reason of the source from which the water is taken the fact that storage of water in private reservoir causes detriment to others is no ground for the imposition of penal water rate : *A I R 1939 Mad 963, Ref.* [P 522 C 1]

(b) Madras Irrigation Cess Act (7 of 1865) — Interpretation — Act should be strictly construed (Per *Patanjali Sastri J.)*

The Act is one entailing penal consequences and should not be applied to any one who is not brought within it in express language : *A I R 1939 Mad 963, Rel. on.* [P 522 C 1]

V. Govindarajachari — *for Appellant.*

B. Sitarama Rao (Government Pleader) — *for Respondent.*

Wadsworth J. — This second appeal raises the question whether the Government are entitled under the Madras Irrigation Cess Act to levy penal assessment in respect of the irrigation of land registered under a particular Government work by reason of the fact that the ryot has stored the water flowing from that work on to his land in a private reservoir.

The facts are simple. The plaintiff-appellant owns land S. No. 72 registered as wet land under the Mallu Dora tank. Within the boundaries of S. No. 72 there is a small private reservoir which has been in existence for many years. It receives water flowing through the fields higher up from the Mallu Dora tank. Below S. No. 72 there is another Government source called the Timmaraju Cheruvu which receives the drainage water flowing through the fields irrigated by the Mallu Dora tank. The plaintiff is admittedly entitled to irrigate his crops in S. No. 72 with water flowing from the Mallu Dora tank through the fields above. He has however been prohibited by the Government from using water stored in his private reservoir and has been penalised for irrigating his crop with such water. The question is whether this penalty is correct. The Government claim the right to penalise this irrigation on the ground that it is

> using without due authority water from a Government source different from or in addition to that which has been assigned by the revenue authorities as the source of irrigation of the land.

See proviso 2 to Section 1 (b) of the Act. Clearly, in this case, the source which has been assigned to the land is the Mallu Dora tank. The question is whether the use of water from a private reservoir fed from the authorized source is the use of water from a source different from or in addition to that authorized. There is no direct authority on this point. It has been pointed out in a recent decision, (1939) 2 M L J 380[1] that in order to justify a penalty imposed upon land which is entitled to Government water, it must be proved that there has been a taking from a source different from or in addition to that assigned. The Courts have recognized that the word "source" covers not merely the river, stream, channel, tank or work, but would include the particular passage by which the water leaves the source. Hence, we have the case in which irrigation from a sluice from which the shutter has been forcibly removed has been treated as irrigation from a source different from the authorized source: 59 Mad 107.[2] There is also the case in which irrigation from two pipes inserted in a Government work when only one pipe was authorized, has been held to be irrigation from a source additional to or different from the authorized source: 26 M L J 210.[3] Our attention has not been drawn to any case in which it has been held that the term "source" must be taken to include not only the Government work and passages in that work by which the water is taken to the private land, but also the distributory system upon the private land.

---

1. Rathnammal v. Secretary of State, (1939) 26 A I R Mad 963=(1939) 2 M L J 380.
2. Kanniappa Mudaliar v. Secretary of State, (1936) 23 A I R Mad 42=159 I C 13=59 Mad 107=69 M L J 728.
3. Krishna Row v. Collector of Krishna, (1914) 1 AIR Mad 155=22 I C 692=26 M L J 210.

An argument has been built upon the words in cl. (b) to the effect that, "whenever water flows into a reservoir and is thereafter used for irrigating any land under cultivation," the irrigation is taxable; but it must be remembered that this clause is supplementary to the main cl. (a) which refers the power of claiming cess to the supply of water from a work belonging to or constructed by Government. Under cl. (b) water flowing through a privately owned reservoir is taxed not because it emanates from the reservoir, but because it emanates from a Government source. It is therefore difficult to hold that the authorized source the supply from which warrants the charge, is the Government work plus the private reservoir.

It is contended that the construction of a storage arrangement on private land in this case does have some detrimental effect on the flow of drainage water into the Government tank lower down. But it is difficult to see how this fact alone would justify the imposition of penal water rate. The charge is leviable not by reason of the detriment to others caused by taking the water, but by reason of the source from which the water is taken. Here the plaintiff undoubtedly has taken no water other than that which comes from the registered source. We find ourselves unable to hold that the impounding of water on the plaintiff's own land, flowing on to that land from the registered source in the authorized manner, can be held to create a different or additional source other than that assigned by the revenue authorities. In this view, we allow the appeal and give the plaintiff a decree for the refund within three months of the amount collected as penal water rate with costs throughout. No injunction is necessary.

Patanjali Sastri J. — I agree. The language of S. 1 (b) read with proviso 2 to that Section is by no means happy or free from ambiguity. But as pointed out in (1939) 2 M L J 380[1] the Act is one entailing penal consequences and should not be applied to any one who is not brought within it in express language. I am not satisfied that the language used is so clear as to bring the appellant before us within the mischief of the Act.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 522

HORWILL J.

R. Sami Naidu — Appellant.

v.

Katha Goundan and another — Respondents.

Second Appeal No. 435 of 1935, Decided on 1st December 1939, against decree of Sub-Judge, Vellore, in A. S. No. 95 of 1934.

Civil P. C. (1908), O. 22, R. 12 — Construction — Minor plaintiff found to be major when suit filed — Other person cannot file suit on his behalf—Suit must be dismissed — O. 22, R. 12 does not apply.

Order 22, R. 12 does not contemplate the giving of an opportunity to a person who is not on record to continue in the suit. That rule applies to cases where a suit has been filed by a minor who becomes a major during the course of the trial. [P 523 C 1, 2]

Where the suit is filed by the uncle in the name of his nephew for the purpose of making it appear that the nephew was very much a minor on the date of the decree sought to be set aside in the suit and the plaintiff is found to be a major when the suit was filed, then clearly no other person has a right to file the suit on his behalf; and the suit must therefore be dismissed. [P 523 C 1, 2]

A. Viswanatha Ayyar and A. Ramaswami Ayyar — *for Appellant.*

V. T. Rangaswami Ayyangar and T. T. Vijayaraghavan — *for Respondents.*

Judgment. — One Chinna Budha Goundan brought a suit purporting to be on behalf of his minor nephew Katha Goundan to set aside the decree of the Chinnasamudram Panchayat Court in Suit No. 14 of 1931 against the plaintiff and another on the grounds of fraud and that he was a minor at the time of the plaint, as well as for other reasons, the plaintiff's uncle even saying that he had no knowledge of the suit at all. No less than nine issues were framed, and the District Munsif of Tirupattur found that there were no grounds at all for setting aside the decree and that the plaintiff was a major at the time of the passing of the decree. He accordingly dismissed the suit. In appeal, the Subordinate Judge of Vellore held that the plaintiff was a minor at the time of the filing of the suit and that even if the finding of the District Munsif had been correct he ought to have given the nephew Katha Goundan an opportunity of continuing the suit in his own name.

On the question of minority, the plaintiff's uncle examined three witnesses. P. W. 1 said nothing at all about the plaintiff's age. P. W. 2, Katha Goundan's grandfather, did nothing more than file a horoscope of another grandson by another daughter and say that the plaintiff was six months older than that grandson. The lower Appellate Court relied on that horoscope; but as nobody was able to speak to the correctness of the horoscope, it was not proved and was of no value. P. W. 3 said nothing at all in examination-in-chief about the age of the plaintiff; but strangely enough he was questioned about the plaintiff's age in cross-examination. The answers to the questions in cross-examination afford the only evidence in this case in support of the plaintiff's claim that he was a minor. That answer was, "I have a son born in Dunmati year, 11 years ago. He is junior to the plaintiff by seven years." Dunmati ran from about April 1921 to March 1922. If the plaintiff was born seven years before that he was born between April 1914 and March 1915. The date of the decree was September 1931; so that if the evidence of P. W. 3 is strictly correct, the plaintiff was about 17 years of age when the decree was passed. There can be no doubt that the burden of proof with regard to minority or majority is definitely on the person who asserts it; and the plaintiff was bound to strictly prove that he was a minor at the time of the filing of the suit in the Panchayat Court. This one sentence given by a villager who must have had very vague notions of times and years cannot be said to be evidence that a Court could accept to discharge the burden lying upon the plaintiff. I feel no doubt at all that the learned District Munsif was quite right in holding that there was no reliable evidence that the plaintiff was a minor at the time when the decree was passed; and it is surprising that the learned Subordinate Judge should, on such slender grounds, have seen fit to disagree with the trial Court.

If the plaintiff was a major at the time of the passing of the decree, then *a fortiori* he was a major at the time of filing the present suit. The suit was presumably filed by the uncle in the name of his nephew for the purpose of making it appear that Katha Goundan was very much a minor on the date of the decree of the Panchayat Court. If the plaintiff was a major when the suit was filed, then clearly no other person had a right to file the suit on his behalf; and the suit had therefore to be dismissed. O. 22, R. 12, Civil P. C., which presumably the learned Subordinate Judge had in mind, does not contemplate the giving of an opportunity to a person who is not on record to continue in the suit. That rule applies to cases where a suit has been filed by a minor who becomes a major during the course of the trial. The suit was therefore rightly dismissed by the District Munsif. The appeal is therefore allowed and the decree of the District Munsif restored. There will be no order as to costs in this Court or in the lower Appellate Court.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 523

PATANJALI SASTRI J.

Gopala Chettiar and others—Appellants.

v.

Arasappa Pillai and others—Respondents.

Second Appeal No. 625 of 1936, Decided on 27th October 1939, against decree of Sub-Judge, Madura, in Appeal Suit No. 38 of 1934.

(a) Madras Estates Land Act (1 of 1908), Chap. 4—Patta is strong prima facie evidence of title.

Having regard to the provisions of Chap. 4 a patta granted by a landholder in respect of a ryot's holding is strong prima facie evidence of title: *A I R 1923 P C 217 and A I R 1931 Mad 613, Rel. on; A I R 1915 P C 118; A I R 1934 Lah 885; A I R 1915 Mad 654 and 23 All 442, Disting.* [P 524 C 2]

(b) Transfer of Property Act (1882), S. 41—Whether transferee has taken reasonable care to ascertain that transferor had power to transfer is question of fact.

The question whether a person has taken reasonable care to ascertain that his transferor had power to make the transfer, so as to get the protection of S. 41 is one of fact and has to be decided with reference to the circumstances of each case. [P 524 C 2]

B. Sitarama Rao, R. Ramasubbu Iyer and M. V. Ganapathi—*for Appellants.*

T. P. Gopalakrishna Ayyar —*for Respondents.*

Judgment. — This appeal arises out of a suit brought by the appellants to redeem a usufructuary mortgage executed by their father in favour of one Madasami Pillai on 21st March 1877. Respondents 1 to 5 and 7 are the heirs of Madasami Pillai and respondent 6 is the purchaser of the property from them. Both the Courts below have dismissed the suit on the ground, firstly that the mortgagor's title was extinguished by the adverse possession of Madasami and his successors for over the statutory period, and secondly, that in any case, respondent 6 acquired a valid title by estoppel as against the appellants under S. 41, T. P. Act, as a bona fide purchaser for value. Mr. Sitarama Rao, the learned counsel for the appellants, contests the validity of both

Mad 342[5] and ILR (1939) Mad 585.[6] Therefore, as the result of the petitioner's attachment of the grandson's share the Insolvency Court lost all its interest in that share, which then became available to the petitioner as the executing creditor and to all persons who became entitled to rateable distribution under S. 73, Civil P. C. Before the proceeds of the grandson's property were brought into Court, the respondent filed his application for execution and thereupon became entitled to rateable distribution.

On behalf of the petitioner, the argument has been advanced that the respondent's decree was not obtained against the same judgment-debtor and therefore S. 73 does not apply, but this argument cannot be accepted. There is ample authority for holding that where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts. In 26 Mad 179,[7] where the decree of one of two judgment-creditors was against the father while the decree of the other judgment-creditor was against the father and his son, but the properties from which the assets had been realized by sale were the ancestral properties of the family of which the father and son were undivided members, White C. J. held that the decrees were "against the same judgment-debtor" for the purpose of S. 295 of the Code of 1882, to which S. 73 of the present Code corresponds. In 59 Mad 93,[8] a Full Bench of this Court (Beasley C. J., Cornish and Pandrang Row JJ.) held that the legal representative of a deceased person against whom a decree was passed in his lifetime but which was sought to be executed against his property in the hands of his legal representative was the same judgment-debtor within the meaning of S. 73. Pandrang Row J. in whose judgment Beasley C. J. concurred, observed that it was obvious that a strict literal construction of the expression, "the same judgment-debtor" could not be adopted in the sense that the decrees must be against the same persons *eo nomine*, and the weight of authority appeared to favour a liberal construction of the expression "the same judgment-debtor." The decision of White C. J. in 26 Mad 179[7] was referred to with obvious approval.

In 43 M L W 624,[9] Venkataramana Rao J. held that when a decree has been passed against a manager of a joint Hindu family, the other members of the family must be deemed to be judgment-debtors as well, and where another decree-holder has obtained a decree against the manager and the other members of the family, they are entitled to rateable distribution. The learned Judge considered that the Full Bench decision in 59 Mad 93[8] applied. There was no insolvency in this case, but in a later decision, 71 M L J 541,[1] Venkataramana Rao J., had to consider the same question in connexion with insolvency proceedings. In that case the respondent filed a suit against the father and attached before judgment the family property. He eventually obtained a decree, and five months later the judgment-debtor was adjudicated an insolvent. Subsequent to the adjudication, the petitioner, with the leave of the Insolvency Court, filed a suit againt the father and his sons. The petitioner also applied for attachment before judgment of the sons' shares in the joint family property. A decree was in due course passed in his favour and the sons' shares were realized in execution proceedings. Before the sale took place the respondent applied for the execution of his decree by the sale of the family estate and claimed rateable distribution. The learned Judge held that he was entitled to rateable distribution as the decrees obtained against the father and the father and the sons were decrees passed against the same judgment-debtor. A similar decision was given by the learned Judge in (1938) 1 M L J 325.[10]

The only case which lends support to the petitioner's argument is (1937) 1 M L J 180[11] which was decided by Horwill J. There the respondents attached before judgment the estate of a joint family consisting of the father and a son. A decree was obtained and the property was subsequently brought to sale, the purchase money being deposited into Court. The father then became an insolvent, and the father's share of the proceeds was handed over to the Official Receiver. The petitioner had obtained a decree against the father on a promissory note and applied for a rateable distribution. His application was filed before the proceeds had been deposited into Court. Horwill J., considered that the petitioner was not entitled to rateable distribution. It would appear from his judgment that he considered that the Full Bench decision in 59 Mad 93[8] had no application and he laid stress on the fact that the petitioner did not make the son a party to the execution proceedings on the ground that he was liable for his father's debts and that the Court did not know that the decree was obtained against the father for a debt binding on the son. In these circumstances he rejected the petitioner's claim to rateable distribution. This decision is in direct conflict with the judgments of Venkataramana Rao J., in 71 M L J 541[1] and (1938) 1 M L J 325,[10] and it also runs contrary to the decision of the Full Bench in 59 Mad 93.[8] The judgment of Horwill J., was considered by Venkataramana Rao J., in (1938) 1 M L J 325,[10] and I am in entire agreement with the observations of Venkataramana Rao J., which are these :

---

[5] Gopalkrishnayya v. Gopalan, (1928) 15 A I R Mad 479=111 I C 505=51 Mad 342=54 M L J 674.

[6] Arunachalam v. Sabaratnam, (1939) 26 A I R Mad 572=185 I C 159=I L R (1939) Mad 585 =(1939) 1 M L J 889.

[7] Ramanathan Chettiar v. Subramania Sastrial, (1903) 26 Mad 179.

[8] Ramakrishnan Chettiar v. Viswanathan Chettiar, (1936) 23 A I R Mad 40 = 169 I C 501= 59 Mad 93=69 M L J 711 (F B).

[9] Swaminatha Aiyar v. Saivu Rowthan, (1936) 23 A I R Mad 123=160 I C 559=43 M L W 624.

[10] Ramayya v. Rangaraju, (1937) 24 A I R Mad 504=45 M L W 501 = (1938) 1 M L J 325.

[11] Arunachalam Chettiar v. Kalayappa Chettiar, (1937) 24 A I R Mad 253=167 I C 503=(1937) 1 M L J 180.

> The learned Judge seems to be of the opinion that where there is a decree against the father alone it cannot be said that the decree was obtained against the father for a debt binding on the son. It may be so. But once there is a decree against the father the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under the Hindu law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debtors are the same.

It follows that I consider that the judgment of Horwill J., to be erroneous and should be overruled. It also follows that I consider that the decision of the District Munsif in the present case was right. The petition will be dismissed but as the respondent has not appeared there will be no order as to costs. I wish to express the appreciation of the Court for the great assistance which it has received from Mr. K. V. Ramachandra Aiyar who has appeared on behalf of the petitioner. He has placed all the relevant authorities before the Court.

Krishnaswami Ayyangar J. — I agree.

C.R.K./G.N. *Petition dismissed.*

---

* A. I. R. 1940 Madras 527

WADSWORTH J.

S. P. K. N. Subramanian Firm, Trichinopolly by Managing Partner S. P. K. N. Subramanian Chettiar — Appellant.

v.

M. Chidambaram Servai — Respondent.

Second Appeal No. 50 of 1936, Decided on 5th October 1939, against decree of the Court of Small Causes, Trichinopoly, D/- 19th August 1935.

*** Transfer of Property Act (1882), S. 3, Expl. 1 — Immovable property — Fixtures — Machinery installed by tenant for cinema, in premises leased for his own profit and not as permanent improvement to premises — Machinery is moveable property within meaning of Section 3.**

If a thing is embedded in the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question must in each case be decided according to the circumstances. An engine installed in a factory may be immovable property or it may be a chattel. In deciding whether or not a transaction relating to an engine is a transaction relating to immovable property regard must be had not merely to the nature of the attachment by which the engine is fixed on the ground but also to the circumstances in which it came to be fixed, the title of the person fixing it in immovable property and the object of the transaction by which the engine is transferred or bound. [P 529 C 1, 2]

Therefore where the tenants installed an oil engine as part of a cinema in the premises leased, not with the intention of making a permanent improvement to the premises, but with the object of utilizing the machinery for their own profit so long as they had the use of the premises and selling it if and when their lease terminated, a security bond pledging the oil engine cannot be deemed to be a transaction relating to immovable property so as to attract the provisions of Expl. 1 to S 3 : *(1902) A C 157 and (1931) 2 Ch 183, Rel. on; (1897) 1 Ch 182 and (1904) A C 466, Expl.* [P 530 C 1]

T. K. Sundararaman — *for Appellant.*

N. R. Govindachari — *for Respondent.*

Judgment.—This appeal raises the question whether a security bond pledging an oil engine installed as part of a cinema can be deemed to be a transaction relating to immovable property so as to attract the provisions of Expl. 1 to S. 3, T. P. Act. The essential facts are the following: Defendant 5 owned a building which he let for a period of three years to defendants 1 and 2 who installed machinery therein and ran it as a cinema. We are now concerned with a 35 horse-power Petter oil engine which was used to work a dynamo to generate electricity for the apparatus and lighting. It is common ground that this engine was installed by making a concrete base fitted with bolts and attaching the engine to the bolts by means of nuts. The lease of defendants 1 and 2 expired in 1930 and there was a suit by defendant 5 for eviction and arrears of rent. Defendant 5 attached before judgment the machinery on the premises. That suit resulted in a compromise decree passed in October 1930 whereunder defendant 5 agreed to give defendants 1 and 2 a further lease for two years, the arrears of rent to be paid in instalments and there was a provision that in the event of default in paying any instalment the lease should cease and defendant 5 should be entitled to evict. The decree also recognized the subsistence of a charge by virtue of the attachment before judgment. It would appear that there was a default in the end of 1930 and an attempt to execute the decree. On 16th February 1931, when defendants 1 and 2 were still in possession of the premises, they borrowed money from the plaintiff and by way of security for the loan they pledged the machinery in the premises under Ex. A. Ex. A recites the existing charge in favour of defendant 5 for the arrears. The bond purports to be executed as a pledge of moveable property, but it was registered in accordance with the provisions of S. 325 of the Registration Manual in the book relating to immovable property. After this transaction defendant 5 brought further pressure to bear on defendants 1 and 2, as a result of which they executed a sale to defendant 5 of the machinery in the premises in order to discharge the arrears due to defendant 5. This sale deed says nothing about the prior security bond in favour of the plaintiff.

Now the question is whether defendant 5 can be deemed to have notice of the transaction embodied in the security bond. This question depends on whether this is or is not a transaction relating to immovable property so as to attract the provisions of Explanation 1 to S. 3, T. P. Act. The question is one of some difficulty involving as it does a consideration of the Indian statute law in relation to the English case law on similar facts. The statutory provisions are simple : it is their application which presents a difficulty. 'Immovable property' is defined in S. 3, General Clauses Act (10 of 1897) as including land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. S. 3, T. P. Act, excludes from 'immovable property' standing timber, growing crops or grass and defines the term "attached to the earth" as (a) rooted in the earth, (b) imbedded in the earth or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Now I think it is settled that the English law relating to fixtures does not apply in toto to India. Clearly, with reference to the right to fixtures as between landlord and tenant the provisions of the Transfer of Property Act are substantially different from the law obtaining in England. Nor is it an absolute rule in India that whatever is fixed to the soil belongs to the owner of the soil though this is a rule which applies in many cases.

In England it appears to be settled that when the owner of a building installs therein an engine similar to that with which we are now concerned by fixing it in a manner similar to that in which the suit engine is fixed, for the purpose of carrying on industrial operations in the premises which he owns, that engine becomes annexed to the realty and would be bound by a mortgage over the premises. The two leading cases on the subject are (1897) 1 Ch 182[1] and (1904) A C 466.[2] These cases both relate to engines acquired by the owner on the hire-purchase system and claimed by the mortgagee of the premises before the title of the owner to these engines had become perfected by payment of all the instalments. It was held in spite of the defects in the title of the owner of the premises to the engines that they had been fixed in such a manner and in such circumstances as to indicate an intention that they should be permanently attached to the premises for the beneficial enjoyment thereof and that therefore they became annexed to the freehold. But I do not read those cases as laying down an absolute rule that wherever there is an oil engine fixed with nuts to a concrete platform, it is necessarily and for all purposes immovable property. As Lord Lindley has observed in the last quoted case, in deciding whether that which has once been a chattel has become annexed to the realty, attention should be paid to the nature of the thing itself, the mode of its attachment and the circumstances in which it came to be attached, the object for which it has been introduced and also the relative positions of the rival claimants.

---

[1] Hobson v. Gorringe, (1897) 1 Ch 182=66 L J Ch 114.

[2] Reynolds v. Ashvy, (1904) A C 466=73 L J K B 946=91 L T 607=53 W R 129=20 T L R 766.

The considerations which should govern the decision of the question whether a thing is or is not a fixture forming part of the freehold have been discussed in two cases where the question was really one at issue between landlord and tenant. In (1902) A C 157[3] the question was whether certain valuable tapestries fixed by the life tenant on the walls should be deemed to be chattels belonging to the life tenant or part of the premises and so immovable property. Lord Halsbury in dealing with this, points out that one should consider not only the manner of annexation but also its purpose, in order to find out whether there was an intention to treat the thing attached as a permanent fixture or whether it was merely attached for its beneficial enjoyment as a chattel. A similar case is that in (1931) 2 Ch 183,[4] a case relating to panelling on the walls of a house, where again emphasis was laid on the fact that the mode of annexation of the thing to the premises is not the only consideration and not always the most important factor. Attention is there invited to the steady progress of the law in England towards the extension of the tenants' rights and the relaxation of the rigidity of the rule that whatever is fixed into the premises becomes part of the freehold. Once more it is pointed out that the real question is, what was the object and purpose of the annexation of the thing? Was it to create a permanent improvement to the premises or was it merely a temporary annexation for the enjoyment of the chattel by the tenant?

Now it seems to me that there is nothing in these English cases to which I have been referred which cannot profitably be applied to the statute law as laid down in India. If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question must in each case be decided according to the circumstances. An engine installed in a factory may be immovable property or it may be a chattel. The plaintiff-appellant lays emphasis on the fact that defendant 5's own sale deed recites that this machinery is permanently fixed. Defendant 5 on the other hand emphasizes the fact that the plaintiff's own security bond recites that the machinery is moveable property. When one considers the different objects and circumstances of these two instruments, the difference in the recitals regarding the description of this engine is easy to understand. Defendants 1 and 2 never had more than a three years lease of the premises. At the time when they executed the security bond in favour of the plaintiff their hold over the premises was liable to be terminated at any moment. They had a two years lease under the compromise agreement, but they were already in default. There would be no point in mortgaging this engine to a stranger as part of the premises to which it was attached, for, in those premises they had no real title at all. When defendants 1 and 2 executed a sale deed of the same machinery to defendant 5 they were selling it as a thing fixed to the premises which were owned by defendant 5 himself. They therefore had every incentive to treat it for that purpose as part of the realty.

Now, in deciding whether or not a transaction relating to an engine is a transaction relating to immovable property, one is entitled, I think, to have regard not merely to the nature of the attachment by which the engine is fixed on the ground but also to the circumstances in which it came to be fixed, the title of the person fixing it in the immovable property and the object of the transaction by which the engine is transferred or bound. When defendants 1 and 2 introduced this engine into defendant 5's premises, they could not have intended to make a permanent improvement to the immovable property. Their object must, from the very circumstances in which the installation was made be deemed to have been to utilize the machinery for their own profit so long as they had the use of the premises and to sell it if and when their lease terminated. It is not therefore a parallel case to the cases in (1897) 1 Ch 182[1] and (1904) A C 466,[2] both cases in which the owner of a building installs machinery therein and may well have been deemed to intend to make a permanent improvement to the premises which he owned in order to facilitate the user of those premises. It seems to me most unlikely that defendants 1 and 2 when they had this engine bolted on to the concrete base, intended that the engine should be permanently attached as an improvement to the premises for the benefit of whoever might be entitled to those premises.

---

[3] Leigh v. Taylor, (1902) A C 157 = 71 L J Ch 272=86 L T 239=50 W R 623=18 T L R 293.

[4] Spyer v. Phillipson, (1931) 2 Ch 183=100 L J Ch 245=144 L T 626.

When we come to consider the circumstances of the actual security bond, then quite clearly it cannot have been the intention of the parties to bring about a transaction relating to immovable property, for defendants 1 and 2 were in daily expectation of being evicted from the premises and they could not give to the plaintiff any rights of a valuable nature in the immovable property as such. All that they could give would be a right to the plaintiff to hold as security for their debt a chattel over which they had a power of disposal which implied its severance from the base to which it was for the time being attached. Looked at in this way it seems to me to be clear that this security bond (Ex. A) was, as it purports to be, a transaction relating to moveable property and the mere fact that the property in question was firmly but not permanently attached to the premises and also the fact that the registration department for its own purposes requires such a transaction to be treated as a transaction relating to immovable property, will not to my mind affect the true nature of the transaction which was one regarding a chattel. In this view I must hold that the security bond is not one relating to immovable property, that Expl. I to S. 3, T. P. Act does not apply and that therefore defendant 5 cannot be deemed to have had constructive notice of that transaction even though it was registered. The appeal therefore fails and is dismissed with costs of defendant 5. Leave to appeal is granted.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 530

VENKATARAMANA RAO AND KUNHI RAMAN JJ.

Varada Bhaktavatsaludu and another — Appellants.

v.

Damojipurapu Venkatanarasimha Rao and others — Respondents.

Appeal No. 301 of 1936, Decided on 2nd October 1939, against decree of Sub-Judge, Ellore, D/- 10th February 1936.

Limitation Act (1908), S. 7—Eldest member of joint Hindu family is presumed to be manager of family unless presumption is rebutted — In Madras he can give valid discharge without concurrence of other members.

When there is an eldest member of a joint family, the presumption is that under the Hindu law he is the manager of the family. If he is the manager, under S. 7, he can give a valid discharge without the concurrence of the other members of the family so far as the Madras Presidency is concerned. If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge, it is incumbent on that person to prove the facts rebutting that presumption: *A I R 1915 Mad 1201, Rel. on ; 31 All 156, Disting.; A I R 1926 P C 16, Expl.* [P 531 C 2]

P. V. Rajamannar and K. Subba Rao — *— for Appellants.*

P. Somasundaram and P. Suryanarayana *— for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment and decree of the learned Subordinate Judge of Ellore dismissing the plaintiffs' suit on the ground that it was barred by limitation. The relevant facts may be shortly stated. The plaintiffs and defendant 4 are the sons of one Varada Venkataramanayya. During his lifetime Varada Venkataramanayya as manager of his family entered into a partnership with defendants 1 to 3 for the carrying on of a mill business known as Gopalakrishna Rice Mill. He died on 12th November 1927 without adjusting his accounts with the partnership. This suit has been laid by the plaintiffs who were admittedly minors on 29th October 1931 for a declaration that the partnership which their father carried on with defendants 1 to 3 must be deemed to have been dissolved on 12th November 1927 and for taking an account of the partnership and for payment of such sums as may be found due and payable appertaining to their father's share. The main defence was one of limitation. The suit admittedly was instituted more than three years from the date of the death of Venkataramanayya. In the absence of an agreement to the contrary, the partnership must be deemed to have been dissolved on the date of the death of Venkataramanayya and under Art. 109 the suit must be laid within three years from that date. But what the plaintiffs contend is that the plaintiffs were minors on the date of the death of their father, and even on the date of suit were admittedly minors, and therefore under S. 6, Limitation Act, their suit must be deemed to be within time. But the defendants contend in answer that defendant 4 was the eldest brother of the family and he attained his majority in July 1927, that is before the death of their father, and he was therefore in a position to discharge all the claims made in the suit and the suit must be held to be barred under S. 7, Limitation Act. Therefore two main questions have to be decided, viz., (1) whether defendant 4 attained majority in 1927 or in 1929 as contended by the plaintiffs-appellants in this case and (2) even assuming that defendant 4 attained majority in 1927, was he in a position to give a discharge of the plaintiffs' claim. On both the points the learned Subordinate Judge's decision was in favour of the defendants.

Mr. Subba Rao on behalf of the plaintiffs-appellants contends that the learned Judge was wrong in finding that defendant 4 attained majority in 1927. He says that the burden of proving that defendant 4 attained majority in 1927 was on the defendants and they have not satisfactorily discharged the burden of proof which lay on them. He points out that the only material documents in the case are Exs. 3 and 3-A wherein defendant 4's age was described as 16 in 1925 and therefore he could not have attained majority in 1927. What he says is that in India it must be presumed that the people generally give the running year as their age and not the completed year. For this position he relies upon the ruling in 1939 M W N 984.[1] It may be so, but the evidence does not rest on Exs. 3 and 3-A. P. W. 3, the uncle of the plaintiffs and defendant 4 was examined on behalf of the plaintiffs and he states that his first son was born in the month of Jeshta in the year Sadharana which is between 8th June 1910 and 6th July 1910 and that defendant 4 was one year or a year and a half older than his first son. This evidence was accepted by the learned Judge in the Court below and on this evidence coupled with the statements contained in Exs. 3 and 3-A and the deposition of defendant 4 himself he has come to the conclusion that defendant 4 must have attained majority at the beginning of 1927. P. W. 3 is certainly a near relation of the plaintiffs. Mr. Subba Rao contends that the age given by him was mere guess work, but we cannot brush aside his evidence on that ground. We are therefore not in a position to disturb the finding of the learned Judge.

The next question is whether defendant 4 was in a position to give discharge within the meaning of S. 7, Limitation Act. Mr. Subba Rao says that if defendant 4 really acted as manager of the family he was not prepared to dispute the capacity of defendant 4 to give a valid discharge of the plaintiffs' claim, but what he contends is that it is not enough to show that defendant 4 has attained majority in 1927, but it must also be shown that as a fact he was acting as manager and the evidence in this case does not establish that fact. It seems to us that when there is an eldest member of a family, the presumption is that under the Hindu law he is the manager of the family. If he is the manager, under S. 7, Limitation Act, discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned, and at any rate that is the ratio decidendi of 38 Mad 118.[2] What Mr. Subba Rao says is that in that case the learned Judges assumed that the plaintiff had the capacity but they did not purport to decide whether the plaintiff acted as the manager and that under the Privy Council ruling in 48 All 152,[3] which confirms 31 All 156,[4] it must be shown as a fact that defendant 4 acted as manager. So far as 31 All 156[4] is concerned, our view is that in that case even though the elder brother was the manager, he would not be in a position to give a valid discharge of the claim because under the law prevailing in Allahabad no member of an undivided family even if he is a manager can alienate his undivided share without the concurrence of the other members. No doubt the case was not rested on that ground. But it seems to us that that case can be distinguished, and the Privy Council in 48 All 152,[3] merely accepted the decision of the learned Judges of the High Court who purported to follow 31 All 156[4] and dissented from 38 Mad 118.[2] We cannot take the said Privy Council decision as authority for the position laid down in 31 All 156,[4] that it must be shown in every case that he has acted as the manager. If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge, it is incumbent on that person to prove the facts rebutting the said presumption.

---

[1] Kunhi Kannan v. Vazhayil Devaki, (1939) 26 A I R Mad 907=(1939) 2 M L J 619=1939 M W N 984.

[2] Doraiswami Serumadan v. Nondisami Saluvan, (1915) 2 A I R Mad 1201=21 I C 410=38 Mad 118=25 M L J 405.

[3] Jawahir Singh v. Udai Parkash, (1926) 13 A I R P C 16=93 I C 216=48 All 152=53 I A 36 (P C).

[4] Ganga Dayal v. Mani Ram, (1909) 31 All 156 =1 I C 824=6 A L J 62.

Mr. Subba Rao says that the evidence in this case showed that defendant 4 was not acting as manager. He relies on three facts: (1) notice Ex. D, in 1928, by defendant 4 and his mother acting on behalf of the minors. According to him this shows that defendant 4 did not purport to give notice on behalf of the minors. Therefore, it must be taken that he could not be manager at the time when the notice was given. Secondly, he says there was no property in respect whereof defendant 4 could act as manager as the mill was admittedly in the possession of the partners. Thirdly, in the written statement it was alleged by the defendants that the plaintiffs and defendant 4 were collecting rents from their houses and there were receipts available which were passed by the plaintiffs' mother herself. Taking Ex. D, it does not follow that defendant 4 was not acting as the manager. Ex. D shows that both defendant 4 and the other members of the family were acting together. This goes to negative the case made by defendant 4 that he was not living with the mother and the other members of the family but was living separately from the other members. The fact that the mother's name is associated as the guardian may be due to the fact that there was a joint notice individually and on behalf of the members and the vakil thought it better to put the mother as the guardian. As regards the question as to the property, the learned Judge holds that Exs. 3 and 3-A show that besides the house in which the rice mill is situated there are some lands. No doubt the rice mill was in the possession of defendants 1 to 3, but there were other properties such as lands and house from which rents were being collected and it is not shown that defendant 4 was not realizing rents from those lands. In regard to the allegations in the written statement there is absolutely no date given as to when the plaintiffs' mother collected the rents. No receipts of rents given by the plaintiffs' mother were produced and it is not possible to predicate that the plaintiffs' mother was collecting rents of the property from the date of the death of the father of the plaintiffs and defendant 4.

The learned Judge refers to Ex. 2 which proved that in 1935 when the family house was sold defendant 4 received an advance of Rs. 100 for showing that even so late as 1935 he was acting on behalf of the family. From this the learned Judge infers that defendant 4 must have throughout acted as manager. We cannot say that this inference is wrong. On the whole we are not prepared to disturb the finding of the learned Judge that defendant 4 was in law the manager and also in fact the manager. In view of this finding the appeal fails and must be dismissed with costs. The appellant should pay the court-fee to Government.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 532

BURN OFFG. C. J. AND KRISHNASWAMI AYYANGAR J.

N. K. R. M. N. Nagappa Chettiar and others — Appellants.

v.

Raja Srimanthu Muthu Vijaya Raghunatha Doraisingam, Zamindar of Sivaganga and another — Respondents.

Letters Patent Appeal No. 13 of 1939, Decided on 2nd January 1940, against judgment and decree of Wadsworth J. in S. A. No. 1076 of 1936, D/- 12th January 1939.

Madras Court of Wards Act (1 of 1902), S. 49 — Suit by managers of temple — Notice under S. 49 giving name and address of temple sufficiently complies with S. 49 even if names and addresses of managers are not given.

A Hindu idol is founded upon the religious customs of the Hindus and is a "juristic entity." It has a juridical status with the power of suing and being sued. Although the managers are often described as trustees they are not trustees in law as the devasthanam properties are not vested in them in trust. A notice which complies with the requirements of S. 49 so far as the temples are concerned cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated, if the notice in question gives the names of the temples and also the village in which they are situate. [P 533 C 2; P 534 C 1]

S. V. Venugopalachari — *for Appellants.*

M. E. Rajagopalachari—*for Respondents.*

Krishnaswami Ayyangar J. — This is an appeal under the Letters Patent from the judgment of Wadsworth J. who confirmed on second appeal the decision of the District Judge, Ramnad, reversing the judgment of the Subordinate Judge of Devakottah in O. S. No. 131 of 1929 on his file. The suit had been instituted by the trustees and hukhdars of three temples in the village of Naganathapuram, for a declaration that the boundaries fixed by the survey authorities between the village of Veeriyanandal belonging to the temples, and the adjacent village of Senjai belonging to the zamindar of Sivaganga were wrong and for the rectification of those boundaries in accordance with the true rights of the parties. At the time of the survey, and at the date of the suit, the Sivaganga zamindari was under the management of the Court of Wards and the latter were accordingly joined as defendant 1 in the suit. The Court of Wards however dropped out of the litigation after the disposal of the suit in consequence of the zamindar having assumed possession of the estate. The zamindar stepped into their place in the lower Appellate Court and has since been contesting the claim of the plaintiffs. The Subordinate Judge decreed the suit disallowing all the contentions raised by the Court of Wards. One of those contentions was that the suit was incompetent as the condition precedent to the institution of a suit against the Court of Wards, namely the issue of a proper notice under S. 49, Madras Court of Wards Act, had not been fulfilled. A registered notice, Ex. M, in the case, had been given to the Court of Wards before suit, but it was attacked as being defective in material particulars and therefore invalid. Differing from the trial Court, the learned District Judge on appeal upheld that contention and accordingly dismissed the suit. A second appeal was preferred to this Court and it came on before Wadsworth J. He concurred with the decision of the learned District Judge and dismissed the second appeal. Leave was however given by the learned Judge for preferring a Letters Patent appeal against his judgment and the appeal accordingly now comes before us. The notice in question is as follows:

> To,
> 1. The District Collector of Ramnad and Agent of the Court of Wards, Sivaganga estate, at Madura.
> 2. The Estate Collector, Court of Wards, Sivaganga Estate, Sivaganga.
>
> Sir,
> On behalf of the Devasthanams of Perumal Koil, Sivan Koil and Pillayar Koil, etc. in Nagathapuram and the trustees thereof, V. N. Venkatachalam Chettiar and others, I hereby give you notice under the provisions of the Court of Wards Act as follows . . . .

The notice then proceeds to set out the cause of action and the relief claimed. The only defect in the notice which is said to invalidate it is that it does not contain a proper description of the names of and the places of abode of the intending plaintiffs. In particular, it is said that whereas there are five plaintiffs who joined in instituting the suit, the name of one of them alone, namely Venkatachalam Chettiar, is mentioned in the notice and the names of the others have been entirely omitted; nor has the address even of Venkatachalam Chettiar been given. It is clear that if the suit is to be regarded as a suit by the trustees, the notice must be held defective as the requirements of S. 49 have not been satisfied. In the light of the decision of the Privy Council in 51 Bom 725,[1] full effect must be given to the language of the statute and it is not permissible to put a liberal construction upon that language or to say that it will be enough if there is a substantial compliance with the conditions of the Section. The statute has laid down certain definite formalities to be observed as a preliminary to a suit against the Court of Wards and we cannot whittle down the effect of S. 49 by adopting a liberal or beneficent interpretation. The appellants have however placed before us an argument which to our mind appears to have great force. They contend that the notice fully complied with the requirements of S. 49 inasmuch as the names and address of the Devasthanams which are the real plaintiffs are mentioned which, it is urged, is all that is required by the statute. In the case of such temples, it is now settled that the presiding deity is a juristic entity having itself the right to sue and be sued. In 52 Cal 809[2] Lord Shaw delivering the judgment of the Privy Council laid down the law on the point in these terms:

> A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a 'juristic entity.' It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established.

It follows that the real plaintiffs in the suit are the presiding deities of the devasthanams mentioned. Although the managers are often described as trustees they are not trustees in law as the Devasthanam properties are not vested in them in trust. A notice, which complies with the requirements of S. 49 so far as the temples are concerned, cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated. In the notice in question the names of the temples are mentioned as also the village in which they are situate. This, in our opinion, is a sufficient compliance with S. 49 even on a strict construction.

---

[1] Bhagachand Dagadusa v. Secy. of State, (1927) 14 A I R P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

[2] Pramatha Nath Mullick v. Pradyumna Kumar Mullick, (1925) 12 A I R P C 189=87 I C 305=52 Cal 809=52 I A 245 (P C).

It is true that in the cause-title to the plaint the names of the managers are mentioned as plaintiffs without reference to the temples or the presiding deities. In para. 3 of the plaint it is however stated that the plaintiffs are some of the trustees and hukhdars of the devasthanam consisting of the Perumal Koil, Sivan Koil and Pillayar Koil etc., in Naganathapuram, Karaikudi. In para. 4 the further statement occurs that the village of Veeriyanendal belongs to and is in the enjoyment of the said devasthanam. Looking at the plaint as a whole it is absolutely clear that no personal rights of the plaintiffs were asserted in the suit. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, it is clear in the eye of the law that they are merely the managers, the deities themselves being the true plaintiffs in fact. The proper form of a suit where a deity figures as a party has been the subject-matter of consideration by a Full Bench of the Allahabad High Court in 33 All 735.[3] The proposition was there laid down that inasmuch as an idol is a juristic person capable of holding property, a suit in respect of property in which an idol is interested is properly brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed.

Regarding the suit, as we must regard it, as a suit instituted by the presiding deities of the three temples, we must hold that a notice issued on behalf of the devasthanams stating their names and the village in which they are situate is a proper notice within S. 49, Madras Court of Wards Act. It follows that the appeal must be allowed and the decree of the learned Subordinate Judge restored except in regard to the portion of S. No. 13 in Veeriyanendal village claimed in the suit but not referred to in the notice. The respondents must pay the costs of the appellants both in this Court as well as in the District Court.

C.R.K./D.S. *Appeal allowed.*

---

[3] Jodi Rai v. Basdeo Prasad, (1911) 33 All 735=11 I C 47=8 A L J 817 (F B).

✻ A. I. R. 1940 Madras 534

WADSWORTH J.

A. Ahamed Ibrahim Rowther — Appellant.

v.

Allapichai Rowther and another — Respondents.

Appeal No. 136 and Civil Revn. Petn. No. 828 of 1937, Decided on 20th September 1939, against appellate order of Sub-Judge, Tuticorin, D/- 21st January 1937.

(a) Civil P. C. (1908), O. 21, Rr. 2 and 18— Adjustment out of Court may be by means of setting off one decree against another if there is no legal objection to such course — Fact that such adjustment does not come within O. 21, R. 18 would not bar recording of satisfaction.

No doubt there is no express provision in the Code authorizing the Court itself to set off one decree against another unless both the decrees are before the Court. There is however provision in the Code for recording satisfaction by way of adjustment out of Court and an adjustment out of Court may be by means of the setting off of one decree against another if there is no legal objection to this course. The fact that this adjustment does not come within the provisions of O. 21, R. 18 would not of itself bar the recording of satisfaction. [P 536 C 1, 2]

(b) Execution — Executing Court cannot record satisfaction of decree over which it has no jurisdiction.

An executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court will be of no effect. [P 536 C 2]

(c) Civil P. C. (1908), O. 21, R. 2 — Executing Court cannot make provisional record of satisfaction of decree.

An executing Court has no power under the Code to make a provisional record of satisfaction of a decree. Either a decree is satisfied or it is not and there is no power for an executing Court to record satisfaction on the basis of a mere promise which is not treated as a sufficient discharge. In recording satisfaction the executing Court cannot undertake the responsibility of seeing to the future performance of provisions in the agreement upon which the satisfaction is based. The Code contemplates only an unconditional record of satisfaction. [P 536 C 2; P 537 C 1]

(d) Civil P. C. (1908), O. 21, R. 2 — Court whether can recognize adjustment which is executory *(Quære)*.

It is very doubtful whether under O. 21, R. 2 the Court can recognize an adjustment which is executory in its nature as if it were complete. [P 537 C 1]

✻ (e) Civil P. C. (1908), O. 21, R. 53 (3)—Attaching decree-holder cannot make adjustment of attached decree and record satisfaction by reason of that adjustment.

The mere use of the word representative in R. 53 (3) cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. The holder of the attaching decree is the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule, namely the purpose of executing. Hence, the attaching decree-holder cannot exercise the power conferred under O. 21, R. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree: *A I R 1937 Cal 468, Rel. on.* [P 537 C 2]

P. S. Ramachandran — *for Appellant.*

K. T. M. Ahmed Ibrahim — *for Respondents.*

Judgment.— The question to be decided in both the revision petition and the appeal is whether the recording of satisfaction of the decree in O. S. No. 11 of 1931 on the file of the District Munsif of Tuticorin at the instance of an attaching decree-holder is valid and consequently whether the refusal to record satisfaction of the decree in O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam under which the attachment of the Tuticorin decree was made is invalid, so that the latter decree becomes amenable to attachment at the instance of a third decree-holder. The facts are rather complicated and I will endeavour to state them in their simplest form. We are concerned with three decrees: (1) O. S. No. 11 of 1931 on the file of the Tuticorin District Munsif which was a decree in favour of Ahmed Ibrahim, the judgment-debtor being Alla Pichai: (2) O. S. No. 13 of 1932 on the file of the Subordinate Judge, Tuticorin, a decree assigned to K. Mohideen, the judgment-debtor being the same Alla Pichai; and (3) O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam, a decree assigned to the same Alla Pichai, the judgment-debtor being Ahmed Ibrahim who is the decree-holder under No. 1 decree.

Decree No. 3 was transferred for execution to the Court of the District Munsif of Srivaikuntam where the parties lived. The assignee of this decree Alla Pichai got an order of attachment in Srivaikuntam Court of No. 1 decree against himself, the attachment being effected in February 1934. On 20th March 1934, Alla Pichai as attaching decree-holder without transferring his own decree to Tuticorin or taking out execution of the decree which he had attached applied to the District Munsif of Tuticorin under S. 151, Civil P. C., to record satisfaction of decree No. 1 against himself by setting off against this decree, No. 3 decree of which he had obtained an assignment. It will be noticed that in form this was an application to set off two decrees which were not before the same Court, the applicant calling in aid S. 151, Civil P. C., because the procedure under O. 21, R. 18 was not available to him, he not having got his own decree transferred to the Court which was executing the attached decree against himself. Before orders were passed upon this application to record satisfaction, Mohideen, the assignee of decree No. 2, passed by the Subordinate Judge of Tuticorin against Alla Pichai attached decree No. 3 which was then on the file of the District Munsif of Srivaikuntam. On 24th September 1935, the District Munsif of Tuticorin passed an order on the application to record satisfaction by setting off the decree assigned to Alla Pichai against the decree under which he was the judgment-debtor. In his order the learned District Munsif observes that Alla Pichai certified satisfaction of his own decree—which of course could not be done except in the Court which had jurisdiction over that decree. He also observes that the application does not come under O. 21, R. 18, but he considers that under O. 21, R. 53 an attaching decree-holder has power to report satisfaction of the attached decree and he therefore passes an order which, in my opinion, is open to serious criticism. He records satisfaction of the attached decree to the extent covered by the amount of the attaching decree, but adds a proviso that the applicant shall within six weeks report to the proper Court full satisfaction of the attaching decree and if he fails to make such a report the order recording satisfaction will stand vacated. That is to say, in effect the learned District Munsif of Tuticorin passed a conditional order recording satisfaction. In pursuance of this order, Alla Pichai on 2nd October 1935 filed a satisfaction memorandum before the District Munsif of Srivaikuntam in respect of the decree of which he had taken an assignment which decree was already under attachment by Mohideen, the holder of decree No. 2. Mohideen opposed the application to record satisfaction. The learned District Munsif of Srivaikuntam held that Alla Pichai was not entitled under O. 21, R. 53 to act as the representative of the holder of the decree which he had attached except for the purpose of execution, that the recording of satisfaction by means of what was in fact an adjustment of that decree was invalid and that satisfaction of Alla Pichai's own decree could not be recorded because of the pending attachment and because there was no valid satisfaction of the Tuticorin District Munsif's Court decree. Against the order passed by the District Munsif of Tuticorin two appeals were filed, one by Mohideen and the other by Ahamed Ibrahim and against the order passed by the District Munsif of Srivaikuntam an appeal was filed by Alla Pichai. All three were heard together by the Subordinate Judge who held that the order of the District Munsif of Tuticorin recording satisfaction of Ahamed Ibrahim's decree by reason of the adjustment of the amount due under Alla Pichai's decree was valid.

I have now before me a civil revision petition filed by Mohideen and an appeal by Ahmed Ibrahim both canvassing the correctness of the same appellate order. I do not think it necessary to discuss at length the question whether the proper remedy is one by appeal or one by revision. It seems to me that so far as Ahmed Ibrahim is concerned the question is one clearly between the parties relating to the satisfaction of his decree and an appeal would lie. So far as Mohideen is concerned the contest is between an attaching decree-holder and the holder of the decree attached. Prima facie, it is not one between parties arrayed on opposite sides in the suit and the proper remedy is revision. The main question is whether the order of the District Munsif of Tuticorin in effect setting off one decree against the other is a valid order. It is common ground that this order cannot be justified as one falling within the provisions of O. 21, R. 18. Nor does it purport to have been passed under that Rule. It is contended that the Code does not contemplate any procedure for setting off one decree against another unless both the decrees are within the jurisdiction of the same Court so that they fall within O. 21, R. 18 : *vide* 32 Mad 336.[1] No doubt this is a correct proposition in the sense that there is no express provision in the Code authorizing the Court itself to set off one decree against another unless both the decrees are before the Court. There is however provision in the Code for recording satisfaction by way of adjustment out of Court and an adjustment out of Court may be by means of the setting off of one decree against another if there is no legal objection to this course. Provided that Alla Pichai was legally entitled to adjust the decree which he had attached by setting off against it the decree assigned to him, the fact that this adjustment does not come within the provisions of O. 21, R. 18 would not of itself bar the recording of satisfaction.

Now it is undeniable that an executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court will be of no effect. It follows therefore that when Alla Pichai represented to the District Munsif of Tuticorin that his own decree pending before the District Munsif of Srivaikuntam had been satisfied, though in fact no satisfaction had yet been recorded, he was doing no more than representing to the Court that he had promised the judgment-debtor (who incidentally was himself) that he would record satisfaction of the decree under which the attachment was made. Looked at in this way it seems to me apparent that Alla Pichai was asking the District Munsif of Tuticorin to record not an actual satisfaction of the decree of that Court, but a prospective satisfaction of the decree. Having regard to the powers of the Tuticorin Court, all that Alla Pichai could do was to represent that he was willing to record satisfaction of his own decree if the District Munsif of Tuticorin would accept that as a sufficient discharge of the decree against himself. The District Munsif of Tuticorin treated as done that which the applicant promised to do; but realizing the danger of this course and perhaps being doubtful of the powers which he proposed to exercise, he inserted in his order a sort of escape clause whereby, if the applicant failed to do that which he had promised, the District Munsif was to cancel the order which he had passed on the strength of that promise. Now it seems to me that an executing Court has no power under the Code to make a provisional record of satisfaction of a decree. Either a decree is satisfied or it is not and there is no power of which I am aware, for an executing Court to record satisfaction on the basis of a mere promise which is not treated as a sufficient discharge. It may perhaps be permissible for a decree-holder to accept a promise as a discharge and to record satisfaction on that basis; and conceivably the Court might if it saw fit, grant the application on the strength of this acceptance. But this is not what the learned District Munsif has done. He has in fact recorded in the form of satisfaction that which is really only a provisional satisfaction conditional on the doing of some future act. To my mind, he had no power to do this.

---

[1] Ponnusami Nadar v. Doraisami Ayyar, (1909) 32 Mad 336=1 I C 247.

It is also very doubtful whether under O. 21, R. 2, the Court can recognize an adjustment which is executory in its nature as if it were complete. The decisions in A I R 1928 Cal 527,[2] 44 All 258[3] and A I R 1934 Rang 190[4] indicate that the only adjustment contemplated under O. 21, R. 2 is one which has already been completed, not one which rests on future performances. But quite apart from this question it seems to me apparent that in recording satisfaction the executing Court cannot undertake the responsibility of seeing to the future performance of provisions in the agreement upon which the satisfaction is based. The Code contemplates only an unconditional record of satisfaction.

A wider question is whether in any case an attaching decree-holder is entitled by the terms of O. 21, R. 53 (3) to make an adjustment of the attached decree and record satisfaction by reason of that adjustment. On this subject there is difference of judicial opinion and, so far as I am aware, no decision of this High Court. In A I R 1937 Cal 468[5] it was held that under R. 53 (3) the attaching decree-holder is the representative of the holder of the attached decree for the limited purpose of execution and not for all purposes and is therefore incapable of making a valid adjustment of the attached decree. A similar decision was passed by a single Judge in the case reported in A I R 1925 All 123[6] which has however been dissented from by a Bench of the same Court in A I R 1930 All 659.[7] There is an observation in the decision in A I R 1924 Pat 696[8] to the effect that there is nothing in R. 53 to prevent an adjustment by payment out of Court between the judgment-debtor of the attached decree and the decree-holder of the attaching decree. The question is not easy and in view of my decision on the earlier points is no longer of vital importance for the present case. But as it has been argued at length it seems to me desirable that I should indicate my opinion. R. 53 (3) says :

> The holder of a decree sought to be executed by the attachment of another decree . . . . . shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

The argument is that by virtue of S. 146, Civil P. C., if there is no prohibition imposed by law, any proceeding which may be taken by the holder of the attached decree may be taken by the holder of the decree under which the attachment is made, since the latter is the representative of the former. In my opinion the mere use of the word representative in R. 53 (3) cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. It is unnecessary to dwell at length on the complications which would arise unless the converse were true, but I would point out that there may be several attaching decree-holders all of whom are undoubtedly entitled to execute the attached decree as representatives of the holder of the decree under attachment. To maintain that each of them was for all purposes the representative of the holder of that decree would lead to chaos. It is pointed out that *A* may have a decree for Rs. 100 against *B* and may attach in execution of his decree a decree against *X* in favour of *B* for Rs. 1,00,000. In such circumstances the extent to which *A* can be the representative of *B* must obviously be governed by the extent of *A's* decree against *B* and to assume that *A* has an unlimited power of representing *B* including a power to compromise the decree which *B* has got against *X* is to put into the hands of *A* a power very liable to abuse. It seems to me that the only safe way of interpreting R. 53 (3) is that adopted by the Calcutta High Court in A I R 1937 Cal 468,[5] i.e. to treat the holder of the attaching decree as the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule, namely the purpose of execution. If this view is correct, it follows that the attaching decree-holder cannot exercise the power conferred under O. 21, R. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree. On this ground also therefore I am constrained to conclude that the order of the District Munsif of Tuticorin recording satisfaction of the decree against Alla Pichai was erroneous. It follows that the decree against Alla Pichai must be regarded as still alive and the decree of which Alla Pichai has obtained an assignment and under which he made the attachment must be regarded as still unsatisfied and liable to be executed by Mohideen by virtue of the attachment which he has obtained under his decree against the same Alla Pichai.

---

[2] Azizur Rahman v. Ali Raja, (1928) 15 A I R Cal 527=113 I C 9=32 C W N 434.

[3] Lachman Das v. Baba Ramnath Kali Kamliwala, (1922) 9 A I R All 13=64 I C 990 = 44 All 258=20 A L J 65.

[4] N. P. L. Firm v. B. K. Bhanja, (1934) 21 A I R Rang 190=149 I C 95.

[5] Durga Prasad v. Secy. of State, (1937) 24 A I R Cal 468=172 I C 560=41 C W N 880.

[6] Ram Badan Singh v. Ram Pargash Singh, (1925) 12 A I R All 123=80 I C 947.

[7] Unao Commercial Bank Ltd. v. Mohan Govind Rai, (1930) 17 A I R All 659 = 129 I C 382 = 1930 A L J 945.

[8] Ramcharan Singh v. Jangbahadur Singh, (1924) 11 A I R Pat 696=79 I C 900=5 P L T 631.

In the result therefore both the appeal and the civil revision petition are allowed, the order of the District Munsif of Tuticorin recording satisfaction of the decree in O. S. No. 11 of 1931 is set aside and the order of the District Munsif of Srivaikuntam refusing to record satisfaction of the decree in O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam is restored. The respondent Alla Pichai will pay the costs of both the appeal and the civil revision petition (one advocate's fee). Leave to appeal refused.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 538

WADSWORTH J.

Koka Adinarayana Rao Naidu — Petitioner.

v.

Koka Kothandaramayya Naidu and others — Respondents.

Civil Revn. Petn. No. 1077 of 1937, Decided on 15th September 1939, to revise order of Dist. Court, Ganjampuri at Berhampore, D/- 1st April 1937.

(a) Civil P. C. (1908), Ss. 152, 115 — Order amending decree without jurisdiction — High Court can in special circumstances entertain revision even when remedy by way of appeal is available.

Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available; but in very special circumstances if there is a clear error relating to jurisdiction, e. g. an order amending a decree under S. 152 without jurisdiction it may at its discretion do so : *A I R 1917 Mad 589, Foll. ; 24 Mad 646, Not approved.* [P 539 C 2]

(b) Civil P. C. (1908), S. 152—Scope—Court cannot rectify decree because it was wrong or unfair or parties did not realize their rights — Power to rectify decree is limited to arithmetical mistakes or errors arising from accidental slips or omissions.

Section 152 does not empower a Court to rectify a decree merely because that decree is wrong or unfair or because the parties have not realized their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under this Section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. An apparent omission of an important term from a judgment proceeding on the consent of parties and sought to be amended 18 years after the passing of a consent decree cannot be regarded as an accidental slip in the absence of evidence of the rights and liabilities of the parties at the time the decree was passed. [P 539 C 2; P 540 C 1]

C. S. Venkatachariar and D. Ramaswamy Ayyangar — *for Petitioner.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

Order. — This revision petition is filed against an order passed in April 1937 amending under S. 152, Civil P. C., a decree of April 1919. The judgment, from which this decree proceeds, was passed on the consent of the lawyers representing both parties. The Judge who passed the decree and the leading counsel who represented both sides are all said to be dead. The facts are a little complicated but the essential points may be summarized briefly. The petitioner here was defendant 1 in a partition suit and the preliminary decree declared the petitioner and the respondent each to be entitled to half of the family properties. At the final decree stage there were difficulties in working out what were the rights and liabilities of the parties. The trial Court passed its final decree on the report of a Commissioner who amongst other things found that defendant 1 was liable for four sums making up a total of Rs. 1888-14-10 in respect of debts due to the family which he had collected. In appeal the learned District Judge passes a judgment, para. 1 of which runs as follows :

> The parties have agreed about the amount of debts due by the family and about the amount of debts due to the family which were allowed by defendant 1 to become time barred. The amount which plaintiff has to pay under Ex. 49 (i. e. "debts due by the family") is Rs. 4043-10-0 and the amount to be deducted for his share of barred debts is Rs. 1253-13-5. The net amount which plaintiff has to pay is Rs. 2789-12-7.

The learned Judge then goes on to deal with the various subsidiary items on which the parties are agreed and then mentions that the questions with regard to these matters had been discussed in Court with the vakils on both sides and an agreement had been reached and ends by saying that the final decree will be revised accordingly. When the decree was drafted, it prescribed that the plaintiff should pay "Rs. 2789-12-7 as agreed by the parties about the amount of debts due by the family and about the amount of the debts due to the family." The decree is silent about defendant 1's liability in respect of debts actually collected. It is contended that the omission of any reference to the fact that this sum of Rupees 2789-12-7 is merely the net result of subtracting the liability of the defendants for time-barred debts from the amount of the plaintiff's liability for debts due by the family, has resulted in an omission to give to the plaintiff a decree for these four items making up Rs. 1888-14-10 which were taken into account in the lower Court's decree and which the Appellate Court did not intend in any way to disallow.

Apparently, the parties did not realize that there was anything wrong with this decree and the plaintiff in execution claimed this sum of Rupees 1888-14-10 under the decree as amended. He succeeded in two Courts but in second appeal Jackson J. held that though this sum might well be really due to the plaintiff, the parties having allowed an agreed statement to be embodied in the decree that the plaintiff do pay so much, they could not afterwards ask the executing Court to recast the amount and amend the decree. This judgment was confirmed in Letters Patent appeal. After the plaintiff had failed to get the decree interpreted as covering this claim for Rupees 1888-14-10, he filed an application before the learned District Judge under S. 152, Civil P. C., asking that the decree passed some 18 years previously should be amended by the insertion of words making defendant 1 liable for Rs. 1888-14-10. The learned District Judge has held that clearly this amount was due, that it was omitted from the decree by error and has ordered the amendment of the decree, but has disallowed costs on the ground that the amendments should have been applied for nearly twenty years previously.

It is contended that the remedy, if the order of the learned District Judge is wrong, should be by way of appeal against the amended decree and not by way of revision, the authority being 24 Mad 646.[1] I may point out, this objection was not taken, as it should have been, until after this rather troublesome case had been argued on the merits at full length. Indeed, it seems to me that assuming the decision in 24 Mad 646[1] to be good law, (and I may remark that it seems to run contrary to the general lines of decisions of other High Courts) the petitioner should not be nonsuited merely because he has filed a revision petition, but should be permitted to pay the court-fee on the amount decreed against him and his revision petition should be treated as an appeal, it having been filed within time for an appeal. But I doubt very much whether there is any prohibition against the Court entertaining a revision petition in very special circumstances against an order passed without jurisdiction by reason of the fact that an appeal might have been filed against the amended decree resulting therefrom. Granted that the rule in 24 Mad 646[1] may be a sound rule for general guidance, there is the authority for the view that in special circumstances this Court can interfere by way of revision against an order passed without jurisdiction, even when there is a possibility of questioning the correctness of the order by way of a regular appeal. The decision in 24 Mad 646[1] was considered in somewhat similar circumstances to those before me by the learned Judge who decided 31 M L J 438[2] in which revision was allowed against an order to amend the decree on the grounds that the amendment was by the trial Court of an appellate decree and was therefore without jurisdiction. This decision seems to postulate that the rule in 24 Mad 646[1] is not an absolute rule for, surely, it would have been open in this case also to file an appeal against the decree as amended.

The correct view must be that ordinarily this Court will not entertain a revision petition when a remedy by way of appeal is available: but that in very special circumstances if there is a clear error relating to jurisdiction, it may at its discretion do so. In the circumstances of the present case I do not think it necessary to call upon the petitioner to pay the court-fee requisite to convert this petition into an appeal. The circumstances are, to my mind, very unusual. The learned District Judge has exercised powers under S. 152, Civil P. C., 18 years after the decree was passed, when the decree itself was one passed on the consent of parties and the persons who were able to speak to the terms of that consent are dead. In my opinion, S. 152 does not empower a Court to rectify a decree merely because that decree is wrong or unfair or because the parties have not realized their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under this Section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. It seems to me impossible to hold long after the event that when there is an apparent omission of an important term from a judgment proceeding on the consent of parties this term has been omitted by an accidental slip. No one knows what took place when the learned District Judge who is now dead discussed the rights and liabilities of the parties with the two learned counsel who are also dead. It is not impossible that counsel may have given up one claim in order to secure another claim. To my mind there can be no certainty that the omission of this term from the final decree as amended by the late District Judge was due to any mere error. Assuming that it was due to an error there is still less certainty that the error was an accident for which the Court itself was responsible and that it was not due to lack of diligence on the part of one of the parties. It is a dangerous thing to add terms to a consent decree and I doubt very much whether the Court has jurisdiction to do so under S. 152 at any rate without the consent of those who agreed to the original order. The presumption is that this judgment and the decree drafted in accordance therewith were scrutinized by the learned gentlemen with whose consent the judgment was passed. "It is", as Jackson J. observes,

---

[1] Viswanathan Chetty v. Ramanathan Chetty, (1901) 24 Mad 646.

[2] Bhagirathi Nethiar Amma v. Minakshi Nethiar Amma, (1917) 4 A I R Mad 589=35 I C 891=31 M L J 438.

> not right when the parties have allowed an agreed statement to be embodied into a decree that the plaintiff do pay so much to ask the executing Court to recast the amount and amend the decree.

The objection is, to my mind, just as forcible when the request is made at a very late stage to the trial Court under S. 152, as when it was made to the executing Court. In this view I must hold that the learned District Judge had no jurisdiction under S. 152 to add a term to what is in fact a consent decree without the consent of both parties. The civil revision petition is therefore allowed with costs here and in the Court below and the amendment to the decree will be expunged.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1940 Madras 540

MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Mudala Sithanna and others — Appellants.

v.

Kuppili Lakshminarasimhulu — Respondent.

Appeals Nos. 10 and 205 and Civil Misc. Petns. Nos. 944 and 2595 of 1937, Decided on 30th August 1939, against decree of Sub-Judge, Chicacole, D/- 6th October 1937.

(a) Grant — Service grant — Inam lands attached to office of karnam and enfranchised in favour of holder of office of karnam — Alienee from karnam gets good title.

The karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family; and where karnam service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an inam title deed is granted confirming the lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. The result of that is that when lands of this description are alienated by a karnam the alienee gets a good title. That principle has been applied to the case of women representatives who occupy the position of karnam : *A I R 1922 P C 96; A I R 1929 Mad 93 and A I R 1922 Mad 173, Rel. on.* [P 541 C 1]

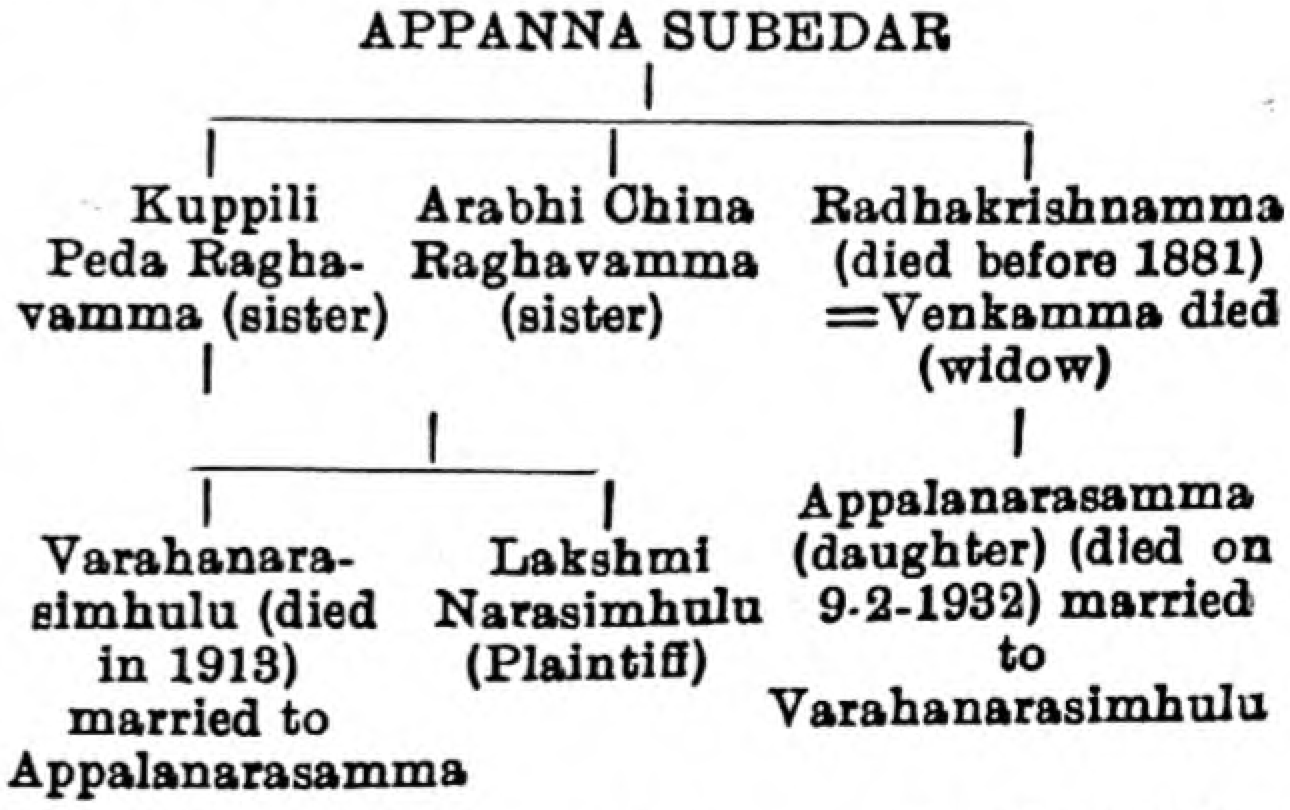
(b) Civil P. C. (1908), O. 13, R. 2 — Official records of undoubted authenticity — Leave to produce them should be granted even though they are produced late.

When documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it, leave should not ordinarily be refused even though they are produced late : *A I R 1929 P C 99, Rel. on.* [P 542 C 1]

P. Somasundaram, V. Govindarajachari and S. Ramamurthi — *for Appellants.*

G. Lakshmanna and J. Krishnamurthi — *for Respondent.*

Mockett J. —The relationship between the plaintiff and one Appalanarasamma who is the all-important character in this story is shown in the genealogical table herewith annexed :


APPANNA SUBEDAR
Kuppili Peda Raghavamma (sister)
Arabhi China Raghavamma (sister)
Radhakrishnamma (died before 1881) =Venkamma died (widow)
Varahanarasimhulu (died in 1913) married to Appalanarasamma
Lakshmi Narasimhulu (Plaintiff)
Appalanarasamma (daughter) (died on 9-2-1932) married to Varahanarasimhulu

It will be seen that one Radhakrishnamma married one Venkamma and that they had a daughter Appalanarasamma who died on 9th February 1932. The plaintiff is the son of a sister of Radhakrishnamma, namely Kuppilli Peda Raghavamma and he claims the property, the subject of this suit, as a reversioner to the estate of Radhakrishnamma. There are before us four defendants-appellants. In A. S. No. 10 of

1937 defendants 2, 3 and 7 are the appellants and are represented by Mr. P. Somasundaram. Defendant 1 appeals separately in A. S. No. 205 of 1937 and is represented by Mr. V. Govindarajachari. The property concerned is as follows : The defendants claim that they are entitled to the suit property; defendant 2 as alienee of portions of item 1 in the plaint which he purchased from defendant 1 and Appalanarasamma ; defendant 3 as alienee also of other portions of item 1 from the same source. Defendant 7 claims under a sale by Appalanarasamma to defendant 6 and from defendant 6 to him of item 4 of Sch. A. The appeal concerns only the items to which I have alluded. The answer to this claim was two-fold (1) that the lands in sub-items 1 to 4 of item 1 which had been covered by a permanent lease given by Appalanarasamma to defendant 1 were enfrachised mirasi service inam lands and (2) that Appalanarasamma was entitled to deal with them as absolute owner as they had been enfranchised in her favour while she was the holder of the office of karnam in the village of Lakshmipuram.

The legal position relating to the ownership of inam lands attached to the office of karnam and enfranchised in his or her favour has been well settled by the Judicial Committee and in this High Court. It was decided by the Judicial Committee in 44 Mad 643[1] that the karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family and that where karnam service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an inam title deed is granted confirming the lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. The result of that is that when lands of this description are alienated by a karnam, the alienee gets a good title. That principle has been applied to the case of women representatives who occupy the position of karnam in 52 Mad 6[2] and 43 M L J 153.[3] It is unnecessary to go into this position at any length because there is no contention about the legal position and there is very little contention now about the one point which we for some time had discussed before us. It was naturally of the utmost importance to the defendants in this case, resting as they did their title on the position of Appalanarasamma as the karnam of this village, to establish that she was actually in that position and that the enfranchisement was in her favour. There were in the possession of the defendants at the earliest stage of this case certain documents which went a long way towards establishing this position. Those documents arose under the following circumstances:

There had been litigation long ago between Appalanarasamma and one Koduru Venkanna in O. S. No. 388 of 1909 in the District Munsif's Court of Parvatipur. It appeared that Koduru Venkanna was claiming that he was entitled to the mirasi inam lands of Lakshmipuram village jointly with Appalanarasamma. Appalanarasamma's contention which it was necessary for her to vindicate by a suit was that Venkanna was no more than her agent or representative to carry out the duties of karnam, she being a woman but that she was the sole karnam and had the sole right to these lands. So it will be seen that the most important question to be considered in that case was what was the legal position of Appalanarasamma in relation to the karnamship. The matter was heard by the District Munsif and his judgment which is now marked as Ex. 15 was produced to the learned Judge. It is a long judgment and there was a decree finally which is marked as Ex. 14. It awarded Appalanarasamma the wet lands claimed but refused a decree for the dry lands. Against that decree there was an appeal to the District Judge whose judgment is marked as Ex. 17. It concluded in para. 12 with the following words :

> I am therefore of opinion that plaintiff is entitled to have all the suit lands exclusively enfranchised in her name and the entry of defendant's name in the title deed as a joint owner is fraudulent and illegal.

So Appalanarasamma succeeded in her claim to the dry lands also. The District Judge had before that held in para. 8 that the plaintiff was the holder of the office at the time of the enfranchisement and not defendant but that defendant was only a deputy doing duties of the office on behalf of plaintiff. The matter in second appeal in this High Court was peremptorily rejected and in the result the learned District Judge's judgment was affirmed. Therefore the position of Appalanarasamma had been a matter of the fullest investigation before a Court of law and it seems to me that under S. 13, Evidence Act, these proceedings on the question of the existence of her right in this office and property would have been and are very relevant as being transactions by which the right was recognized. Most unfortunately in the lower Court copies of these documents according to the learned Judge were not produced until the hearing of the suit. He rejected them because, as is obvious, their receipt in evidence was opposed by the plaintiff. The learned Judge said:

---

[1] Venkata Jagannadha v. Veerabhadrayya, (1922) 9 A I R P C 96= 61 I C 667 = 48 I A 244=44 Mad 643 (P C).

[2] Palaniyandi v. Velayudan Pillai,(1929) 16 AIR Mad 98= 112 I C 320 = 52 Mad 6 = 55 M L J 579.

[3] Venkataramadas v. Gavaraju, (1922) 9 A I R Mad 173=70 I C 677=43 M L J 153.

> These documents are for the first time produced into Court only today and the explanation for their non-production previously is not satisfactory. They were not also mentioned in any list filed with the written statement as documents on which defendants wanted to rely.

There does not appear to us to be any provision of the Code which provides for this list to which the learned Judge refers but that apparently was one of the grounds on which he excluded these documents. Except for two documents, Nos. 8 and 12, which were a registered notice and a public copy of a lease, the whole of these documents were rejected including all these records of the proceedings in the District Munsif's Court of Parvatipur. The Judicial Committee, if authority is needed, have emphasized that when documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it, leave should not ordinarily be refused even though they are produced late: *vide* 56 Cal 1003[4] at p. 1011. I can imagine no stronger case for granting leave than this. These documents had been referred to in the pleadings. They are documents about whose authenticity there cannot be the slightest question, being Court records. They were produced before the case started on the first day and yet they were summarily rejected by the learned Judge for reasons which I confess I do not understand. A petition has been presented to us asking that these documents should be admitted in evidence and after hearing both sides we have decided that this petition should be allowed. Certified copies of these documents are now before us though before the learned Judge copies contained in the printed papers in the old litigation had been produced and the result seems to prove conclusively the case which the defendants seek to establish, namely that Appalanarasamma was entitled to deal with these properties by virtue of holding this office and of the enfranchisement of the properties.

Now it is very unfortunate that there was not produced to the learned trial Judge a copy of the Inam Register which might have put this matter beyond any further dispute. We therefore thought it right to suggest to Mr. Lakshmanna for the respondent, if he so desired, that time would be given to him to obtain certified copies of the relevant entries from the Board of Revenue as an answer to these documents which we now admit; but Mr. Lakshmanna did not think it worth while. In fact although everything possible was said, finally I think he was driven to the position that it was quite impossible to maintain (1) that these documents should not be admitted and (2) when they were admitted that the defendant's case was not established and the plaintiff's case thereby defeated. This however concerns item 1, sub-items 1 to 4 only. Items 2 (a) and 2 (b) which are among the sub-items concern defendants 2 and 3. All these items are covered by the admission of these documents (together with items 1 to 4 in the plaint schedule). Item 4 of the plaint schedule however is said to rest upon a will of Radhakrishnamma which was not produced in the lower Court but which was sought to be proved by the production of a document Ex. 1 said to be signed by Radhakrishnamma in which the execution of a will in favour of Venkamma was admitted. That document which seems to contain all possible admissions necessary for this part of the defendants' case rested also on the evidence of three witnesses. D. W. 1 produced the document. He says that Koduri Venkanna was his mother's father and he found Ex. 1 in his father's records. Why this Koduri Venkanna should be in possession of this document is not clear. So Ex. 1 started its career by being produced not from proper custody but from unexpected custody. D. W. 2 identified the signature in Ex. 1 of Pattabhiramayya. D. W. 3, an old gentleman of 80, identified the signature of Radhakrishnamma, the maker of the document. The learned Judge regarded this document as suspect and was not satisfied with the evidence of these witnesses and we are inclined to take the same view. It certainly cannot be said that the learned Judge was not entitled to arrive at the conclusion which he did and we are proposing to confirm that part of his judgment. So far as any claim therefore is made under this will referred to in Ex. 1 it must fail. The claim to item 4 and sub-item 5 of item 1 has not therefore been established by the defendants or any of them. But so far as the rest of the properties are concerned, I am satisfied that the defendants by the production of Exs. 14, 15, 17 and 19 which we have now admitted and which should have been admitted in the Court below have established beyond doubt that Appalanarasamma occupied this position and that the power to alienate these properties was hers. As the defendants claim title from her their title is therefore good.

---

[4] Gopika Raman Roy v. Atal Singh, (1929) 16 A I R P C 99=114 I C 561=56 Cal 1003=56 I A 119 (P C).

Mr. Somasundaram took exception to the learned Judge's order with regard to mesne profits. But the only evidence before the learned Judge was the evidence of P. W. 2 who gave the total of the mesne profits from all these lands as Rs. 800. The defendants did not think fit to give the Court any assistance. The learned Judge was therefore in a difficulty but he arrived—how exactly it is not clear—at the view that the proper amount should be taken to be Rs. 752 and he consequently estimated that the mesne profits should be decreed at that amount which equals Rs. 16-7-0 per acre. It does not seem to me to lie in the mouth of Mr. Somasundaram to complain about this figure Rs. 752; the answer might well have been that the sole evidence on the record was of a larger figure, Rs. 800, and that that amount might well have been awarded. In the result therefore in substance, except as I have indicated, this appeal must succeed. With regard to costs the parties will pay and receive proportionate costs here and below to the extent of their respective success. The court-fee also will be shared in the same proportion.

Krishnaswami Ayyangar J.—I entirely agree. As observed by my learned brother there are two defences put forward: (1) a defence that would cover all the items claimed by the plaintiff in the suit, namely that the last male-holder Radhakrishnamma left a will by which he bequeathed his entire estate to his widow Vemkamma for life and after her life absolutely to his daughter Appalanarasamma. If this will were true, it would afford a defence to the entire suit. The learned Judge has found against it and the matter has been discussed in the judgment of my learned brother. I agree that there is no sufficient material for disturbing the finding of the learned Judge.

The second defence related only to the inam land of the extent of 22 acres consisting of 12 acres wet and 10 acres dry. It had been originally attached to the office of karnam held in the family. Radhakrishnamma held the office and after his death it is clear that Appalanarasamma held it. Some time prior to 1909, while Appalanarasamma was the holder of the office and was in enjoyment of these inam properties, they were enfranchised and an inam title deed came to be issued not in the name of Appalanarasamma alone as it should have been, but in the joint names of Appalanarasamma and Koduru Venkanna. Koduru Venkanna was the husband of the mother's sister of Appalanarasamma and appears to have been a gumastha for doing the karnam service both during the lifetime of Radhakrishnamma and after his death when Appalanarasamma was the holder of the office. He apparently took advantage of his position and the ignorance of Appalanarasamma and managed to get the inam title deed issued jointly in the name of himself and Appalanarasamma behind her back. This led to the litigation started by O. S. No. 388 of 1909 on the file of the District Munsif's Court of Parvatipur. The District Munsif upheld the claim of Appalanarasamma in regard to the wet lands alone, dismissing her suit in regard to the dry lands on the ground that she was not shown to have been in possession of them. The District Judge in A. S. No. 550 of 1910 declared her sole right to both the wet and dry lands comprised in the inam and also directed that the inam title deed should be amended accordingly. This judgment was confirmed by the High Court in S. A. No. 1020 of 1912. The result of this litigation was that Appalanarasamma's absolute title to the entire property to the exclusion of Koduru Venkanna based upon the enfranchisement of the inam land in her favour was established. That being so, her alienations of these enfranchised inam lands cannot be questioned by the reversioner as it is settled that an enfranchisement confers absolute title on the enfranchisee.

It is necessary to mention that the inam lands comprise sub-items 1 to 4 only in item 1 of the schedule to the plaint, two of these sub-items being 2 (a) and 2 (b) separately numbered for purposes of identification. Appellant 1 in A. S. No. 10 of 1937 succeeds in regard to item 2 (a) and appellant 2 succeeds in regard to item 2 (b). So far as appellant 3 (who was defendant 7 in the Court below and who put forward a claim to item 4) is concerned, he fails as his only ground of defence was the will which has been found against by us. So far as he is concerned the appeal must therefore be dismissed. The appellant in A. S. No. 205 of 1937 who was defendant 1 in the Court below succeeds in regard to two of the sub-items in item 1, namely those other than 2 (a) and 2 (b) and to that extent his appeal succeeds. In the result the plaintiff's suit will be dismissed as regards all the four sub-items of item 1 of the plaint schedule inclusive of items 2 (a) and 2 (b) separately numbered which are the items purchased by defendants 2 and 3 who are appellants 1 and 2 in A. S. No. 10 of 1937.

C.R.K./D.S. *Appeal partly allowed.*

✻ A. I. R. 1940 Madras 544

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Reddi Krishnan Naidu and others — Appellants.

v.

Chintala Somi Naidu and others — Respondents.

Letters Patent Appeals Nos. 97 and 98 of 1938, Decided on 12th December 1939, from judgment of King J., in A. A. A. O. No. 39 of 1936, D/- 28th October 1938.

✻ Hindu Law—Suit on promissory note executed by father — Sons joined as defendants but subsequently dismissed from suit — Decree passed against father alone—Interest of sons in family property held liable in execution.

In a suit on a promissory note executed by the father alone the sons were impleaded on the ground that the debt was incurred for family necessity. But subsequently the sons were dismissed from the suit and a decree was passed against the father alone. In execution the decree-holder asked for attachment and sale of sons' interest in the family property :

Held that the decree-holder could proceed to execute the decree against the sons' interests in the family property : *27 Mad 243 (F B), Rel. on; A I R 1938 P C 7, Expl.* [P 545 C 2]

V. Govindarajachari—*for Appellants.*

Y. Suryanarayana—*for Respondents.*

Leach C. J. — These two appeals arise out of the same suit and they can be disposed of here in one judgment. The appellants obtained a money decree against respondent 3 in the Court of the District Munsif of Parvatipur. The appellants made respondent 3's sons parties to the suit and they are respondents 1, 2 and 4. The suit was on a promissory note executed by the father alone. The sons were joined as defendants on the ground that the debt was incurred for family necessities. The District Munsif dismissed the suit, as he was not satisfied that the promissory note was genuine, but on the appeal to the District Judge a decree was passed against the father. In the District Court the appellants decided not to ask for a decree against the sons who were dismissed from the suit. In due course the appellants instituted execution proceedings and asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debt. The District Munsif upheld their objection, but on appeal the Subordinate Judge held that they could be held liable in execution proceedings. The sons then appealed to this Court. The appeal was heard by King J. who allowed it, but granted leave to appeal under Cl. 15, Letters Patent.

The Subordinate Judge found that there was no intention on the part of the appellants in allowing the sons to be dismissed from the suit to exonerate them altogether. King J. reversed the Subordinate Judge's decision because he considered that the authorities which support the Subordinate Judge's decision had in effect been overruled by the decision of the Privy Council in 13 Luck 61.[1] The appellants contend that the learned Judge has misconceived the effect of this decision. They say that it has not in any way altered the law as stated in the decisions of this Court. It is not necessary to examine all the judgments of this Court which have a bearing on the question; it is sufficient to refer to the Full Bench decision in 27 Mad 243[2] and to 47 M L W 60[3] and A I R 1929 Mad 898[4] which were decided by Division Benches. In 27 Mad 243[2] Benson, Bhashyam Ayyangar and

---

1. Raja Ram v. Rajah Baksh Singh, (1938) 25 A I R P C 7 = 172 I C 5 = 13 Luck 61 = 32 S L R 221 (P C).
2. Periasami Mudaliar v. Seetharama Chettiar, (1904) 27 Mad 243=14 M L J 84 (FB).
3. Periasami v. Vaithilinga Pillai, (1937) 24 A I R Mad 718=176 I C 359=47 M L W 60.
4. Doraisami v. Nagasami, (1929) 16 A I R Mad 898=121 I C 863.

Russel JJ., held, that independently of the debt arising from the original transaction entered into by a father, a decree passed against him in respect of the transaction by its own force creates a debt as against him which his sons are, under the Hindu law, under an obligation to discharge, unless they can show that the debt is illegal or immoral. Bhashyam Ayyangar J. said:

> But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him. . . . The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought.

In 47 M L W 60,[3] Varadachariar and Pandrang Row JJ., considered a case in which the suit was filed against the father and his sons, but before judgment was passed the suit was withdrawn as against the sons. The question was whether the sons were liable inasmuch as the debt was a debt binding upon them under the rule of Hindu law. The learned Judges held that the withdrawal of the suit as against the sons did not exonerate them. The result of the withdrawal was not to bring into operation the rule of res judicata embodied in S. 11, Civil P. C., but only to entail the statutory penalty enacted in O. 23, R. 1, which was that no fresh suit could be instituted against the sons on the same cause of action. Therefore it could not be said that what had happened in the suit amounted to an adjudication that the sons were not liable in respect of the decree debt. A I R 1929 Mad 898[4] was decided by Coutts-Trotter C.J., and Walsh J., who also held that a decree passed against a father personally after the sons had been exonerated could be executed against the sons' interests in the family property in respect of a decree debt passed against the father.

The facts in 13 Luck 61[1] on which King J. based his decision were these. After the death of a Hindu the sons and grandsons were made defendants in a suit filed by a creditor of the deceased to recover the amount of the debt from their interest in the family properties. Before judgment the grandsons were dismissed from the suit, but it was sought to realize their interests in the property in execution proceedings. The Privy Council held that they were not liable inasmuch as they had been dismissed from the suit. The question of their liability was directly raised and as they had been dismissed from the suit they could not be made liable under the decree passed in it. That case differs from the case now before us in that there the suit was brought against the grandsons after the death of the grandfather against whom no decree had been obtained. The dismissal of the grandsons from the suit amounted to a decision in their favour, of the question of their liability. That is not the position here. A decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-holders a new right, which they could enforce against the sons. We do not consider that 13 Luck 61[1] has overruled the decision of the Full Bench in 27 Mad 243.[2] In our opinion, the decision of the Full Bench remains unaffected and a decree-holder in circumstances like we have here may proceed to execute the decree against the sons' interests in the family property. The appeals will be allowed with costs in this Court and in the second appeals but the advocate's fee will be allowed only in Appeal No. 97 of 1938 of this Court and in the corresponding second appeal. The result is that the decrees of the Subordinate Judge will be restored.

C.R.K./D.S. *Appeals allowed.*

---

* A. I. R. 1940 Madras 545

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Yenamandra Jagannadham — *Plaintiff* — Appellant.

v.

Theerthala Adilakshmi and others — *Defendants* — Respondents.

Second Appeal No. 595 of 1936, Decided on 27th November 1939, against decree of Sub-Judge, Vizagapatam, in A. S. No. 197 of 1934.

*** Hindu Law—Inheritance — Brother's son's daughter is entitled to inherit.**

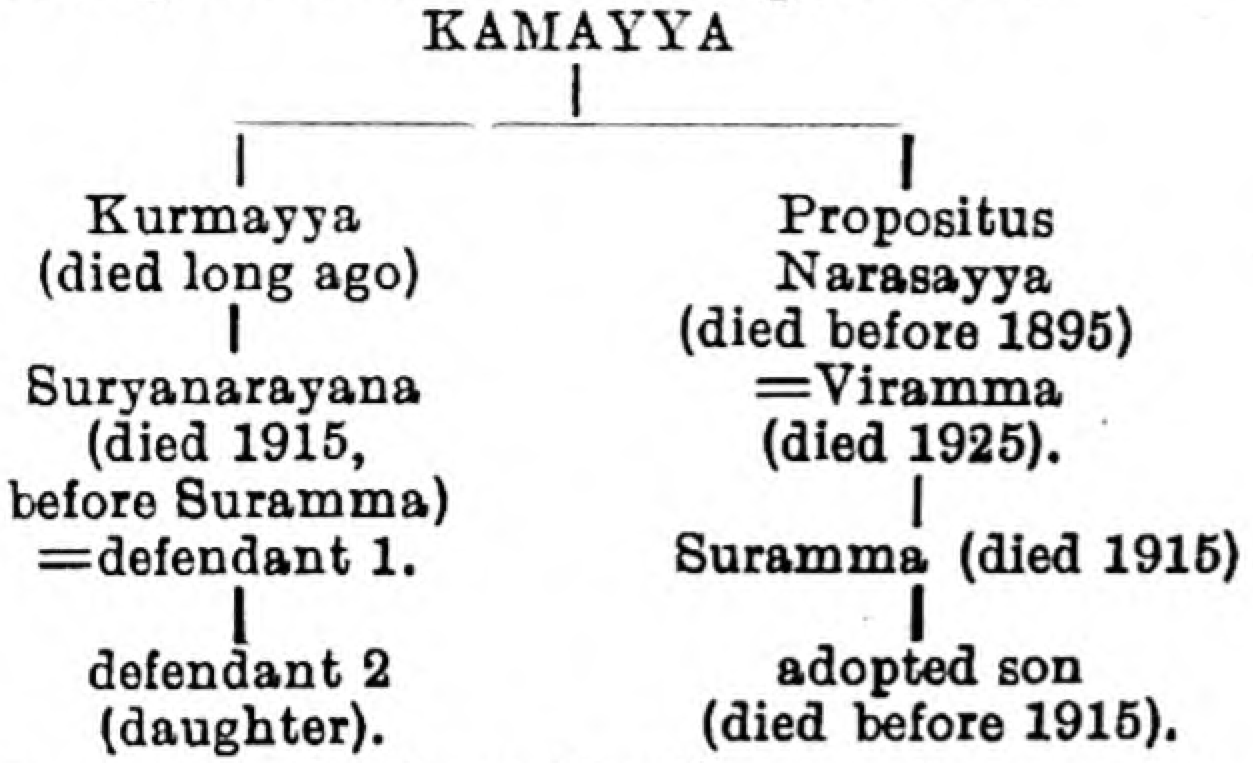
Under the Hindu law as administered in the Madras Presidency, female bandhus are entitled to come in after the male bandhus are exhausted, provided of course they satisfy the other conditions required by law. Therefore a brother's son's daughter is entitled to inherit : *8 M H C R 88, Rel. on.* [P 547 C 2]

G. Lakshmanna and G. Chandrasekhara Sastry — *for Appellant.*

B. Jagannadha Das — *for Respondents.*

ORDER OF REFERENCE.

Wadsworth J.—It seems to me that this appeal, which involves a decision of the question whether a brother's son's daughter is an heir under the Mitakshara law as administered in Madras, should be posted before a Bench, there being no direct authority so far as I am aware. The following genealogical tree shows the position :


KAMAYYA
Kurmayya (died long ago)
Suryanarayana (died 1915, before Suramma) =defendant 1.
defendant 2 (daughter).
Propositus Narasayya (died before 1895) =Viramma (died 1925).
Suramma (died 1915)
adopted son (died before 1915).

The plaintiff (appellant) sues for possession of property formerly enjoyed by Viramma as heir of her husband Narasayya. Plaintiff (a relative of Viramma) put forward a title based on the will of Suramma (to whom Viramma had gifted the properties) and on a surrender by the presumptive reversioner Suryanarayana, who died long before the reversion opened. Quite obviously, this title will not prevail against the right of the nearest reversioner to Narasayya's estate. The trial Court found that plaintiff was in possession at any rate during the lifetime of Viramma, that defendants 1 and 2 were not reversioners of Narasayya and that plaintiff was entitled to a decree. The Subordinate Judge abstained from giving any finding on the two additional issues (relating to the possession of the plaintiff and the heirship of the defendants 1 and 2) framed by the District Judge before remand but dismissed the suit on the strength of his conclusion that plaintiff had not proved title or adverse possession. He appears to have overlooked the fact that plaintiff is entitled to claim a decree on the strength of his possessory title if defendants 1 and 2 are mere trespassers. With reference to the heirship of defendant 2, he refers to a statement that there are nearer heirs, viz., the sister of Suryanarayana and her son, which statement so far as I can find, receives no support in the evidence unless it can be deemed that a question asked in cross-examination of P. W. 2 which elicited the reply, "I do not know," can be deemed to be evidence. Since the heirship of defendant 2 was in issue and there is no evidence of nearer heirs, it must be taken that they do not exist, especially in view of the fact that plaintiff pleaded that there were no heirs at all and defendants 1 and 2 pleaded that they were the nearest heirs. If neither of defendants 1 and 2 is found to have title, a remand will be necessary to the lower Appellate Court for a finding on the second additional issue.

It cannot, I think, be contended that the widow of a brother's son is an heir. She has no community of blood with the propositus and cannot be a bhinnagotra sapinda. The position of the brother's son's daughter, defendant 2, is however different. She is certainly a bhinnagotra sapinda or bandhu within the five degrees. On the authorities, she would be excluded by any male bandhu entitled to succeed. But in the absence of a male heir, can it be said that the brother's son's daughter will not be entitled to inherit to her great uncle ? The authorities are summarized in Mayne's Hindu Law, Edn. 10, paras. 509 and 510. The learned author quotes 5 Mad 241[1] and 21 Mad 263[2] and opines that the reasoning of these judgments is unassailable and applies to all descendants, ascendants and collaterals within five degrees. Hitherto, the rights of the son's daughter, the daughter's daughter and the sister have been confirmed by legislation while the rights of the father's sister, brother's daughter and sister's daughter have been recognized by Madras decisions. I do not think that the right of the brother's son's daughter to succeed has ever been expressly recognized or negatived by a Madras authority. But the following propositions seem to be established :

(1) A brother's son's daughter is a bandhu within the five degrees; (2) a female bandhu is not disentitled to inherit (in the absence of a male heir) merely by reason of her sex; (3) the heirship of female bandhus is not limited to those mentioned in express texts but is governed by the propinquity of their blood relationship. Granted the truth of these propositions, it seems to follow that in the absence of male heirs a brother's son's daughter would be entitled to inherit. But the subject being uncovered by authority and the decision being one likely to affect the position of other female bandhus of like degree, it seems to me desirable that the appeal should be placed before a Bench. The appellant should furnish typed translations of the pleadings and typed copies of the depositions which have not been printed, for the use of the Bench.

---

[1] **Lakshmanammal v. Thiruvengada, (1882) 5 Mad 241.**

[2] **Venkatasubramaniam Chetti v. Thayarammal, (1898) 21 Mad 263.**

Krishnaswami Ayyangar J. — This is a second appeal which came before Wadsworth J. in the first instance. The question raised in it related to the right of a brother's son's daughter to inherit under the Hindu law. The precise question is not covered by authority in this presidency and for that reason the learned Judge has referred the point for consideration by a Bench. The appellant was the plaintiff in the trial Court. He instituted the suit for the recovery of possession of property which appertained to the estate of one Narasayya who died some time before 1895. He was succeeded by his widow, Viramma, who in 1895 entered into an arrangement with the next reversioner Suryanarayana who was her husband's brother's son. By that arrangement, Suryanarayana in consideration of a sum of Rs. 100 agreed to Viramma holding the estate as absolute owner—a transaction which is admittedly invalid under Hindu law. Viramma having thus secured, as she probably thought, a valid right to dispose of the estate, made a gift of the property to her daughter Suramma in 1908. The daughter died in 1915 having in her turn purported to bequeath the property in favour of the appellant in this second appeal. The appellant's case thus rests on the arrangement of 1895, which is totally void—a point which is not disputed. The appellant's case is that he took peaceful possession of the property under the will and continued to enjoy the property undisturbed till 1925. That was the year in which Viramma died. After her death, respondent 1, who is Suryanarayana's widow and respondent 2, his daughter, dispossessed him of the property. The District Munsif decreed the suit. On appeal by the respondents, the District Judge allowed the appeal holding that respondent 2 was entitled to retain possession of the property on the ground that she had succeeded to the estate as the next heir of Narasayya. It is admitted that if she is an heir under the Hindu law, the appellant must fail, as his rights based on mere possession cannot prevail against those of the true owner. The only question then is whether respondent 2 is not the true owner, and whether she has not succeeded to the estate of Narasayya in the events which have happened.

Respondent 2 is the daughter of a brother's son of the propositus, and is only four degrees removed from Narasayya's father, the common ancestor. She is thus within the prescribed limit of proximity, being less than seven degrees in ascent and descent from the last male owner. Further the test of mutuality is also satisfied as she and Narasayya are sapindas of each other in the Mitakshara sense of the term. Her right to succeed to the estate cannot be questioned except on the ground that being a female she is not within the class of heritable bandhus. But it is now too late in the day to question the proposition that under the Hindu law as administered in this presidency, female bandhus are entitled to come in after the male bandhus are exhausted, provided of course they satisfy the other conditions required by law. A series of decisions of this Court commencing from 8 M H C R 88[3] have established their right to rank as heirs under Hindu law. It is true that there has been no direct decision relating to the right of a brother's son's daughter to inherit. But this can make very little difference, once it is established, as we hold it to be, that females are not to be disqualified by reason of their sex only. This proposition is firmly established for such a length of time that it is unnecessary to discuss it. The second appeal therefore fails and must be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[3] Kutti Ammal v. Radhakrishna, (1875) 8 M H C R 88.

A. I. R. 1940 Madras 547

PANDRANG ROW AND ABDUR RAHMAN JJ.

Nallapareddi Annapoornamma — Appellant.

v.

Pelleti Veeraraghava Reddi and others — Respondents.

Appeals Nos. 156, 166, 179 and 191 of 1936, Decided on 16th October 1939.

(a) Hindu Law—Widow—Maintenance—Suit for, against manager of joint family — Onus is on manager to prove binding nature of debts sought to be taken into account for reducing family income — Manager's ipse dixit is not sufficient—He must adduce prima facie reliable evidence.

In a suit for maintenance by a Hindu widow against the manager of the joint Hindu family, the manager is under an obligation to prove that the debts which according to him have to be taken into account in ascertaining family income are binding on the family. The manager's *ipse dixit* is not sufficient to show for this purpose that the debts are binding on the family. Although the standard of proof required for establishing the binding nature of the debts need not be so high as in a suit in which the dispute arises either as between the coparceners in a suit for partition or as between the creditors and the other members of the family, nevertheless there must be some prima facie reliable evidence to show that the debts are binding on the family when the manager of the family wants to have those debts to be taken into account for the purpose of reducing the family income available for calculating the rate of maintenance. [P 549 C 2; P 550 C 1]

(b) Hindu Law—Debts—Manager—Necessity —Purchase of new lands for family and litigation are not prima facie family necessities.

Primy facie the purchase of new lands for the joint Hindu family is not a family necessity, and certainly every litigation cannot be regarded as prima facie a necessity of the family, assuming in both cases that borrowing alone could meet the alleged necessity and the money required could not be found from the surplus of the family income. [P 550 C 1]

(c) Hindu Law—Widow—Maintenance—Suit for — Costs — Amount claimed not out of all proportion to amount found due — She ought not to be mulcted in costs.

So long as the claim to maintenance is genuine and true, and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. [P 553 C 2]

☆ (d) Hindu Law—Widow — Maintenance— Widow's right of maintenance is absolute—Her separate property or income therefrom should not be taken into account in assessing amount of maintenance to be awarded.

It is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during her husband's lifetime. It is immaterial if she has any private means of her own or can have them by selling some of the jewellery which is not required by her after her husband's death. Had the husband remained alive it would have been his duty to maintain his wife out of his own estate irrespective of her stridhanam or private means and there is no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance is conferred on the widow under the Hindu law in lieu of her husband's share in the joint family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income : *Case law reviewed.* [P 557 C 1]

P. V. Rajamannar and K. Subba Rao (in 156), K. Umamaheswaran (in 179), D. R. Krishna Rao (in 191) and P. S. Raghavarama Sastry (in 166 and 179) — *for Appellant.*

P. V. Rajamannar and K. Subba Rao (in 166 and 179), and P. S. Raghavarama Sastry (in 156) — *for Respondents.*

Pandrang Row J. — These four connected appeals arise out of two suits for maintenance filed by two widows belonging to the same composite family. Appeals Nos. 156 and 191 are by the plaintiffs in the suits and the other two appeals are by defendants 1 to 7. The suits were for maintenance including arrears of maintenance and also for recovery of jewels or their value and for provision for residence. The claim in both cases was for maintenance and arrears at the rate of Rs. 300 a month and Rs. 5000 each in lieu of provision for residence. The value of the stridhanam jewels that were claimed was Rs. 6700 odd in one case and in the other Rs. 8700.

The suits were tried together and disposed of by one and the same judgment dated 12th October 1935, the suits having been actually instituted in 1929. The Subordinate Judge of Nellore who decided both these suits gave a decree in each case for Rs. 100 a month as maintenance and arrears of maintenance and Rs. 2500 as provision for residence and dismissed the claim for jewels or their value in both the suits. Both parties have now appealed in both suits and the contentions of the defendants, who are the appellants in two of the appeals, namely 166 and 179, are that the maintenance and arrears of maintenance should not be more than Rs. 40 a month and that the provision for residence is excessive and they raise also two comparatively minor points relating to the alleged payment of Rs. 500 at the rate of Rs. 250 to each of the plaintiffs just before the suits were instituted and to the direction by the Court below regarding costs of the suits. The point raised in the appeals by the plaintiffs, i. e. the claimants for maintenance and arrears, is that they should be given at the lowest Rs. 200 a month and that a decree should have been given for jewels or their value to the extent of Rs. 3000 in the case of Seethamma, i. e. the plaintiff in O. S. No. 66 of 1931 and Rs. 4000 in the case of Annapurnamma, the plaintiff in O. S. No. 68 of 1931. A point regarding costs has also been raised in these appeals. This direction regarding costs made by the Court below which is objected to by both the sets of appellants will be dealt with after the other points are disposed of.

The main question, the discussion of which took up most of the time before us is the one relating to the rate of maintenance. The question has been dealt with in very great detail by the Court below, but unfortunately, in dealing with the point in great detail, the Court below lost sight of one or two important points which had to be decided as a preliminary to an examination of the details. In the first place, the Court below relied almost entirely, or at least primarily, on the abstracts of the accounts said to have been kept by the family of the parties for many years. (His Lordship discussed the evidence relating to the abstracts of the account books prepared and then proceeded.) In these circumstances it is impossible to say that anyone who really examined all the numerous accounts in this case and prepared the abstracts as the result of his examination has been examined as a witness in this case to prove that the abstracts are correct, and certainly it is not pretended that defendant 1 is himself competent to prepare correct abstracts of so many accounts as are put forward in the present suits. It is thus apparent that these abstracts have been admitted in evidence in circumstances in which they should not have been admitted; in other words, they have not been properly proved and should not have been relied upon to such an extent at any rate as the Court below has done. Apart from that we find there are obvious discrepancies which even a cursory glance at the accounts and abstracts themselves would show. (After pointing out these, his Lordship proceeded.) Basing its finding mainly on the abstracts, the Court below was of opinion that the total income was not less than Rs. 20,000, from landed property. We need not go into the evidence at very great length regarding this point because after all it does not make a great deal of difference whether the family income is Rs. 20,000 or Rs. 25,000 or even Rs. 30,000. The income in any case is sufficiently large as not to bring into operation of what one may call the rule prescribing the maximum amount that might be awarded as maintenance. Even on the basis of Rs. 20,000 the share of the deceased husbands of the plaintiffs in these suits would be about Rs. 5000 a year or Rs. 400 a month and what they now demand is Rs. 200 a month. Unless therefore the income of the family is something less than Rs. 10,000 a year the claim of the plaintiffs' maintenance at Rs. 200 a month could be satisfied without going beyond the maximum fixed by the law as laid down by the highest authorities. Nevertheless, we have to say something on the other aspects of the question on what one may call general evidence, which in a case like this affords a greater security, so to say, against falsity creeping in. (His Lordship then dealt with the general evidence and proceeded.) On the whole therefore there can be no doubt that the net income of the family after making all allowances for vicissitudes of season and risk of all kinds cannot be less than Rs. 20,000 a year. Indeed it would not be unreasonable to say that the income would not be less than Rs. 25,000 a year, the family being one which pays about Rs. 10,000 Government assessment in respect of patta lands and Rs. 4000 jodi in respect of shrotriam villages. A net income of double the Government revenue and jodi is certainly not unreasonable even when prices are lowest.

We do not propose to say much about the details of the question which has been argued at some length, namely, the amount of outstandings and the amount of debts relating to the family. As regards the outstandings, it is obvious that the view taken by the Court below is right, namely that the belated attempt made by the defendants to prove that some of the outstandings of the family were irrecoverable and that some others did not bear any interest did not succeed. This allegation was subsequently made during the trial, and there is really no independent evidence corroborating this belated allegation; none of the debts due to the family has been written off as irrecoverable or shown as irrecoverable in the accounts of the income submitted to the income-tax authorities. It is too much to suppose that out of a total amount of Rs. 40,000 and odd of outstandings more than Rs. 11,000 should be irrecoverable and more than Rs. 6000 should carry no interest. It becomes all the more improbable when one considers the wealth of the family and the existence of debts due by the family to others. When the family is borrowing moneys it is most unlikely that they would lend money without interest. In any case, we do not propose to deal with this aspect of the case at greater length as the lower Court has dealt fully and correctly with it. As regards however the debts due by the family, one or two observations fall to be made. We do not agree with the Court below that the defendants are under no obligation whatever to prove that the debts which according to them have to be taken into account in ascertaining family income are binding on the family; that, in other words, the manager's *ipse dixit* is sufficient to show for this purpose that the debts are binding on the family. It may be that the standard of proof, so to say, required for establishing the binding nature of the debts need not be so high as in a suit in which the dispute arises either as between the coparceners in a suit for partition or as between the creditors and the other members of the family. But nevertheless, there must be some prima facie reliable evidence to show that the debts are binding on the family when the manager of the family wants to have those debts to be taken into account for the purpose of reducing the family income available for calculating the rate of maintenance.

In this case there is no such reliable prima facie evidence. It is admitted by defendant 1 himself that more of the debts were contracted after the dispute arose in 1928. It is admitted that the family is well-to-do, and in such a case the evidence required of necessity to borrow must obviously be more satisfactory than in the case of a family more or less impecunious all the time. In this case the debts were contracted —all of them—by defendant 1 and most of them after 1928. The debts were only about Rs. 30,000 to Rs. 35,000 when he took up the management, and they have now swelled to Rs. 71,000. The explanation given is that he had to borrow for the purpose of purchasing properties, making repairs to lands and for litigation and so on; he mentions two big items—Rs. 20,000 for purchase of lands and Rs. 10,000 to Rupees 16,000 for certain litigation. As defendant 1 himself was a party to both these items of expenditure, certainly he should have been in a position to give evidence that both these items of expenditure were necessary and that money had to be borrowed for the purpose of meeting this expenditure. But beyond saying that they were borrowed for these purposes, he does not say that there was a necessity to borrow. Prima facie, the purchase of new lands for the family is not a family necessity, and certainly every litigation cannot be regarded as prima facie a necessity of the family, assuming in both cases that borrowing alone could meet the alleged necessity, and the money required could not be found from the surplus of the family income.

Bearing all these circumstances in mind, the general conclusion emerges that in cases of this kind, where we are not required to determine, so to say, correctly to the last pie, what the family income is, where a rough estimate is as good as any attempt to arrive at strict accuracy and indeed—where strict accuracy is hardly to be hoped for — namely the outstandings and the debts can be set off one against the other without doing any serious injustice to either party in this litigation and this conclusion which we mentioned during the hearing of the appeal was not controverted or disputed on either side. We therefore do not propose to go further into the details of debts and liabilities and we rest content with the general observation which is accepted on both sides that for the purposes of this case it is enough to disregard both of them because one can be regarded as being set off against the other. But we make it clear that this is done only for purposes of these cases, namely where we have to determine roughly the family income in order to decide, so to say, the status of the family and the amount of maintenance that could be granted.

Before determining the reasonable amount that can be given in these cases as maintenance, one point remains to be dealt with and that arises in one of these cases only, namely the claim of Sitamma, the plaintiff in O. S. No. 66. She claimed in a separate suit certain properties as her own and she got a decree in part in her favour in the Court below and that decree is now under appeal. It is argued in these appeals that so far as Sitamma's claim for maintenance is concerned, the income which she derives from the separate property which may be ultimately decreed in her favour should be taken into consideration in determining the maintenance to be allowed to her and that this should be done even in the matter of arrears because mesne profits have been claimed by her and have been decreed. We cannot anticipate the ultimate decision in that suit relating to the separate property of Sitamma, and we shall therefore assume for the purpose of these appeals that Sitamma has separate property of her own which brings her an income of about Rs. 50 a month which is what is alleged by the defendants against her. In other words, we proceed on the basis that Sitamma has separate property from which she gets a monthly income of about Rs. 50. Now, the question is whether the possession of this income from separate property is a factor to be taken into account or consideration in the determination of the maintenance to be given to her. On this point, I have had the advantage of seeing my learned brother's judgment which deals with all the relevant cases dealing with this point, and I do not propose to anticipate or repeat any portion of what he is going to say in his judgment. It is enough for me to say that I concur in his views as to the effect of the decided cases and in his final conclusion that this income from separate property is not a factor to be taken into account at all, and that the defendants' contention is not supported by any recognized principle of Hindu law. It is obvious that the recognition of any such contention will introduce greater uncertainty into a field where already there is too much uncertainty. Because, while it is no doubt very easy to say in a general way that the income from separate property should be taken into consideration, the extent and mode of taking it into consideration are left vague, and vagueness in a point like this means trouble to the parties who will have to get the question determined by one Court after another.

The learned counsel for the defendants, Mr. Umamaheswaran, felt himself compelled to admit that taking into consideration cannot mean that if the widow, for instance, be entitled legitimately to a maintenance allowance of Rs. 100 a month in this case, the rate of maintenance allotted to her should be reduced by Rs. 50 a month, i. e., by the amount of the income from her separate property. Obviously he feels that such a position could not possibly be defensible, because, if the income from the widow's separate property had not been only Rs. 50 a month but Rs. 100 a month, the rate of maintenance to which the widow would be entitled would be nil which would be absolutely in the teeth of all principle, for, the right of a Hindu widow to maintenance from out of the property belonging to her deceased husband is absolute and not subject to any condition that she should be in need of any allowance for maintenance.

The co-existence of an absolute right to get maintenance with conditions of this kind is really difficult to postulate, for, what is absolute must be unconditional, and if there are conditions, there cannot be any absolute right. It may be that though in a case of a coparcener's right to a share, the law itself fixes definitely what his share is to be, the amount of the maintenance due to a widow has to be determined by the Court having regard to the facts and circumstances of each case, but that does not make the right other than absolute. The fact that a Court has to determine the exact money value, so to say, of a right which is not determined by the law itself, cannot convert what is an absolute right into a conditional right, i. e. a right that can be claimed or that can be said to exist only if certain conditions are satisfied. The only condition—if one may call it a condition—to be satisfied in a case like this is that the person who claims maintenance must show that she is the widow of a deceased coparcener and that the family has property on which the claim for maintenance can be fastened. I do not however propose to go further into this point. We therefore come to the conclusion that there is no necessity for taking into consideration the income that Sitamma would derive from her own separate property.

The point is what is the rate of maintenance that can be regarded as reasonable and proper in the circumstances of these cases. The Court below has given Rs. 100 and the defendants want to reduce it to Rs. 40 while the plaintiffs want to enhance it to Rs. 200. Of course, it is impossible to satisfy both the parties in cases like these, however deeply one may go into the details of the case, or to expect both parties to accept any amount as reasonable, unless they are reasonable enough to compromise and settle the rate between themselves, and not leave it to the Court to decide what the rate should be. In these cases, there is no danger, as we have observed, of exceeding or even approaching near the limit prescribed in cases of this kind, namely the income of the deceased husband's share which in each of these cases is one-fourth of the entire family property and which share on any reasonable estimate would fetch an income of not less than Rs. 400 a month. It is obvious that the rate of Rs. 40 is obviously and clearly unreasonably low. There is no legal authority for the shastric injunction on which extremely low awards of maintenance are sought to be based, namely that the widow ought to "eat or enjoy moderately," that is live as abstemiously as possible. This moral precept cannot be given legal authority in order to cut down the level of comfort which otherwise a widow to whom fortune has been unkind, would be entitled to claim. Whatever might have been the practice in the past, there can be no doubt that the recent tendency has been to be liberal in the grant of maintenance; or to put it perhaps more accurately not to be illiberal in the grant of maintenance to widows. This is obviously in keeping with the changed times and the changed notions of the people including notions as regards comforts reasonably required for persons belonging to certain classes of society.

These changes are reflected in the recent legislation in favour of widows in the shape of the Hindu Women's Rights to Property Act, 1937, which as Mr. Raghavachariar, the learned author of "Hindu Law Principles and Precedents" says can more appropriately be called the Hindu Widows' Rights to Property Act, because the most marked change introduced in the Hindu law by that Act is the provision in favour of Hindu widows. Though that Act is not applicable to the present cases because the law governing the rights of the parties in these cases is the law as it prevailed before the Act of 1937, nevertheless, the reference to this new legislation is not entirely pointless because that legislation only reflects the change that has unconsciously and slowly crept into Hindu society towards a more liberal treatment of Hindu widows. It is not as if the Legislature suddenly thought it necessary to ameliorate their condition but the Legislature merely gave sanction to a change which had already taken place and that change cannot be ignored by Courts in determining the rates of maintenance. In other words, to put it concretely, the changed notions as to the way in which a widow should live and what pleasures she should be permitted and so on, have to be determined, not in accordance with the old ideals which have more or less ceased to apply or to be applied to actual life, but according to the changed notions that prevail to a greater and greater extent in the present day; as is well known one tendency observed in the country is the gradual steady rise in the standard of living and Hindu widows have been as much subject to this tendency as any other class of people in Hindu society.

We therefore think that while the principle to be observed is to bear in mind all the circumstances of the family, Courts should also bear in mind the changed conditions of society and award maintenance in such a way that the widow concerned is able to live in more or less that standard of comfort in which she would have been able to live if her husband had been alive, so long as the family can stand it and there is no difficulty in the way of the family finding the necessary money to maintain the widow in such comfort. It cannot be said that Rs. 100 a month is sufficient for a widow of a wealthy family who is no longer content to stay in her own native village and live the same village existence as widows in the past. It cannot be said that her desire to live in a place like Nellore is unreasonable nor that life in Nellore is not more expensive than life in a village like Kota.

Considering all the circumstances, we are of opinion that the rate of maintenance should be enhanced from Rs. 100 a month to Rs. 150 a month. This however would apply only to maintenance from the date of the suit and will not apply to the arrears claimed and allowed by the Court below which will remain at the figure Rs. 100 a month. This enhanced rate of maintenance, namely Rs. 150 a month, will, of course, be granted to both the widows; that is to say, the plaintiffs in both the suits will each get maintenance at this rate from the date of her suit.

Before leaving this aspect of the case we might conveniently deal with the contention of the side of the defendants that the charge given by the Court below covers a much larger extent of land than is reasonably necessary in the circumstances. The lower Court has given a charge in respect of all the nine shrotriem villages to each plaintiff. The result is that the defendants' family would be unable to deal with the properties contained in the shrotriems on account of the charge. We must however have regard to the higher rate of maintenance which we have considered it necessary to award. In these circumstances, and with the consent of the advocates on the side of the plaintiffs in the suit, we will confine their charge in respect of their claim to maintenance including arrears to the following villages. As regards the claim of Annapoornamma the charge is limited to Vudathavari Parlapalle and Bhuvanagiripalem and as regards the claim of Sittamma the charge is limited to the villages of Polipadu, Muddumudi and Ambapuram. The charge given by the Court below on the remaining four villages is cancelled. (His Lordship then dealt with the controversy regarding the provision for residence and the question of jewels and proceeded.) The only other points that remain to be decided in these appeals are the payment of Rs. 500 in two halves of Rs. 250 to each of the plaintiffs after disputes arose between the parties, and the point relating to costs in the Court below. As regards the payment of Rs. 500 after disputes arose the finding is against defendant 1 who pleaded the payment, and after-looking into the evidence relating to the point we are not inclined to differ from the finding of the Court below. (After examining the evidence, his Lordship held that the alleged payment could not be believed and proceeded.) The other question of the costs in the lower Court more or less answers itself after the other points have been decided. It is now found that the plaintiffs are entitled to maintenance at least at one half of the rate which was claimed by them in the Court below. In view of the peculiar way in which information was kept back by defendant 1 about the status and the property of the family even from the Court itself, it is obvious that the plaintiffs could not be expected to have made a better or nearer estimate of the income of the family than they did. It is impossible to say that a family which, as is now found, pays a Government assessment of Rs. 10,000 in respect of ryotwari lands and Rs. 4000 for jodi in respect of shrotriem villages could not possibly be getting a net income of Rs. 50,000 a year. It was not an unreasonable estimate to make and it cannot be said that in putting forward that estimate the plaintiffs deliberately exaggerated their claim. After all, even according to the correct state of facts as now found by us the family must have an annual net income of not less than Rs. 25,000 and therefore the shares of the deceased husbands of the plaintiffs would have been about Rs. 500 a month. Even assuming that the total income was only about Rs. 20,000 their shares would have come to Rs 4500. They were entitled to claim up to this limit.

What exactly is the reasonable amount to be claimed as maintenance is probably more difficult for the claimant-widow to decide than it is for the Court to decide what is the reasonable amount to give, because it is more difficult for the widow to decide against herself than for the Court so to decide. Moreover the Court has to decide only after having all the materials before it. In this case, as in many other similar cases, the plaintiffs are widows with little or no exact knowledge of the extent of the property belonging to the family, and have necessarily to depend upon vague information given by people who may know something about it, and they should not and cannot rightly be penalized for acting upon such information as they pick up in this manner. The determination of the actual amount depends on a number of circumstances, and, as these cases themselves show, two Courts can form different opinions as to what is the reasonable rate of maintenance in a given case. The Court below thought Rs. 100 was reasonable and proper whereas we are of the opinion that Rs. 150 is reasonable and proper. This itself shows that it is not reasonable to expect parties who claim maintenance to be meticulously accurate and observe all possible moderation in making their claim. So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. In these circumstances we are of opinion that the plaintiffs should be given their entire costs including court-fee due on the plaint in the Court below to be paid by the contesting defendants, and the contesting defendants should bear their entire costs in the Court below.

The result is that the appeals by the plaintiffs in the suits are allowed to the extent indicated above, that is to say the rate of maintenance is raised from Rs. 100 to Rs. 150 a month, but not in the case of arrears claimed. The value of the jewels Rs. 2,200 and Rs. 4,000 are decreed in favour of the plaintiffs, Sitamma and Annapurnamma respectively, in addition to what has been decreed in their favour by the Court below. We have already indicated the change to be made in the decree of the Court below as regards the provision for residence of both the plaintiffs. The question of costs in the Court below has been already dealt with. In the circumstances the appellants in Appeals Nos. 156 and 191 of 1936 are allowed their costs of these appeals to be paid by the contesting respondents who will bear their own costs, the appeals being allowed to the extent indicated above. The other appeals, namely those by defendants 1 to 7, Appeals Nos. 166 and 179 of 1936, are dismissed with costs.

Abdur Rahman J. — I agree with my learned brother and should like to examine the legal point which arises here for consideration with reference to decided cases relied upon by learned counsel for the parties. The question to decide is whether the private income which Seethamma has been getting from her stridhanam, (or which has been at times described as peculiar property) should be taken into account in assessing the amount of her maintenance. Learned counsel for the appellant contends that it should be so. There is some divergence of opinion on the subject both amongst the textbook writers and the decisions of the various High Courts. Strange in his Hindu Law, Vol. 1, at pp. 171 and 172 (1830 edition) observes as follows :

> Whether, in estimating her stridhana on the occasion, her clothes, ornaments, and the like, are to be taken into account, or only such articles of her property as are productive of income to her, or conducive to her subsistence, does not distinctly appear; though the restricting the account to the latter would seem to be reasonable, considering the object. An opinion, that her maintenance should be independent of her peculiar property is unsupported.

This was not the correct method, in my opinion, of approach to this question. It should not have been presumed that a widow's income from her stridhanam property would have to be taken into consideration in fixing the amount of her maintenance unless some authority was found to support that view. This is particularly so, when Sir Thomas Strange has himself in Volume 2 of his Hindu Law published the opinion of the Nellore Pundit at p. 307 when the matter was referred to him, i. e. the Pundit, for his opinion by the Court. The answer which the Court proposed to give to the matter in issue was suggested in the following words :

> On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of stridhana in which case she is entitled only to a half share.

The Pundit's comment on the answer was as hereunder :

> This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share, in case of the existence of stridhana. The division (as it appears to me) should be made without reference to any property she may hold under this title, unless it may have been accepted by her..... The widow's claim to maintenance from her husband's estate is absolute, unlimited by circumstances; but then, it is only a claim to maintenance and it is not correct to say that she is entitled to any share or division.

Having regard to this opinion and without referring to any text or authority which would point to a different conclusion, the presumption raised by Sir Thomas Strange in Vol. 1 against the widow does not seem to be, if I may say so with respect to that author, justifiable. Learned counsel for the appellant has also not been able to point to any original text in support of his contention and in the absence of any such text, I will have to examine the relevant passages from the works to which reference was made and the cases which were cited at the Bar. There are certain passages in Mayne's and Mullah's Hindu Laws at pp. 834 and 595 of their latest editions respectively; but having gone through them I do not find any opinion expressed by the learned authors themselves although relying on certain decisions of the various High Courts, the proposition has been stated that in calculating the amount of maintenance a widow's stridhanam property must be taken into consideration unless it was of an unproductive character. Sir Dinshaw Mullah has however referred to the conflict of opinion existing on the point. Sirkar in his treatise on Hindu law after referring to the various cases on which reliance was placed by the other authors struck a discordant note at p. 621 of Edn. 6 where he observed as follows :

> But all this is open to the objection, that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so?

Since the Hindu Women's Right to Property Act (18 of 1937) came into force, subsequent to the dates on which the rights to get their maintenance had become vested in Sitamma and Annapurnamma, the law as it stood before the Act had come into force will govern the present appeals. It cannot be denied that the widows would be entitled to maintenance as members of their deceased husbands' families. It is a right which devolved on them on account of their marriage with those who owned certain shares during their lives in the joint family property. Their husbands were during their own lives bound to maintain these ladies and the same right would continue to exist as long as they (that is the widows) do so and there is property in which their husbands had shares at the time of their deaths. The question is whether this right can be held to have ceased to exist or said to remain in abeyance if these widows happen to possess some private means of their own. There seems to be nothing on principle which would compel us to take the view that this right which came into existence at the time of their marriage and continued to subsist even after the demise of their husbands should disappear permanently or even temporarily, only because they are able to maintain themselves out of their own stridhanam property.

A widow's right of maintenance is an absolute right and cannot ordinarily be taken away without a clear provision of Hindu law. No such provision has been brought to our notice by the learned counsel for the appellant and in the absence of such a provision or any other cogent reasons it is impossible to ignore that right. Nor are there any decisions of this Court in which the view pressed upon us on behalf of the appellant has been taken. The only Madras case to which our attention was drawn on behalf of the appellant was that in 38 Mad 153.[1] It might be noted here that the headnote of this case is rather misleading. The learned Judges do not seem to have decided that a widow's private income was to be taken into account in determining the quantum of maintenance to be paid to her. The facts of the case were that the defendant was found to be in possession of the family property yielding an income of about Rs. 100 per annum. The widow had some private property out of which she could realize something like Rs. 40 to 50 per year. It was contended there that a widow who was able to maintain herself out of other property had no right to claim out of the husband's estate anything for that purpose. This contention was repelled as it was found by the learned Judges to be based on an entirely wrong conception of the right sought to be enforced. In disposing of that contention the learned Judges observed as follows :

> The wives of the male coparceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their lifetime sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves.

Two single Bench decisions of this Court were cited on behalf of the respondent in which Ananthakrishna Ayyar J., and Pandalai J. sitting separately took the view that a widow's private means were not to be considered in fixing the amounts of her maintenance. Those cases are reported in 59 M L J 531[2] and 66 M L J 680.[3] It is true that the question for decision in the latter case was whether the amount of maintenance granted to the widow should not be reduced if her condition had subsequently improved by her own efforts or on account of a gift made to her by one of her relations; but I think that the principle on which that decision was based was that her private income could not be taken into consideration for the purpose of her maintenance. With these decisions I find myself in respectful agreement. Ananthakrishna Ayyar J. had in 59 M L J 531[2] after considering the various decisions of different High Courts and what was stated in Mayne's Hindu Law, come to the conclusion that a widow's income from her private property should be, in fixing her maintenance, disregarded. It may not be necessary in this case to decide the question, but the observation in that case by the learned Judge to which I am, as at present advised, unable to give my assent reads as follows :

> The question will be different when the income from the joint family estate is not enough to maintain all the members depending upon it.

It was unnecessary for Ananthakrishna Ayyar J. to say this in that case. It is unnecessary for us also to decide that question now. I have simply drawn attention to that observation on the ground that our silence may not be construed as tantamount to its approval. In a case where this question arises for decision, it will have to be examined with care. Out of the cases decided by the High Courts it appears to be more convenient at this stage to examine an old Allahabad decision given in 4 N W P H C R 63[4] to which reference has been made in one or two Bombay rulings. The facts of that case were that a suit for the recovery of maintenance was instituted by Shib Dayee against her father-in-law in which it was pleaded by the latter that the plaintiff had taken some cash and moveable property belonging to her deceased husband and of the defendant of the value of Rupees 5000 which sufficed for her maintenance. The trial Court found the proof of the fact that Shib Dayee had taken any jewellery, etc. to the value of Rs. 5000 wanting, but held that she possessed a sum of Rs. 1000 awarded to her husband in an arbitration and jewels suitable to the position of the family. Holding that the income of the estate purchased by the defendant for his son, i. e. Shib Dayee's husband, along with the interest on the Rs. 1000 in her possession would be sufficient for her maintenance, the Subordinate Judge dismissed her claim. It will be noticed that no plea was raised on behalf of the defendant that Shib Dayee had no right to get a maintenance on account of her stridhanam property. The sum of Rs. 1000 which was found to be in her possession was alleged to belong to her husband and if it did, there is no doubt that it had to be taken into consideration in fixing maintenance. But it appears that some argument was advanced in appeal that she was not entitled to get any maintenance inasmuch as she was found to be in possession of some jewels and other property although unproductive of any income. This was repelled by the learned Judges with the observation:

---

[1] Lingayya v. Kanakamma, (1916) 3 A I R Mad 444=28 I C 200=38 Mad 153=28 M L J 260.

[2] Kothandarami Reddi v. Chenchamma, (1930) 17 A I R Mad 479=126 I C 597=59 M L J 531.

[3] Sundari Ammal v. Venkatarama Sastrigal, (1934) 21 AIR Mad 384=149 IC 265=66 MLJ 680.

[4] Shib Dayee v. Doorga Pershad, (1872) 4 N W P H C R 63.

> Nor will the fact that a widow has in her possession jewels and other property unproductive of income, deprive her of or diminish her right to maintenance if they constitute her stridhanam although forming part of her husband's estate, they are suitable to the position of the family in society.

This does not help the appellant, but the next passage appears to be more directly in point and is liable to be construed so as to be more helpful to him. It reads:

> If, on the other hand, she has property in her possession productive of income, the amount should be taken into consideration in determining the measure of her allowance for maintenance.

In reading this passage, I do not think that the learned Judges were referring to the widow's stridhanam property at all. In fact the property in Shib Dayee's possession which was productive of interest was the sum of Rs. 1000 and this observation must necessarily be taken to have referred to that property. It cannot be detached from its context or from the facts of that case and held to be expressing a principle which the learned Judges were not called upon to consider. If it referred to the Rs. 1000 belonging to her husband, it would not help the appellant. If on the contrary it referred to some property which was not mentioned in that suit it would be obiter and although entitled to respect, yet it would not be, in the absence of any authority, of any great help to us here.

The first Bombay case which was brought to our notice was that in 2 Bom H C R 341[5] (the page given in some of the references is 323 but the case is the same.) It does not help the appellant as it shows that the income accruing from the widow's peculiar property was not taken into account. The next Bombay decision in 14 Bom 490,[6] does not help the appellant either. It is true that Farron J. did observe in this case that the defendant was bound to show that the widow was possessed of property out of which she could maintain herself, but nothing was said in that judgment which would indicate whether the learned Judge was referring to the joint family property or to the widow's stridhanam property. It is obvious that if the widow could be shown to be in possession of joint family property out of which she could maintain herself she would not be entitled to maintain an action of this nature at all. The decision in 33 Bom 50,[7] does not support the contention raised by the appellant. The widow was in that case found to be in possession of funds belonging to her husband's family estate which fund was sufficient to provide her maintenance for five years after the suit had been brought at the rate allowed by the lower Court. In the circumstances it was held that no cause of action had accrued to the plaintiff in 1904 when the suit was instituted. This case does not decide whether the widow had any private income of her own. The last Bombay case to which reference was made was that in I L R (1937) Bom 113.[8] The question in this case was whether the value of the widow's ornaments should be taken into consideration in awarding maintenance to her. The learned Judges who heard the case came to the conclusion that it could not be, but in recording their decision, Broomfield J. observed:

> I think it must be taken to be good law that as an ordinary rule stridhan ornaments are not to be taken into account in assessing maintenance. It need not be laid down as an invariable rule. If the widow were in possession of ornaments of great value which she would not ordinarily wear or use, and which she would be likely to dispose of, that might be a different matter. In the present case I see no reason to differ from the view taken by the trial Judge.

No stridhanam property of a productive character or which could be converted into property of that character was involved in that suit and the observation must be regarded to be in the nature of obiter. Wassoodew J. in writing a concurring judgment observed that a widow's right to claim maintenance out of the husband's estate was absolute and rested upon the possession of her husband's property by the person from whom the maintenance was claimed. But he happened to observe :

---

[5] Chandrabhagabai v. Kashinath Vithal, (1864-66) 2 Bom H C R 341.

[6] Gokibai v. Lakshmidas Khimji, (1890) 14 Bom 490.

[7] Dattatraya v. Rukhmabai, (1909) 33 Bom 50 =1 I C 466=10 Bom L R 770.

[8] Gurushiddappa v. Parwatewa, (1937) 24 A I R Bom 135=167 I C 973=I L R (1937) Bom 113 =38 Bom L R 1293.

> It seems to me difficult upon principle to say that the clothes and jewels or ornaments of the widow, whatever their value, should invariably be excluded in the calculation of her maintenance out of her husband's property.

It was not stated by the learned Judge what principle did he have in mind to which reference was made in this sentence. In view of the position that a widow's right to maintenance was conceded to be absolute, i. e. not conditional on anything else, why should the fact of her not being in possession of her own private or peculiar property be regarded as a condition before maintenance is granted? If the right is an absolute one, her possession of stridhanam property must be regarded as irrelevant. In spite of this observation the learned Judge agreed in excluding the ornaments from consideration although on the ground that

> it was not clear upon the record, having regard to the custom of the community to which the widow belonged, that the ornaments in her possession would not all be required to maintain the status of her family.

There is, it is true, a distinction made in some of the textbooks, which have already been referred to, between the productive and unproductive character of a widow's stridhanam property, but this does not seem to be based on any principle, if we bear in mind that it is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate, and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during her husband's lifetime. It is immaterial if she had any private means of her own or could have them by selling some of the jewellery which would not be required by her after her husband's death. Had the husband remained alive, it would have been his duty to maintain his wife out of his own estate irrespective of her stridhanam or private means and there appears to be no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance was conferred on the widow under the Hindu law in lieu of her husband's share in the joint family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income. This exhausts all the Bombay cases cited at the Bar. The next decision to which reference was made at the Bar was that in 12 Pat 869.[9] Wort J. in delivering his judgment at p. 874 observed as follows :

> The point really is somewhat academic, having come to the conclusion, as I have done, that the plaintiff's claim was based under the general Hindu law, and that being so, the amount to which she is entitled would be a sum in accordance with her position in life, and, as the Privy Council has pointed out, in accordance with the condition of the estate.

No exception could be taken to this statement, but the learned Judge at p. 175 happened to observe :

> There is no doubt that under the general Hindu law a widow claiming maintenance claims it on the basis, as I have said, of her position in life and the position of the estate *having regard also to her means.*

The last words in the preceding sentence do not occur in any of the decisions by their Lordships of the Privy Council. The statement made by the learned Judge himself on the previous page and which has been quoted above does not contain any such qualification. No authority was cited by the learned Judge for the view that a widow's means had to be taken into consideration and apparently the point was not considered by him in its legal aspect. Moreover, the private income which the widow was getting in that case by way of an allowance from her brother was disregarded as it was held not to be an income which could be taken into consideration by the Court. This case is certainly no authority for the proposition that in calculating the amount of maintenance her stridhanam must be taken into account. The last case to which reference was made was an old Calcutta case in 4 C L J 74.[10] Relying on 14 Bom 490[6] the case which has been already considered by me in an earlier portion of this judgment, and on the Privy Council decision in 3 Bom 415[11] the learned Judges came to the conclusion that so long as an applicant for maintenance had private means for her own support she could not claim maintenance from her husband's family. I have already tried to show that 14 Bom 490[6] does not support that proposition. As for the second case decided by their Lordships of the Judicial Committee, a reference to that case would show

---

9. Saraswati Kuar v. Sheoratan Kuar, (1934) 21 A I R Pat 99=149 I C 738=12 Pat 869 = 15 P L T 372.
10. Ramawati Koer v. Manjhari Koer, (1906) 4 C L J 74.
11. Narayana Rao Ramachandra Pant v. Ramabai, (1878) 3 Bom 415=6 I A 114=4 Sar 24 (PC).

that their Lordships did not hold in that case that the right of a widow to maintenance was, "according to the wants and exigencies of the widow." The last words were certainly used by their Lordships of the Judicial Committee but they were used when they were considering a question of limitation and not a question of Hindu law. Referring to the Limitation Act they observed as follows :

> The language of the Act is not very clear ; and by two subsequent statutes of limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow ; and a statute of limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

This would show that their Lordships of the Privy Council were trying to express that the cause of action for a widow to maintain her action is of a recurring nature and the period of limitation would only start from time to time according to the wants and exigencies of the widow. They were not considering whether the widow's private means had to be taken into account before a decree for maintenance was passed in her favour. In the absence of any other authority, the decision in 4 C L J 74[10] could not be supported. It was expressly dissented from in 38 Mad 153.[1] A review of these cases would show that but for certain obiter dicta in some of the judgments it has not been decided in any case, except in the Calcutta case just referred to, that the widow's private means have to be calculated in fixing the amount of her maintenance. On principle as we have already stated above there seems to be no reason why a widow's stridhanam property or private income should be taken into consideration if her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 558

BURN AND MOCKETT JJ.

Ramamurthy — Appellant.

v.

Nandi Ramulamma — Respondent.

City Civil Court Appeal No. 59 of 1938, Decided on 8th November 1939, against decree of Addl. Judge of City Civil Court, Madras, D/- 15th August 1938.

Custom — Validity of — Custom in Madras entitling one scavenger to absolute right of sending scavengers to various houses is not recognized by law.

A claim to an absolute right of sending scavengers in Madras to various houses and thereby to extort from the scavengers a certain portion of the wages earned by them has no basis in law nor can it be maintained on the ground of custom as no Court of law can possibly recognise such a custom. Such a right would result in exploitation of the labour of the scavengers and is of a kind which has long since become out of date and no Court can encourage its perpetuation : *A I R 1938 Mad 881, Rel. on.* [P 559 C 1, 2 ; P 560 C 1]

A. V. Seshayya and K. Ramachandra Sastry — *for Appellant.*

N. A. Lowry — *for Respondent.*

Burn J.—The hearing of this appeal has involved a grievous waste of the time of two Judges of this Court. There are no merits in the appeal as there were none in the suit. The suit was based upon an extraordinary claim. It was alleged that the plaintiff's grandmother had "absolute rights of scavenging" in about 230 houses in the 16th Division of the City of Madras and that under her will which was dated 25th August 1926 she had bequeathed the said right to the minor plaintiff, her grandson. It was alleged that the plaintiff's grandmother had borrowed Rs. 350 and Rs. 200 in October 1931 from the defendant Ramulamma and her brother now deceased on promissory notes. It was alleged that "under an arrangement" — the plaintiff carefully refrained from mentioning who were the parties to the arrangement — the defendant should do the scavenging work of 198 houses out of the 230 yielding an income of Rs. 90 per mensem, that the defendant was to appropriate Rs. 45 out of the Rs. 90 for payment to the servants to be engaged by her for doing scavenging work and was to credit the balance of Rs. 45 a month towards the amounts due under the two promissory notes until they were fully discharged. It was then alleged that the defendant under this arrangement had gone on collecting Rs. 45 a month and had by the time of the suit collected more than Rs. 1445 in excess over and above the amount due to her under the promissory notes. The plaintiff therefore prayed for a decree for Rs. 1445, for a direction to the defendant to surrender to him the scavenging work of 198 houses or in the alternative to pay Rs. 1800, its value, thirdly for a declaration that the plaintiff alone has the right to carry on the scavenging work in the 198 houses and for a permanent injunction restraining the defendant or any one on her behalf from interfering with his rights.

The learned Judge of the City Civil Court has found that the plaintiff's grandmother had no right of scavenging in the houses, which could be bequeathed to the plaintiff or which could be transferred to the defendant either by way of mortgage or in any other manner. This finding of the learned Judge is clearly correct. It is admitted that there was no contract between the plaintiff's grandmother and the owners or occupiers of the 230 houses by which the plaintiff's grandmother was entitled to do the scavenging work in these houses. The house owners or the occupiers are not parties to the suit, nor are the scavengers, who actually do the work. In these circumstances it is absurd to speak of any "right of scavenging." As the learned Judge has pointed out, in houses where flush out latrines are introduced there is no scavenging left to be done of the kind that is done under the auspices of the plaintiff's grandmother or of the defendant, and even if flush out latrines are not introduced in any particular house, there is nothing to compel any of the occupants of the 230 houses to employ the scavengers sent by the plaintiff's grandmother or to employ any scavenger at all. In these circumstances, it is ridiculous to speak of any "right" to scavenge the houses referred to in the plaint.

The plaintiff relies mainly upon the conduct of the defendant. He is able to point out that the defendant has admitted that she collected certain sums of money from the scavengers who did the work in the 198 houses referred to in the plaint. In fact, it appears that the "arrangement" was that one half of the scavengers' fees should be taken by the defendant and the other half only left to the scavengers. Why the scavengers should have consented to any such arrangement as this I am not able to say. It is not alleged that the plaintiff's grandmother did anything for the scavengers in return for which she was entitled to collect 50 per cent. of the fees earned by them. The whole arrangement appears to me to be extremely immoral and contrary to public policy. How it originated I do not know nor has it been shown during the trial of the suit. From the documents produced in this suit it would appear that persons like the plaintiff's grandmother having obtained some kind of ascendancy over the scavengers have assumed to themselves the function of sending scavengers to various houses and have virtually extorted from the scavengers one half of the wages earned by them. There is no basis for this in law and, considered as a custom, it is certainly a custom which no Court of law could possibly recognize. That the defendant has repaid herself the amounts borrowed by the plaintiff's grandmother out of the fees earned by the scavengers is not, even if true, a circumstance that has any bearing on the plaintiff's alleged right. The mere fact that the defendant has done this does not render it right. The matter is really covered by authority in this Court and therefore I do not propose to spend further time upon it. Venkataramana Rao J. in 1938 M W N 806,[1] has dealt with the matter fully and exhaustively and I agree entirely with everything that he has said. Adopting part of a quotation made by Venkataramana Rao J., from a judgment of Mukerji J. in 12 Cal L J 75[2] I will say :

> If we were to recognize the alleged custom as reasonable, we would have to uphold what must, in the end, turn out to be an oppressive monopoly, and the very first reason assigned in the celebrated case of monopolies, *Darcy* v. *Allen*,[3] would be conclusive upon the matter, namely that if the monopoly was sustained, the person in whose favour the monopoly was created might charge whatever price he pleased.

It is obvious that if the plaintiff got any such declarations as he claims in this suit, he would be entitled to send his own scavengers to the houses in question and to claim any fees he liked without consulting the house-holders and without coming to any arrangement with them. The learned advocate for the appellant does not suggest that any of the 198 house-holders could be compelled to accept the services of the plaintiff's scavengers, or of anybody else's scavengers for that matter. The learned advocate for the plaintiff has contended that even if the supposed contract is void, the defendant having had the benefit of it ought to be compelled to refund whatever amounts she has collected from the scavengers in excess of the amount due to her under the promissory notes. This contention is completely devoid of substance. It is not a case in which the plaintiff or the plaintiff's predecessor-in-title has parted with any money to the defendant. The allegation is merely that the plaintiff's

---

1. Raghudu v. Arraiya, (1938) 25 AIR Mad 881=183 I C 64=1938 M W N 806.
2. Gourmoni Debi v. Chairman of Panihati Municipality, (1910) 12 C L J 75=6 I C 864=14 C W N 1067.
3. (1602) 11 Coke 84.

grandmother borrowed money from the defendant and that the defendant has been recouping herself from the wages of the scavengers who, as already mentioned, are not parties to this suit under an arrangement, come to between the defendant and somebody else, perhaps the father and mother of the plaintiff. It is certainly not under any arrangement between the defendant and the plaintiff's grandmother, for there is no evidence of any arrangement between these two parties. The defendant cannot be said to have obtained any advantage from the plaintiff which under S. 65, Contract Act, she could be compelled to restore or for which she could be compelled to make compensation.

The "arrangement" pleaded by the plaintiff and apparently admitted by the defendant is virtually an arrangement for the exploitation of the labour of the scavengers, of a kind which, in my opinion, is long out of date. I should be very sorry to encourage its perpetuation by my judgment that I could deliver from this bench. I agree with the conclusion of the learned Judge of the City Civil Court and think that this appeal ought to be dismissed with costs and that the appellant should pay the court-fee due to Government on the memorandum of appeal.

Mockett J.—I entirely agree. I confess that I have throughout this case found it extremely difficult to understand what is the alleged cause of action. But it seems that two points stood out. The first was that this was an assignment of a contract and as such, it having been held to be void, the defendant was bound under S. 65, Contract Act, to restore any advantage which she had received or to compensate the other contracting party. My learned brother has dealt fully with the question of what it was that the plaintiff's grandmother purported to assign. He has also pointed out that it has never been alleged in this case that any contract was assigned at all. There never was any contract between the householders and the plaintiff's grandmother by which the plaintiff's grandmother contracted with the house-holders to supply scavengers for their houses. The suit is entirely based on the supposition that the plaintiff's family had some sort of vague hereditary right to do the scavenging work in the 16th division of Madras. That being so, no question arises under S. 65, because the money which was received by the defendant was never the money of the plaintiff at all but was money which she received from the house-holders in her turn as a payment by the house-holder to her for providing scavengers. It has already been dealt with by my learned brother and I only desire to express added agreement on this particular point. I am glad further also to add my agreement with the observations that have been made with regard to the nature of the scavenging agreement as conceived by the plaintiff in this case. They amount to nothing else except a trafficking not only in labour in this city but also in the rights of third parties (the house-holders) to employ what scavengers they pleased. It is inevitable that, if this sort of notion was encouraged by the Courts, people will never dare to make their own arrangements for fear of boycotts or even worse action by people who arrogate to themselves the rights which the plaintiff, I consider, has arrogated in this case. I agree that this appeal should be dismissed.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 560

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Kopparthi Venkataratnam and another — Appellants.

v.

Palleti Sivaramudu and another — Respondents.

Letters Patent Appeal No. 9 of 1938, Decided on 21st November 1939, against decree of Horwill J., in S. A. No. 886 of 1933, D/- 12th October 1937.

Contract Act (1872), S. 19—Vendor of land failing to disclose that land had been leased to third party and representing to vendee that he could take immediate possession of land—Sale is voidable and does not fall within exception to S. 19.

Where a person has purchased certain land and the vendor has not only failed to disclose to the vendee that he had leased the land to a third party but has represented that the vendee could take immediate possession and cultivate the land, the sale is voidable and the absence of exercise of due diligence by the vendee is no defence open to the vendor : *A I R 1931 All 154*; *A I R 1939 Cal 473 and 11 Mad 419, Rel. on*; *A I R 1928 Bom 427, Expl.* [P 561 C 1, 2]

A. Bhujanga Rao and D. R. Krishna Rao —*for Appellants.*

Ch. Raghava Rao, S. Rajaraman and S. Kothandarama Nair — *for Respondents.*

Leach C. J. — This Letters Patent Appeal arises out of a suit filed by the respondents' mother in the Court of the District Munsif of Nellore for a decree setting aside a conveyance on the ground of fraud. The respondents' mother was an ignorant cultivator and she bought from defendant 1 in the suit, the appellant's father, certain wet lands in the Nellore District. Defendant 1 had granted a lease of these lands for seven years to a third party. Not only did defendant 1 fail to disclose this fact to the vendee, but he represented to her that she could take immediate possession and cultivate the lands. This amounted to a fraudulent misrepresentation and as this is the finding of the District Judge on first appeal it cannot be challenged in this Court. The District Munsif held that there was no fraud, but granted the plaintiff a decree for damages based on the amount of two years mesne profits. The District Judge reversed this decision and decreed the suit as prayed. There was a second appeal to this Court which was heard by Horwill J. The learned Judge accepted the decision of the District Judge, but granted a certificate under Cl. 15 of the Letters Patent. The appeal turns upon the interpretation to be placed upon the words in the exception to S. 19, Contract Act. S. 19 says that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The exception reads as follows :

> If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of S. 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

The appellant's case is that inasmuch as the lease which their father had granted to the third party was a registered one the fact that he had fraudulently represented to the vendee that she was in a position to take possession of the property at once made no difference, because if she had used ordinary diligence she would have made a search in the registration office, and if she had done so, she would have discovered that there was a registered lease which precluded her from taking possession. It is accepted that where a vendor has deliberately made a false statement with the object of concealing the true position with regard to property the vendee under English law is not put upon enquiry, but it is said that the exception to S. 19 was intended to place the Indian law on a different basis.

The meaning to be placed upon the words used in the exception was fully discussed by the Allahabad High Court in 53 All 374,[1] and I consider that the position was correctly stated in the following passage in the judgment:

> The difficulty is caused mainly by the punctuation, viz. a comma after the word 'silence', which seems to indicate that the words 'fraudulent within the meaning of S. 17,' apply both to 'misrepresentation' and to 'silence.' But as observed by their Lordships of the Privy Council in 14 I A 30[2] and 8 Pat 516[3] the punctuation is not part of the statute and a Court of law is bound to interpret the Section without the comma inserted in the print. If the comma after the word 'silence' is to be ignored, the expression 'fraudulent' within the meaning of S. 17 might well apply to 'silence' exclusively and not to 'misrepresentation.' This interpretation is strengthened by the circumstance that the Legislature had used the preposition 'by' twice, i. e. both before 'misrepresentation' and also before 'silence.' If the expression 'fraudulent within the meaning of S. 17' qualifies 'misrepresentation,' the result would be that due diligence would be required in the case where the misrepresentation became fraudulent, but would not be required when the misrepresentation fell within S. 18 and was just short of fraud, for the exception would be confined to the former kind only. This would be a startling result.

There is no reason whatsoever for thinking that the Legislature intended to depart from the English law when it inserted the exception. It would be lamentable if a person who is guilty of deliberate fraud could benefit by his fraud because the victim accepted his statements as being true. The judgment of the Allahabad High Court was also accepted as embodying the correct statement of the law by the Calcutta High Court in 43 C W N 347.[4] This Court considered the effect of S. 19, Contract Act, in 11 Mad 419,[5] a case very similar to the one now before us. A vendor had deliberately concealed from a purchaser the fact that he had already granted a lease of the property sold, but the buyer if he had been diligent could have ascertained this. The Court held that the case was not within the exception to S. 19 and the absence of exercise of diligence by the plaintiff was not a defence open to the defendant who had concealed the fact of the execution of the lease in order to deceive the plaintiff and had induced him to enter into the contract. This is the position here.

---

1. Niaz Ahmed v. Parshotam, (1931) 18 AIR All 154=129 I C 545=53 All 374=1931 A L J 153.
2. Maharani of Burdwan v. Krishna Kamini Dasi, (1887) 14 Cal 365=14 I A 30=4 Sar 772 (PC).
3. Lewis Pugh v. Ashutosh Sen, (1929) 16 AIR P C 69=114 I C 604=56 I A 93=8 Pat 516 (PC).
4. John Minas Apcar v. Louis Caird Malchus, (1939) 26 AIR Cal 473 = 184 I C 321=I L R (1939) 1 Cal 389=43 C W N 347.
5. Morgan v. Government of Hyderabad, (1888) 11 Mad 419.

The only decision contrary is that of the Bombay High Court in 52 Bom 883.[6] The Bombay High Court merely based its decision on a reading of the exception and did not consider whether the punctuation was correct or whether the Legislature intended to make what would be a startling departure from accepted principle. I am of opinion that the appeal should be dismissed with costs.

Krishnaswami Ayyangar J.—I concur.

C.R.K./D.S. *Appeal dismissed.*

---

[6] Harilal Dalsukhram v. Mulchand, (1928) 15 AIR Bom 427=113 I C 27=52 Bom 883=30 Bom L R 1149.

A. I. R. 1940 Madras 562

LAKSHMANA RAO AND STODART JJ.

In re Perumal Kudumban — Prisoner — Appellant.

Referred Trial No. 116 and Criminal Appeal No. 498 of 1939, Decided on 24th October 1939, referred by Court of Session, Ramnad Division at Madura, D/- 2nd September 1939.

(a) Criminal P. C. (1898), S. 164 (3) — Magistrate recording confession under S. 26, Evidence Act, asking accused to think over matter and state what really happened as otherwise statement would be used against him — S. 164 (3) is not complied with.

Where all that the Magistrate recording a confession under S. 26, Evidence Act, says to the accused is that he should think over the matter and state what really happened as otherwise the statement would be used against him, the provisions of S. 164 (3) are not complied with and consequently the accused's statement is inadmissible in evidence. [P 563 C 2]

(b) Penal Code (1860), S. 302 — Sentence— Lesser sentence held sufficient.

When the crime has been committed by accused when he was in an abnormal frame of mind induced by unhappy domestic circumstances, and wanted to end his wife's life and his own at the same time, the lesser penalty will meet the ends of justice. [P 564 C 1]

R. Sadasiva Pillai — *for Appellant.*

Public Prosecutor — *for the Crown.*

Stodart J. — The appellant has been convicted and sentenced to death by the learned Sessions Judge of Ramnad for the murder of his wife by cutting her throat with a razor in the early hours of the morning of 13th March last. He was also convicted of having at the same time and place attempted to commit suicide, an offence under S. 309, I. P. C. The facts of the case, that is to say, the circumstances of the crime, are not in dispute. The parties are Pallas by caste and of an humble station in life earning their life by agricultural labour. The appellant is aged 24 or 25. His wife was aged 20. On the night of the 12th the appellant and his wife lay down to sleep in the house of the appellant's mother P. W. 6. About 4-30 in the early morning P. W. 6 heard a gurgling sound and went into the room where the appellant and his wife had gone to bed. She saw that the deceased was dead from a great wound in her throat and the appellant was lying beside her with a wound in his throat and unable to speak. P. W. 6 was closely followed by her eldest daughter P. W. 3, a girl of 18, and is corroborated by her. The deceased's mother P. W. 4, who lives in another house a few yards away, and P. W. 7, the uncle of the appellant, P. W. 5, a near neighbour, and many others immediately came on the scene. P. W. 7 went and told the Village Munsif what had happened and he at once came to the place and remained there until on receipt of his report the Sub-Inspector P. W. 9 arrived.

The Sub-Inspector found that the body of the deceased had not been disturbed. He found that the appellant was not able to speak and he sent immediately to Sathur which is only three miles away to summon the doctor, P. W. 1, who came to the scene and attended to the injured man. At 7-15 the appellant produced from underneath the mat on which he was lying a razor and delivered it up to the Sub-Inspector P. W. 9. That razor was stained with blood. The Sub-Inspector, P. W. 9, and the Village Munsif, P. W. 8, testify to the production of this blood-stained razor by the appellant. The deceased's mother P. W. 4 says that she was present and saw it being produced and given to the Inspector by the appellant. This evidence has not been rebutted or in any way shaken in cross-examination and there is no evidence to the contrary effect. The conclusion to be drawn from these facts is that the appellant killed his wife by cutting her throat with this razor M. O. 1 and then cut his own neck.

Learned counsel for the appellant has been able to put before us three arguments. First that the door from the street into the room in which the deceased and the appellant were sleeping was open and therefore there is some ground for the statement of the appellant made in the Magistrate's Court and in the Sessions Court that the offence was committed by some person unknown and that he himself only woke up when he was actually being attacked by the murderer. The evidence on this point is discrepant. The mother of the appellant and his sister (P. Ws. 6 and 3) do say that the southern door was open. The southern door is the door that leads into the street directly from the room where the deceased and the appellant were sleeping. On the other hand, P. W. 4, the mother of the deceased and P. W. 5, a neighbour who came along with P. W. 4, say that that door was closed and fastened from inside when they arrived at the house hearing the noise and they say moreover that it was opened for them by P. W. 3, the appellant's sister. In our opinion, it is not very important whether this door was open or closed because all the circumstances point to the appellant being the culprit and to nobody else. The allegation that there were other people who might have committed this awful crime rests on the slenderest of foundations. The appellant says that his wife's maternal uncle resented him being married to his wife thinking that the choice should have fallen upon that uncle's brother. And the appellant again says that he incurred the hostility of another relative because he opposed the marriage of that relative to his sister, P. W. 3. It is quite clear, in our opinion, that even if these causes of friction did exist they could not for a moment be regarded as furnishing a motive for the murder of the unfortunate girl, the wife of the appellant.

Another argument of learned counsel is that the appellant was not likely to have had a razor as razors are not generally kept by people of the appellant's caste. But we do not see much force in this argument because after all the evidence is that the appellant did have a razor which of course if he did not already possess he must have got from some place before committing the crime. It only makes the crime more heinous if we are to suppose that in order to commit it the appellant had to secure a weapon which was not easily available in his own house or in the house of his friends. Learned counsel also takes some objection to the evidence of the production of the razor and has carefully explained the evidence on that point to us but as we have said we do not find any flaw in that evidence. Lastly learned counsel has animadverted and quite properly we think on some of the statements made by the appellant which were for all practical purposes allowed in evidence against him. It will be remembered that in the morning when the crime was discovered the appellant was not able to articulate. Later in the day, that is to say about 7 o'clock in the evening when he was lying in the hospital at Sathur, he became able to speak and the Magistrate was sent for to take his statement not as a person accused of the crime but as a dying declaration, it being feared that at the time the appellant might die. As the Magistrate knew that what the appellant was going to say was likely to be of an incriminating nature he warned the appellant. But the fact remains that the statement given by the appellent to the Magistrate that evening was not taken under the conditions prescribed by S. 164, Criminal P. C. It was a statement made after the appellant had been arrested and it was presumably made in the presence of a police officer because even in the hospital an accused person is always in the immediate custody of a police officer. Under S. 26, Evidence Act, therefore no such confession can be proved against the person making it unless it is made in the immediate presence of a Magistrate.

The Magistrate recording a confession under S. 26 when he knows that the confession relates to some definite crime which has been committed and which is being investigated at the time acts under S. 164, Criminal P. C., and has to observe the rule laid down in sub-s. (3) of S. 164, that is to say, he shall before recording the statement explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. Here it appears that the Magistrate said to the appellant that he should think over the matter and state what really happened as otherwise the statement would be used against him. This of course did not satisfy the rule in sub-s. (3) of S. 164. The learned Sessions Judge has allowed the Sub-Magistrate who was examined in the case as P. W. 10 to give evidence of what the appellant said when he made this statement and also the statement was exhibited and presumably was read out and came to the knowledge of the learned Judge and of the assessors. The learned Judge when he came to the stage of pronouncing his judgment said that he did not place much value on the dying declaration, Ex. E. It is obvious that he was aware of the rules relating to the recording of confessions by Magistrates, and it would have been better if, instead of admitting this irrelevant document and the evidence of what the appellant said to the Magistrate while in police custody, he had disallowed that part of the evidence altogether. But apart from any incriminating statement made by the appellant shortly after the crime, the evidence is conclusive, in our opinion, that he did cut his wife's throat and afterwards attempted to cut his own.

This crime is one that has certain singular features about it. The evidence is that the appellant and the deceased were on the best of terms. They had only been married a few months and their married life had been made unhappy by the quarrels between their respective families, the mother of the deceased on the one hand and the mother of the appellant on the other. The crime must have been committed by the appellant when he was in an abnormal frame of mind induced by unhappy domestic circumstances. It looks as if he wanted to end his wife's life and his own at the same time. In these circumstances we think the lesser penalty will meet the ends of justice. We confirm the conviction of the appellant for murder and his conviction for the offence of attempt to commit suicide. We do not confirm the sentence of death but we sentence the appellant for the offence of murder to transportation for life. The separate sentence under S. 309, I. P. C., will stand but will run concurrently.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 564

KING J.

Sevadappa Gounder — Appellant.

v.

K. V. Narayanaswami Ayyar — Respondent.

Appeal No. 84 of 1938, Decided on 5th January 1940, against appellate order of Dist. Court, Coimbatore, D/- 18-10-1937.

(a) Provincial Insolvency Act (1920), Ss. 4 and 53—Mortgagor becoming insolvent after execution of mortgage — Suit by mortgagee — Application by Official Receiver under Ss. 4 and 53 to same Court rejected and mortgagee's suit decreed — Appeal by Official Receiver against order of dismissal only—Appeal held was barred by res judicata as decree had become final—S. 53 has no application.

After the execution of the mortgage the mortgagor became insolvent. Subsequently the mortgagee instituted a suit to enforce the mortgage and the Official Receiver also put in an application under Ss. 4 and 53 before the same Court on behalf of the insolvent mortgagor. The suit was decreed and the application having been rejected the receiver preferred an appeal against the order of dismissal only and not from the decree :

Held that the decree not having been appealed against had become final and therefore the appeal was barred by the principle of res judicata. Since the mortgage had been executed two years before the insolvency of the mortgagor S. 53 did not apply: *A I R 1925 Mad 1051*; *A I R 1927 Mad 684 and 29 Mad 333 (FB), Disting.* [P 565 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 4 — Jurisdiction of Civil Court is not barred.

Civil Court has jurisdiction to deal with the subject-matter of S. 4. The existence of insolvency proceedings does not take away the jurisdiction of the ordinary Civil Court : *A I R 1925 Mad 1051, Rel. on.* [P 565 C 2]

T. R. Venkatarama Sastry and M. Krishna Bharathi — *for Appellant.*

C. V. Subramania Aiyer—*for Respondent.*

Judgment. — The subject-matter of this appeal is a mortgage deed executed by a person who subsequently became an insolvent. The date of the mortgage is 9th December 1927 and the mortgagor was adjudicated insolvent in October 1930. The appellant is the mortgagee. In June 1931, he sued on his mortgage in the Court of the Subordinate Judge of Coimbatore. In August 1931, the Official Receiver applied in insolvency before the same Judge under Ss. 4 and 53, Provincial Insolvency Act, to have the mortgage set aside. In October 1934 the Subordinate Judge decreed the appellant's suit and dismissed the application of the Official Receiver. Against the decree, no appeal was filed by the Official Receiver who contented himself with filing an appeal against the order of dismissal under the Provincial Insolvency Act. That appeal was heard by the learned District Judge of Coimbatore who reversed the decision of the learned Subordinate Judge and under S. 4 of the Act held that the mortgage was not good against the rights of the general body of the insolvent's creditors. This is now an appeal against that order of the learned District Judge. The only point upon which there has been any serious argument in this appeal is the question of res judicata which has been dealt with by the learned District Judge in para. 9 of his judgment. The argument in appeal is that the learned District Judge ought to have held that as there had been no appeal against the decree of the Subordinate Judge, he was precluded by the rule of res judicata from disposing of the issue before him under S. 4, Provincial Insolvency Act. The learned District Judge in disposing of the appeal says that there is really no substance in this contention:

> As has been just now said both the petition and the mortgage suit were tried together and commo

evidence taken in both by the consent of the parties. The governing litigation is the one on the insolvency side. As has been held in 49 M L J 203,[1] it is the duty of the Court executing the mortgage decree to give effect under S. 4, Provincial Insolvency Act, to the decision in the insolvency inquiry.

It seems to me obvious that apart from any specific rulings which may be cited, the plea of the appellant before the learned District Judge on the question of res judicata is one which should prevail. There was a decree of a competent Court on the question of this mortgage which had not been appealed against and therefore had become final. It was final and in full force and effect at the date when the learned District Judge heard the appeal and the learned District Judge ought to have recognized this fact and dismissed the appeal on that ground. It remains however to consider two rulings in this connexion one of which has already been referred to by the learned District Judge and another of which has been brought to my attention during the course of the hearing of this appeal. 49 M L J 203[1] is a case which is not directly in point. The question at issue in that case was whether when proceedings under S. 53, Insolvency Act, had been initiated by the Official Receiver, a suit on a mortgage which was then pending, ought or ought not to have been stayed, and the decision in the case was that the institution of proceedings under S. 53, Provincial Insolvency Act, in no way takes away the jurisdiction of the ordinary Civil Court to try a mortgage suit and that therefore the suit need not be stayed.

There are however passages in the judgment which deal with the question of the concurrent jurisdiction of the Civil Court and of the Insolvency Court and there is an interesting distinction drawn by Wallace J., between the position of the Official Receiver in defending a mortgage suit and his position as petitioner under the Insolvency Act. It is held by Wallace J. that there may be certain defences against a mortgage suit which the Official Receiver impleaded in that suit is unable to put forward. For instance, it would not be competent for him to say that although the mortgage was true in fact and the mortgagor, i. e. the insolvent had received the money covered by it, nevertheless, the mortgage ought to be set aside in the interests of the general body of creditors. Or, in other words, the Official Receiver might not be able to put forward some of the contentions which would justify him in filing an application under S. 53. But it cannot, I think, be held that in the present case, the Official Receiver in defending the mortgage suit was debarred in any way from putting forward the actual case, which he did in fact put forward both in the suit and in the proceedings under the Provincial Insolvency Act. There is some ambiguity in the way in which his pleadings have been framed. But, as the case came finally to be disposed of by the learned Judge, it seems clear to me that his real case was that there was no consideration for the mortgage at all. Such a defence was a perfectly valid defence to be put forward by him in his capacity as defendant in the mortgage suit.

The distinction therefore which has been drawn in 49 M L J 203[1] is of no assistance to the respondent in the present case. Nor can it be contended here that by virtue of the fact that proceedings are pending under S. 53, Provincial Insolvency Act, the decision of the Insolvency Court must take precedence over any decree of the Civil Court. No doubt it has been held in 50 Mad 776,[2] that it is the Insolvency Court alone which is entitled to dispose of the subject-matter of an application under S. 53. But on the chronology of this case, it is clear that S. 53 cannot be applied at all. As has already been made clear, the mortgage was executed more than two years before the date of the insolvency. S. 53 therefore does not apply and the only order that can possibly be passed under the Provincial Insolvency Act to set aside the mortgage must be one under S. 4. I have been shown no authority which suggests that the subject-matter of S. 4, Provincial Insolvency Act, is one with which the Insolvency Court alone is concerned. On the other hand, as has already been pointed out in 49 M L J 203,[1] it is definitely held that the existence of insolvency proceedings does not take away the jurisdiction of the ordinary Civil Court.

The second case with which I must now deal is 29 Mad 333.[3] That is a case decided by a Full Bench of the Madras High Court in which there were two cross suits and an appeal was filed against only one of them, the other decree being left without any appeal. It was contended that the Appellate Court could not dispose of the one appeal which was filed on the ground that the non-filing of the second appeal rendered the decree of the Court which was thus not appealed against final. The High Court held that the doctrine of res judicata could not apply to the facts of that case. It observed that the subject-matter of the litigation in the two suits was the same, the evidence was the same and the two suits were tried together.

---

[1] Official Receiver, Coimbatore v. Palaniswami Chetty, (1925) 12 A I R Mad 1051=88 I C 934 =48 Mad 750=49 M L J 203.

[2] Official Assignee, Bombay v. Sundarachari, (1927) 14 A I R Mad 684 = 102 I C 702 = 50 Mad 776=53 M L J 209.

[3] Panchanada Velan v. Vaithinatha Sastrial, (1906) 29 Mad 333=16 M L J 63 (F B).

> The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide res judicata. The tenant's appeal in his suit, if successful will have the effect of superseding the adjudication in the landlord's suit.

At the same time the High Court points out that technically two appeals ought to have been filed. Finally they say :

> It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a decision which had not been appealed against at the same time as the decision in the case under appeal.

It is of course obvious from the facts of that case that, if the second appeal had been filed, it would have been filed in the same Court as the first appeal and no question arises at all as to the competency of the Appellate Court to have decided the two appeals itself. The essential distinction in the present case is that the learned District Judge of Coimbatore was not competent to decide an appeal against the decree in the mortgage suit as the amount involved in the mortgage suit was Rs. 11,200. An appeal therefore lay only to the High Court. It seems to me that this is a fundamental distinction and renders the arguments of the learned Judges of the High Court in 29 Mad 333[3] inapplicable to the facts of the present case. In the result, I am therefore of opinion that the learned District Judge in deciding this appeal ought to have decided it in the manner contended for by the appellant herein by holding that the subject matter of the appeal before him was already res judicata. I accordingly set aside his order and restore the order of the learned Subordinate Judge with costs throughout. Leave to appeal is granted.

C.R.K./G.N. *Order set aside.*

---

* A. I. R. 1940 Madras 566

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

K. S. R. M. Sivasubramaniam Chettiar —Appellant.

v.

Murugesa Mudaliar and another — Respondents.

Letters Patent Appeal No. 102 of 1938, Decided on 30th November 1939, against judgment and order of Abdur Rahman J., in C. M. S. A. No. 53 of 1936, D/- 14th November 1938.

(a) Execution Sale — No bidders on date of auction—Decree-holder can in same proceedings ask Court to put property for sale at later date.

The fact that there were no bidders on the date of auction does not prevent the decree-holder from asking the Court in the same proceedings to put up the property for sale at a later date. [P 567 C 1]

*** (b) Civil P. C. (1908), O. 21, Rr. 71 and 87—Application for re-sale can be made at any time within three years — Delay of eleven months therefore cannot justify Court in rejecting decree-holder's application for payment of deficit.**

The Code of Civil Procedure contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Limitation Act, applies. Hence, even if there has been a delay of eleven months for an application for re-sale, this would not justify the Court in rejecting the decree-holder's application for an order directing the payment of the amount of the deficit. [P 568 C 1, 2]

(c) Execution — Application necessitated by Court's striking off previous application is not fresh application for execution but merely one for revival.

An application in execution which is necessitated by the action of the Court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application: *21 Mad 261; 28 Mad 50 (F B); 31 Mad 71; A I R 1933 Mad 418 and A I R 1935 Mad 803, Rel. on.* [P 568 C 2]

T. S. Anantharaman — *for Appellant.*

K. Rajah Ayyar and V. Sankaran — *for Respondents.*

Leach C. J.—The appellant obtained a money decree against respondent 2 in the Court of the District Munsif of Tirupur and in execution of that decree attached immovable property belonging to the judgment-debtor. The property was sold by the Court in execution proceedings on 23rd February 1932, respondent 1 being the purchaser. Respondent 1 immediately deposited 25 per cent. of the purchase price, which was Rs. 715, as required by R. 84 of O. 21, Civil

P. C. The sale proclamation disclosed that there was a mortgage on the property, but it indicated that the mortgage was invalid. The mortgage was in fact a valid one and subsequently the mortgagee obtained a mortgage decree. Respondent 1 did not pay the balance of the purchase money within fifteen days, as required by R. 85 of O. 21, but on 29th February he applied for an order setting the sale aside on the ground of material irregularity in the publication of the sale inasmuch as the mortgage had been described as being invalid. As the balance of the purchase money had not been paid into Court, the District Munsif held that there had in law been no sale and therefore there was no need for an order setting aside the sale. On this ground he dismissed respondent 1's application and by a subsequent order directed that his deposit of 25 per cent. of Rs. 715, namely Rs. 178-12-0, should be refunded to him.

On 30th March 1932 the District Munsif, for what has been described as "statistical reasons," struck off his list of pending cases the application of the appellant for the sale of respondent 2's property. The Court closed for the summer vacation on 11th May 1932 until 28th June 1932. On the re-opening day the appellant filed a fresh application for the sale of the same property. He was compelled to do so in consequence of the District Munsif's action on 30th March 1932, which action was illegal. As the result of the fresh application the property was advertised for sale by the Court on 24th September 1932. There were no bidders at the auction and the District Munsif dismissed the application. This again constituted unlawful action on his part. The fact that there were no bidders on this occasion did not prevent the appellant from asking the Court in the same proceedings to put up the property for sale at a later date. The 25th September 1932 was a Saturday and the Court was closed. When it re-opened on Monday, 27th September, the appellant filed a further application for the sale of the property and on this application the Court directed the auction to take place on 3rd January 1933. At this auction the property was sold to one Somasundara Naidu for Rs. 301 leaving a deficit of Rs. 414. On 25th November 1933 the appellant applied for an order against respondent 1 for the payment of this sum under the provisions of O. 21, R. 71, which states that any deficiency of price which may happen on a re-sale, by reason of the purchaser's default, and all expenses attending such re-sale, shall at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser.

The District Munsif dismissed the application on three grounds, namely: (1) there had been material irregularity in the publication of the sale of 23rd February 1932; (2) the property which was sold to Somasundara was not in law the same property as was sold to respondent 1, a mortgage decree having been passed in the meantime; and (3) even if the property was the same there had been undue delay in filing the application which had led to the second sale, namely the application of 27th September 1932. The appellant appealed to the Court of the Subordinate Judge of Coimbatore. The Subordinate Judge allowed the appeal. He found that the appellant had not been guilty of culpable delay and that the property which was sold to Somasundara was the same property which was sold to respondent 1. He also held that there was no material irregularity in the conduct of the first sale, but in any event it had caused no injury to the auction-purchaser. Respondent 1 then appealed to this Court and his appeal was heard by Abdur Rahman J. who allowed it on the ground that the appellant was not entitled to recover because there had been a delay of about eleven months in filing the application which had resulted in the sale to Somasundara. The learned Judge recognized that the delay was not due to any fault of the appellant, but nevertheless he considered that the appellant was not entitled to payment of the balance because delay had taken place. He agreed with the Subordinate Judge that there had been no irregularity in the publication of the first sale and that respondent 1 had suffered no injury. He also agreed that the property sold on the second occasion was identical with the property which was sold on the first occasion.

Only three questions have been argued before us. They are these: (1) whether the learned Judge was right in holding that there had been delay and that as the result of that delay the appellant has lost his remedy; (2) whether in order to recover from respondent 1 the deficit the second sale must have taken place under the same application; and (3) whether the property sold on the second occasion is identical with the property sold on the first occasion. It is manifest that the appellant had been diligent throughout and there is no ground for holding that there had been delay in the filing of the application of 27th September 1932. The delay which took place in the second sale was due entirely to the improper action of the District Munsif in closing for "statistical reasons" the first application for sale and his improper action in dismissing the second application when there were no bids made at the auction which was fixed for 24th September 1932. But even if there had been a delay of eleven months this would not justify the Court in rejecting the appellant's application for an order directing the payment of the amount of the deficit. The learned Judge has in effect read into the Civil Procedure Code something which is not there and something which should not be there. When there has to be a re-sale as the result of the default of the auction-purchaser the decree-holder has to apply for a re-sale.

Order 21, R. 87, as framed by this Court, says that every re-sale of immovable property in default of payment of the amount mentioned in R. 85 (the full amount of the purchase money. plus the amount required for the general stamp for a certificate under R. 94) shall be made after the issue of a fresh proclamation. The Code of Civil Procedure contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Limitation Act, applies. It may be thought that this period is too long in such a case, but the Court is not concerned with that. Its duty is merely to apply the law. The learned Judge relied on the observations of Kumaraswami Sastriar J. in 41 Mad 474[1] at p. 485, where he said that

> the reasonable construction to place on R. 71 is that the re-sale should be within a reasonable time after the first sale.

Abdur Rahman J. rightly observed that this statement can only be regarded as obiter, but he considered that the principles governing the assessment of damages in cases of breach of contract apply here, and that the defaulting auction-purchaser should not suffer for any fall in prices which may take place after his default. I am unable to agree. O. 21, R. 71 says that the defaulting purchaser shall be responsible for the deficit and there is no qualification of this statement. But even if it were the case that an application for a re-sale is not governed by Art. 181, Limitation Act, and that it is incumbent upon the decree-holder to apply for a re-sale within a reasonable time, that condition has been fulfilled in the present case. The appellant took prompt steps for the securing of an order for re-sale and, as I have pointed out, the re-sale did not take place as early as it should have been done because of the erroneous orders passed by the District Munsif, not passed in a judicial capacity but in pursuance of an administrative practice which I trust has long been discontinued.

Mr. Rajah Iyer on behalf of respondent 1 has contended that the re-sale took place in execution proceedings different from those originally instituted, but this argument does not call for discussion. It has been decided over and over again that an application in execution which is necessitated by the action of the Court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application. I need only mention 21 Mad 261,[2] 28 Mad 50,[3] 31 Mad 71,[4] 56 Mad 490[5] at p. 503 and 58 Mad 893[6] at p. 901. The application which the appellant was compelled to file on 28th June 1932 by reason of the order of 30th March 1932 and the application of 27th September 1932 which was necessitated by the order of 24th September 1932 are not fresh applications, but are applications to revive or continue the application which led to the sale of 23rd February 1932, and therefore it must be held that the sale to Somasundara was a sale in the original proceedings. There is also no substance in the third contention raised on behalf of respondent 1. The property sold to Somasundara was in truth and in fact the same property which was sold to respondent 1. In the first case the property was bought subject to a mortgage; in the second case, the property was the same but the mortgage had been replaced by a mortgage decree. The property was the same property and what was sold was the right, title and interest of the

---

1. Venkatachalamayya v. Nilakanta Girjee, (1919) 6 A I R Mad 1014=43 I C 685 = 41 Mad 474 =34 M L J 156.
2. Sasivarna Tevar v. Arulanandam Pillai, (1898) 21 Mad 261=8 M L J 18.
3. Suppa Reddiar v. Avudai Ammal, (1905) 28 Mad 50 (F B).
4. Chalavadai Kotiah v. Poloori Alamelammal, (1908) 31 Mad 71=18 M L J 46.
5. Tripura Sundaramma v. Abdul Khader, (1933) 20 A I R Mad 418=143 I C 1=56 Mad 490=64 M L J 664 (F B).
6. Abdul Aziz Sahib v. Chokkan Chettiar, (1935) 22 A I R Mad 803=159 I C 279=58 Mad 893 =69 M L J 821 (F B).

judgment-debtor in it. For the reasons indicated the appeal succeeds and the appellant is entitled to his costs throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 569

PANDRANG ROW AND HORWILL JJ.

Manthiri Goundan — Appellant.

v.

Arunachalam Goundan and another — Respondents.

Appeals Nos. 303 and 304 of 1938, Decided on 4th January 1940, against orders of Sub-Judge, Coimbatore, D/- 9th December 1937.

(a) Civil P. C. (1908), O. 9, R. 13—Application to restore petition to set aside sale is not maintainable.

An application to restore to file the petition to set aside a sale which had been dismissed for default is not maintainable: *A I R 1931 Mad 656, Rel. on.* [P 569 C 2]

(b) Civil P. C. (1908), O. 21, R. 90 — Application to set aside sale cannot be dismissed merely on ground that applicant is adjudicated insolvent.

The words "whose interests are affected by the sale" must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. Hence, the insolvency of the judgment-debtor does not per se render it incompetent for him to continue proceedings initiated by him under O. 21, R. 90: *A I R 1933 Mad 851 (F B) and A I R 1933 Mad 694, Foll.; A I R 1939 Mad 250, Rel. on; A I R 1926 Mad 556 and A I R 1935 Mad 107, Disting.* [P 570 C 1, 2]

(c) Civil P. C. (1908), O. 26, R. 1—Provisions of O. 26, R. 1 do not apply to execution proceedings.

The provisions relating to the issue of a commission do not apply to execution proceedings. [P 570 C 2]

(d) Practice—Adjournment—Party's physical presence made impossible by reason of illness—He should be granted adjournment.

Ordinarily, a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present. [P 571 C 1]

S. Thayagaraja Ayer — *for Appellant.*

V. C. Viraraghavachari — *for Respondents.*

Pandrang Row J.—These appeals are connected. One is from an order dismissing the application of the appellant to restore to file the petition to set aside a sale presented by him which had been dismissed for default; and the other is an appeal from the order dismissing the petition to set aside the sale. The appellant who was the first defendant in O. S. No. 18 of 1934 had been adjudicated an insolvent and the application was made by him to set aside the sale on various grounds. That application was dismissed for default on 9th December 1937. An application to restore the petition to file was made on the next day and that also was dismissed. As a result we have two appeals from the two orders which were passed against the appellant. So far as the application made on 10th December 1937 to restore the petition to file is concerned it is not seriously argued that such a petition was competent. The learned Subordinate Judge relied on the Full Bench decision in A I R 1931 Mad 656[1] and his finding to the effect that the petition to restore the application to set aside the sale is not maintainable is obviously right. It follows from this that C. M. A. No. 304 of 1938 has no substance and must be dismissed. It is accordingly dismissed with costs.

The other appeal which is from the order dismissing the application to set aside the sale is pressed mainly on the ground that the finding of the Court below that such an application made by the appellant is not competent because he had been adjudicated as an insolvent is wrong, and further on the ground that on the merits it had been held that the appellant was really disabled by illness from attending Court when his application came on for hearing and therefore the application for adjournment that was made to the Court below on this ground of illness ought to have been allowed instead of being rejected. The first point, namely, the appellant's right to apply to have the sale set aside is governed by the provisions of O. 21, R. 90, Civil P. C., under which the application was made. That rule provides that any person whose interests are affected by the sale may apply to set aside the sale. The question therefore for decision is whether the appellant is not a person whose interests are affected by the sale of the properties in question. Those properties were undoubtedly his properties which had been mortgaged and which had been sold in execution of the mortgage decree. His adjudication as an insolvent and the vesting of these properties and all his other properties in the Official Receiver no doubt deprived him of all interest in the property *in præsenti*. But does this mean that he ceased to be a person whose interests are affected by the sale of the properties?

---

[1] Arunachalam v. Veerappa Chettiar, (1931) 18 A I R Mad 656=134 I C 806=55 Mad 17=61 M L J 348 (F B).

The point is really concluded in our opinion by the Full Bench decision in 65 M L J 719.[2] That was also a case of an insolvent and it was held that the insolvency of the judgment-debtor did not per se render it incompetent for him to continue proceedings initiated by him under O. 21, R. 90, and that he had also a right to prefer an appeal from an order dismissing such an application. There is an earlier case reported at p. 359 of the same volume of the Madras Law Journal decided by a single Judge, namely 65 M L J 359.[3] We have also been referred to the latest Full Bench decision in I L R (1939) Mad 374,[4] in which it is pointed out by the learned Chief Justice that the narrower meaning given to the phrase "whose interests are affected by the sale" in certain decisions is not the correct meaning to be given to those words but that the words should be taken to mean any person whose pecuniary interests are immediately and directly affected and that the decision in 27 M L J 302[5] which interpreted the words to mean "having an interest in the property sold" was wrong, and that decision was overruled expressly by the Full Bench.

In these circumstances it is obvious that the learned Subordinate Judge was not right in coming to the contrary conclusion relying on the cases reported in 49 Mad 461[6] and 67 M L J 942,[7] which were not concerned with the words with which we are now concerned, namely the words found in O. 21, R. 90, but with the word "aggrieved" found in the Insolvency Acts. It seems to us that the words "whose interests are affected by the sale" must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. For instance, if the insolvent's property is really worth a lakh of rupees and is sold fraudulently for Rs. 10,000, his interests are clearly affected by such a sale. There is no reason why these words should be interpreted in a narrow sense; on the other hand, as observed already, the point is concluded by authority which is binding on us and we would follow it even if it was not so binding because we take the same view. We find therefore that the lower Court's finding on the right of the appellant to present the application to set aside the sale is wrong and that he is entitled to present the application and to ask the Court to adjudicate upon it.

The only other question that remains is whether the petitioner had a reasonable opportunity of being heard when his application came on for hearing. This would turn on the question of the propriety of the order of the Court below refusing to grant an adjournment which was applied for on 9th December 1937. It is not now seriously disputed that the appellant was really too ill to be present in Court on that day as he had undergone an operation for fistula. There is the evidence of the doctor who attended on him and there is really no room for doubt on the point; and it may therefore be taken as established that the appellant was really disabled by his illness from being present in Court when his application to set aside the sale came on for hearing. In these circumstances the Court below ought to have granted the adjournment that was applied for because the appellant was entitled to have a reasonable opportunity of being present in Court when his application was being heard on its merits. It is said that what the appellant wanted was merely to have his evidence taken on commission and this he could have done in spite of his illness which did not prevent his giving evidence in his own house. This loses sight of the fact that the appellant was not entitled as a matter of course to have a commission taken out because the provisions relating to the issue of a commission do not apply to execution proceedings.

Even otherwise, though there is this reference to examination of the appellant on commission for the purpose of obtaining his evidence, it does not mean that the appellant was not also anxious to exercise his right and privilege of being present himself in Court when his case was being taken up.

---

[2] Subbaraya Goundan v. Veerappa Chettiar Bank, (1933) 20 A I R Mad 851=146 I C 521 =57 Mad 89=65 M L J 719 (F B).

[3] Swaminatha Udayar v. Kalyanarama Iyengar, (1933) 20 A I R Mad 694 = 145 I C 855 = 65 M L J 359.

[4] Ayyappa v. Kasi Perumal, (1939) 26 A I R Mad 250 = 180 I C 267 = I L R (1939) Mad 374=(1939) 1 M L J 163 (F B).

[5] Kathiresan Chettiar v. Ramasami Chettiar, (1915) 2 A I R Mad 541=26 I C 93=27 M L J 302.

[6] Hari Rao v. Official Assignee, Madras, (1926) 13 A I R Mad 556=94 I C 642 = 49 Mad 461 =50 M L J 359 (F B).

[7] Venkataramayya v. Bangarayya, (1935) 22 A I R Mad 107=154 I C 96=67 M L J 942.

Ordinarily a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present. In the present case the Court below was made aware of the illness which prevented the appellant from being present in Court and an application for adjournment had been made on this ground. In the circumstances we are of opinion that the lower Court erred in refusing to grant an adjournment and it follows that the appellant should be given a fresh opportunity of establishing his case. This appeal is therefore allowed and the order of the Court below dismissing the application to set aside the sale is set aside and the application is remanded to the Court below for fresh disposal on the merits according to law. The costs of this appeal will abide the event and should be provided for in the revised order to be passed by the Court below.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 571

PATANJALI SASTRI J.

Katragadda Lakshminarasamma — Appellant.

v.

Singamsetti Venkatanarayanarao — Respondent.

Second Appeal No. 605 of 1936, Decided on 10th October 1939, against decree of Sub-Judge, Masulipatam, D/- 9th December 1935.

Madras Estates Land Act (1 of 1908), S. 125 —Mortgagee of mortgage executed before Act paid off by mortgagee holding mortgage executed subsequent to Act — Latter mortgage cannot be regarded as "encumbrance created before passing of Act."

A mortgage executed after the passing of Act cannot be regarded as an "encumbrance created before the passing of the Act" within the meaning of S. 125 thereof by reason of the fact that the mortgagee paid off a mortgage executed in favour of a third person before the Act and thereby became entitled to be subrogated to it : *A I R 1924 Mad 619 and A I R 1937 Mad 349, Disting.* [P 571 C 1, 2 ; P 572 C 2]

Ch. Raghava Rao — *for Appellant.*

K. Krishnamurthi — *for Respondent.*

Judgment. — The only question arising for decision in this appeal is whether a mortgage executed after the passing of the Madras Estates Land Act can be regarded as an "encumbrance created before the passing of the Act" within the meaning of S. 125 thereof by reason of the fact that the mortgagee paid off a mortgage executed before the Act and thereby became entitled to be subrogated to it. The facts, so far as they are material for the determination of this question, may be briefly stated. The appellant purchased the property which is a ryoti holding in an estate from one Subba Rao who had purchased it in October 1926 at a rent sale held at the instance of the landholder for recovery of arrears of rent due from the registered owner of the land. Long before the rent sale however the property had been mortgaged by the owner to one Prabhakarmurtemma under a mortgage, Ex. 1, dated 5th November 1910. The deed provided that the mortgagee should, out of the mortgage money, pay off an earlier mortgage Ex. 9 of 1904 on the same property and that the security should be kept alive for the benefit of the mortgagee. A decree having been obtained on the mortgage in O. S. No. 19 of 1923 of the District Court, Kistna, the property was brought to sale in execution and the respondent in this appeal purchased it in Court auction. The appellant on the strength of the title acquired under the rent sale obstructed the respondent when the latter attempted to take delivery of the property in pursuance of his purchase at the execution sale but the obstruction was removed by a summary order of Court in E. A. No. 1 of 1931 filed in that mortgage suit. He thereupon brought the present suit to set aside that summary order and establish his right to the property against the respondent.

The Court below has dismissed the suit on the ground that the rent sale at which the appellant's predecessor-in-title purchased the property passed no title to the purchaser, as it had been already sold at an earlier rent sale held in 1925. But as the learned Subordinate Judge himself held that the earlier sale was void as the pattadar was dead when the notice of such sale was served by affixture to his house, there was no reason why the second sale which, according to him, was held in due compliance with all the formalities prescribed by the Act, should not operate to pass title to the purchaser. The respondent's counsel rightly admitted that the decision of the learned Subordinate Judge could not be supported on that ground. He attempted however to support the decree appealed against by contending that the appellant's title derived through the rent sale referred to above could not prevail against the respondent's purchase at the Court sale in execution of the mortgage decree, having regard to the provisions of S. 125 of the Act. That Section, so far as it is material here, provides that when a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take subject to "any encumbrances created before the passing of the Act." The saving of encumbrances existing at the date of the Act is, of course, due to the fact that under the earlier Rent Recovery Act, rent was not a first charge on the holding, whereas under S. 5 of the present Act, it is made a first charge, with the result that encumbrances created after this Act came into force are subordinated to the landholder's claim for rent.

Prima facie, the mortgage, Ex. 1, to which the respondent traces his title, having been executed in 1910, it seems impossible to regard it as an encumbrance created before the passing of the Act of 1908. But the respondent's counsel contended that the mortgage deed having expressly provided for the discharge of the earlier mortgage under Ex. 9 of the year 1904 and for the keeping alive of that security, the mortgage, Ex. 1, must be deemed to be an encumbrance created before the passing of the Act within the meaning of S. 125. In support of this contention reliance was placed on 46 M L J 380[1] at p. 382 and (1937) 1 M L J 399.[2] But it is to be noted that both these decisions relate to a case where the later mortgage executed after the Act was taken by the same person who held the earlier mortgage, which was thus merely renewed under the later deed and the Court applied the principle,

> that a man by taking a further security for his money that is charged upon land, does not, and cannot be taken thereby to have intended to give up his rights under the earlier deed which he had,

and held that though the suit was brought on the later mortgage, it must be regarded as having been based equally upon the earlier mortgage which had been created before the passing of the Act. But the principle cannot be invoked by the respondent here as he cannot in any sense be regarded as having held any mortgage created prior to the Act, as Ex. 9 had been executed to a third party. The respondent might be entitled to be subrogated to the rights of the mortgagee under Ex. 9 in a question with an intermediate mesne encumbrancer, if any, but it would, in my opinion, be stretching the language of S. 125 far too much to hold that by reason of such a right of subrogation arising out of it, the mortgage under Ex. 1 must be deemed to be an encumbrance 'created before the passing of the Act' although in fact it was executed subsequent to the Act. The distinction, for purposes of S. 125, between a mortgage taken merely in renewal of an earlier one in favour of the same person and a mortgage taken by a person who pays off a prior encumbrance and becomes thereby entitled to a right of subrogation was recognised in 46 M L J 380,[1] the learned Judge expressing the opinion that the principle of that decision might not apply to a person who merely claims a right of subrogation. I hold therefore that the rent sale under which the appellant claims title operated to vest the property in the purchaser free from the mortgage under Ex. 1 and prevails against the title acquired by the respondent by his purchase at the Court sale in execution of the decree obtained on that mortgage. The appeal succeeds and the appellant's suit is decreed so far as it relates to the property covered by the second rent sale held on 19th October 1926. The parties will pay and receive proportionate costs throughout. Leave granted.

C.R.K./D.S. *Appeal allowed.*

---

[1] Sreekanta Sundararamiah v. Venkatasubbiah, (1924) 11 A I R Mad 619=84 I C 788=46 M L J 380.

[2] Venkatanarasimharaju v. Siddah Chetty, (1937) 24 A I R Mad 349=169 I C 420=(1937) 1 M L J 399.

A. I. R. 1940 Madras 572

BURN, OFFG. C. J. AND KRISHNASWAMI AYYANGAR J.

In re A. V. Jones and another — Appellants.

S. R. No. 27956 of 1939, Decided on 4th January 1940, from order of Somayya J., in Appln. No. 194 of 1939, D/- 25th September 1939.

Presidency Towns Insolvency Act (1909), S. 106 (1) Proviso—Proviso has no bearing on appealability of orders passed.

The proviso to S. 106 (1) is concerned solely with the provisions of the Act relating to the discharge of the insolvent and has no bearing on the question of appealability of orders passed and therefore an appeal without leave of the Court under S. 106 (1) (a) is incompetent. [P.573 C 1]

T. P. Ramachandra Aiyar — *for Appellants.*

Burn Offg. C. J.—Under S. 106 (1) (a), Presidency Towns Insolvency Act, it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of the Court. The proviso to S. 106 (1) is concerned solely with the provisions of the Act relating to the discharge of the insolvent and has no bearing on the question of appealability of orders passed. In this case no leave has been obtained. This appeal therefore cannot be entertained and it is rejected.

C.R.K./G.N. *Appeal rejected.*

A. I. R. 1940 Madras 573

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

V. G. Manicka Mudaliar — Appellant.

v.

Andalammal — Respondent.

O. S. Appeal No. 64 of 1938, Decided on 24th January 1940, against judgment of Venkataramana Rao J., in C. S. No. 562 of 1930, D/- 25th July 1938.

Madras High Court (Original Side) Rules — Questions within province of Judge should not be referred to Official Referee unless parties have agreed to submit their disputes to arbitration — Consent given by party subsequently withdrawn — Report of Official Referee should be ignored.

The Official Referee is not a Judge of the Court but only a Commissioner and adjudication by him of questions which under the Code and the rules, form part of the functions of a Judge would be ultra vires. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, i. e., the working out of those rights either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee: *A I R 1924 Mad 406, Foll.* [P 574 C 1, 2]

Where the questions raised are entirely within the province of the Judge, the Court has no jurisdiction to refer them to anyone for decision unless the parties had agreed to submit their disputes to arbitration. Where the consent of the party to the matter proceeding before the Official Referee was withdrawn, the report of the Official Referee should not be considered. But if the parties have expressly agreed that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration. [P 574 C 1; P 575 C 1]

W. S. Krishnaswamy Naidu — *for Appellant.*

A. Seshachariar — *for Respondent.*

Leach C. J. — This appeal arises out of a suit filed by the respondent on the original side of this Court for a declaration that a piece of land conveyed to the appellant under a deed dated 30th October 1925 is her property and that she is also entitled to the house built thereon. The respondent's case is that she acquired the site and built the house out of the proceeds of a milk business belonging to her. The appellant claimed that the milk business belonged to him and that the property was his. The suit was tried by Venkataramana Rao J. who held that the property belonged to both of them in equal shares. Consequently, the learned Judge granted a decree for partition and the delivery to the respondent of her half share with mesne profits. The respondent has not appealed, and the main question which the Court is called upon to consider is whether the appellant is entitled to the share allotted to the respondent; in other words whether he is absolute owner of the site and the house. The procedure which was adopted in this case was not in accordance with that contemplated by the Code of Civil Procedure, and it is necessary also to consider the effect of this. It will be convenient to deal first with the question relating to the procedure adopted. The plaint was filed on 18th November 1930. The hearing was interrupted after a portion of the plaintiff's evidence had been recorded by Lakshmana Rao J. and on the 1st October 1935 the following order was passed by the learned Judge with the consent of the parties:

(1) That this suit be and is hereby referred to the Official Referee of this Court for the determination of the following issues, viz. :

i. Did the plaintiff carry on milk business or any other business of her own and was the defendant entrusted with the management of all or any of the said business as her agent? If so, is the defendant liable to render an account;

ii. Was the said house No. 14 Pallappan Street, Triplicane, Madras, purchased and constructed out of funds belonging to the plaintiff in the name of the defendant benami for the plaintiff? If so, is the defendant liable to account to the plaintiff for the mesne profits?

iii. Is the defendant in possession of all the moveable properties mentioned in Sch. "B" to the plaint and do any of them belong to the plaintiff?

2. That the said Official Referee do give his findings on the said issues and submit his report and proceedings thereon to this Court expeditiously.

3. That the evidence recorded herein so far, shall be treated as evidence before the said Official Referee and the said Official Referee do continue the enquiry from the stage at which it was stopped.

4. And that the further consideration of this suit do stand adjourned until after the receipt of the report of the said Official Referee by this Court.

In accordance with this order the Official Referee recorded the further evidence tendered by the parties and the depositions and exhibits comprise a volume of nearly

200 printed pages. The Official Referee presented his report to the Court on 2nd September 1937 and it was considered by Venkataramana Rao J. on 12th May 1938. I should mention that shortly after the consent order of 1st October 1935 had been passed the respondent applied to Lakshmana Rao J. to recall the order on the ground that the Official Referee had no jurisdiction to conduct the inquiry into the questions set out therein and that it had been passed without the position being fully realized. The learned Judge, however, refused to recall the order and stated his reasons in these words:

> The suit was referred to the Official Referee by consent and it is this Court that goes finally into all the questions and decides the right of the parties. There is therefore no need to or ground for review and the application is dismissed with costs.

The question relating to the procedure adopted was raised before Venkataramana Rao J. who considered that it was unlawful and expressed the opinion that Lakshmana Rao J. should have recalled the order of reference. Inasmuch as the suit was of long standing, and the parties had agreed that the evidence recorded by the Official Referee should be treated as evidence in the trial, the learned Judge decided not to put the case back for trial de novo and gave his judgment on the evidence recorded by the Official Referee, but he did not ignore the Official Referee's report altogether. There can be no doubt that the procedure adopted in this case was not only irregular, but was opposed to the provisions of the Code of Civil Procedure and had no sanction from the rules of practice of the original side of this Court. I entirely agree with the observation of Venkataramana Rao J., that Lakshmana Rao J. should have recalled the order of reference when the application was made to him by the respondent. As a matter of fact he ought to have refused to pass the consent order. The questions raised in the issues were entirely within the province of the Judge, and, as Venkataramana Rao J. has said, the Court had no jurisdiction to refer them to any one for decision unless the parties had agreed to submit their disputes to arbitration. This very question was raised before Kumaraswami Sastri J. in C. S. No. 661 of 1920,[1] and, with Venkataramana Rao J., I am in agreement with the following observations which Kumaraswami Sastri J. made in that case:

> He (the Official Referee) is not a Judge of the Court but only a Commissioner and I think that the adjudication by him of these questions, which under the Code and the Rules, form part of the functions of a Judge would be ultra vires. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, i. e. the working out of those rights either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee . . . . . . It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply en bloc to the Original Side except so far as our own rules modify them.

In a suit of the description of the one now under consideration the Court has no power to adopt the rules of practice in England. O. 26, Civil P. C., states when commissions may be issued. They may be issued for the examination of witnesses, for the purpose of local investigations, for the purpose of examination of accounts and for the effecting of partition but for no other purposes. O. 23 of the rules of the original side states the procedure which should be followed when there is a reference, but they do not purport to enlarge the powers of the Official Referee or authorize the issue of commissions beyond those mentioned in the Civil Procedure Code.

Counsel are agreed, as they were agreed before Venkataramana Rao J. that the Court shall treat the evidence recorded by the Official Referee as being evidence recorded by the Court and they are content that the rights of the parties shall be decided on what appears in the printed record, but they suggest that the report of the Official Referee should be eliminated. It seems to me that it is open to the Court in the circumstances of this case to adopt this course. I consider that the Court should ignore the report of the Official Referee, and I may say that neither I nor my learned brother has read it. Approval for the suggested course may be obtained from the decision of the Privy Council in 53 All 190.[2] In that case an ancestral business of a Mitakshara joint family had been carried on in partnership with another person. The stranger partner retired and thereupon the partnership was dissolved and wound up. The business was then carried on in the same commodities and in the same premises though under a new firm name and with new books. It was alleged that speculative transactions were subsequently entered into and it was contended that the business could not be regarded as a family affair. When the case was before the High Court on appeal a commissioner was appointed to examine the books and report whether the new business was of a gambling nature. The Privy Council disapproved of this course as this question was one for determination by the Judge alone. As their Lordships were not aware whether the order referring to the commissioner was made under protest by the appellant-defendant or with his consent, they were not prepared to hold that the report of the commissioner should be disregarded and in fact took it into consideration along with the other evidence in the case. In the case before us, the consent of the respondent to the matter proceeding before the Official Referee was withdrawn and it is for that reason that I consider that the report of the Official Referee should not be considered. As the parties have expressly agreed before us that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration, but at the same time I trust that in future similar references will not be made to the Official Referee.

---

[1] Abdul Wahab v. Rokia Bibi, *Reported in* (1924) 11 A I R Mad 406=78 I C 903.

[2] Sri Thakur Ramakrishna Muraji v. Ratan Chand, (1931) 18 A I R P C 136=132 I C 613 =53 All 190=58 I A 173 (P C).

Turning now to the facts, the respondent is the wife of one Balasundara Mudaliar whom she married in 1898. In 1919 the appellant married the daughter of the respondent's brother. He had been married before, but his first wife has died. At the time of the appellant's marriage the respondent and her husband were living in her brother's house with her brother and his family. In 1920 the appellant became ill and he went to live in his father-in-law's house. That year his wife and his daughter by his first wife were accidentally drowned. The appellant continued to live in the respondent's brother's house and it is now common ground that improper relations developed between the appellant and the respondent. This was persisted in and resulted in the respondent's husband leaving the house in 1921, since when he has never returned to live with the respondent. The illicit intercourse between the appellant and the respondent continued and eventually they lived openly as man and wife. The site of the house was bought in 1925 and the house was built during the years 1927 and 1928. When it was completed the appellant and the respondent left the respondent's brother's house and went to live in the new house and continued to do so until 1930 when they quarrelled.

The appellant says that he provided the whole of the money for the purchase of the land and for the building of the house, but it appears to me to be abundantly clear that he had not sufficient resources of his own to meet anything like the cost of this property. The site was bought for Rs. 1989-5-4 and over Rs. 10,000 was spent on the building of the house. The appellant was a police constable and never in his service drew more than Rs. 38 a month. He retired from the police force in 1924 on a pension of Rs. 11 a month. The evidence discloses that the respondent had means. It is admitted that when the appellant went to live in her brother's house she had two businesses one in dhall and the other in lungis, and it has been proved that she was carrying on a milk business as long ago as 1911. The lungi business was closed in 1922 because of the fall in price of piece-goods and the dhall business was closed in 1924. The reason given for the closing of the dhall business was that the milk business in which the appellant was assisting had so grown and was so profitable that there was no time for the dhall business. The evidence also discloses that the respondent was in the habit of lending money and that she had a post office savings bank account.

I agree with the learned trial Judge that the fact that the land was bought in the name of the appellant is not of very great importance. When it was bought the appellant and the respondent were living openly as man and wife and this no doubt accounts for the fact that the land was taken in the name of the appellant. It is also true that some of the money for the building of the house was borrowed in the appellant's name. It would be far easier for a man, than a woman, to borrow money and as they were living together and were going to live in the new house it was only natural that the appellant should borrow money in his own name. I concur in the finding of the learned trial Judge that the milk business belonged to the respondent and that the house was really bought from the profits of this business. The learned Judge awarded the appellant a half share in the property because he considered that it was

> unlikely that the appellant would have retired from service but for some understanding between them that the business should be shared equally

between them and that whatever was earned by either must be shared by either.

In these circumstances the learned Judge considered that there was an agreement of partnership subsisting between them. As I have indicated, this finding has not been challenged. It has been stated at the Bar that the respondent had not the means to pay the court-fee necessary for a cross appeal. That is a question which the Court cannot go into now. There was no application for leave to appeal in forma pauperis and the Court can only assume that the respondent acquiesced in this part of the judgment of Venkataramana Rao J. On the evidence the appellant can clearly not maintain a claim for more than what has been awarded to him. The learned Judge has discussed the evidence in detail and I consider that the reasons which he has given for finding in favour of the respondent to the extent of a half share in the property cannot be seriously challenged. Whether the respondent might have succeeded if a cross appeal had been filed is a question which does not in the circumstances require to be considered. For the reasons indicated I would dismiss the appeal with costs.

Krishnaswami Ayyangar J.—I am in entire agreement with the judgment just pronounced by my Lord. I shall however add a few words on the question as to what matters are properly referable for inquiry to the Official Referee. Before the creation of the office of the Official Referee some 25 or 30 years back, the practice on the original side was to entrust inquiries into accounts and such other matters as are referable to a Commissioner under O. 26, Civil P. C., to a Commissioner appointed *ad hoc* by the Court. There were delays in the submission of reports and defects noticed in them which necessitated fresh references. For these and other reasons, it was felt it would be a great advantage to have a permanent officer with the necessary training and experience to enable him to do in a more satisfactory way what was till then being done by a Commissioner. To start with, it was certainly not the idea to delegate to the Official Referee any of the functions of the Court. Neither is there anything in the rules of the original side to warrant the view that there has since been an enlargement in the scope of the functions of the Official Referee. He is to be no more than a permanent Commissioner for the purpose of taking the accounts and making the inquiries contemplated by the Civil Procedure Code. O. 23 of the rules of the original side contain the provisions relating to the appointment of a Commissioner, and a definition of the matters which could be left to him for enquiry and report. There is nothing in O. 24 of the original side Rules to suggest that it was the intention to give him an extended jurisdiction. R. 1 of this Order says that:

> Subject to the rules hereinafter contained, O. 23 of the rules relating to accounts and enquiries referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee.

This is a fair indication that the Official Referee is only expected to perform the functions of a Commissioner under the Code and that it was never intended that he should have power to deal with or decide material questions of fact or law on which the decision of the suit itself depends. So far as my knowledge goes questions of this character were rarely, if ever, referred to the Official Referee for decision or report. Such a course might have been taken in a few exceptional instances, but I think that it happened almost always because both sides consented to it and invited the presiding Judge to adopt this procedure. In such cases the inquiry generally went on without demur and the report when made was taken into consideration by the Court. I am not aware that there has been any instance of a reference being made on substantial questions in contest between the parties, without their express consent, or the Referee's report considered valid in spite of objection taken to his jurisdiction to try.

I may also observe that whenever during an inquiry before the Official Referee material questions of fact or law arose it has been the practice ordinarily for the Referee to refer those questions to the Court or ask the parties to take the orders of the Court thereon. Questions of title to property and such other material questions were as a rule dealt with by the Court. I agree that in view of the fact that in the present case the consent had been withdrawn even before the commencement of the inquiry before the Official Referee there is good reason for ignoring the findings of the Referee altogether, though there can be no objection to the evidence recorded by the Official Referee being treated as evidence in the case with the consent of the parties. It is on this footing that we have considered the appeal, learned counsel on both sides having expressly assented to this course.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 577

STODART J.

Mannicheenntavita Cheria Mammu — Appellant.

v.

Katavath Teyyil Payankavil Seyina and others — Respondents.

Second Appeal No. 1069 of 1936, Decided on 12th January 1940, against decree of Dist. Court, North Malabar, in A. S. No. 249 of 1935.

(a) Malabar Tenancy Act (14 of 1930), S. 20 (3) — Jenmi or his assignee can sue to evict tenant even if melcherthdar has that right and has failed to exercise it.

Even if the jenmi has granted away to a melcherthdar the right to redeem, then in proper circumstances he himself is not debarred from filing a suit to redeem and to evict the tenant. If it is plain that the melcherthdar has no intention of implementing his melcherth, namely by exercising his preferential claim to redeem the kanom there is no reason why the jenmi himself or his assignee should not file a suit to evict the tenant provided that he impleads the melcherthdar. [P 578 C 2]

(b) Second Appeal—Claim involving point of law can be investigated.

There is no reason why the claim if it involves a point of law should not be investigated on second appeal. [P 579 C 2]

P. Govinda Menon — *for Appellant.*

B. Sitarama Rao and K. Kuttikrishna Menon — *for Respondents.*

Judgment. — This is a suit from North Malabar and it is concerned with a Malabar tenancy. The land is jenm property and in 1907 it was demised on kanom tenure to the predecessors-in-title of defendants 1 and 2. According to the custom of the country that tenancy expired in 1919 but the kanomdars did not apply for renewal of the term. Since then therefore they have been holding land on yearly tenancy. On 5th September 1933, the jenmi granted to the present plaintiff what is called a melcherth. A melcherth as defined in the Malabar Tenancy Act, 14 of 1930, means

> the transfer by the landlord of part of his interest in any land held by his tenant by which the transferee is entitled to evict such tenant.

The jenmi's title to evict accrues under S. 20 (3) of the Act, namely on the ground that the period of the kanom tenancy has expired and no renewal has been obtained. This suit, the subject of the present appeal, was to evict defendants 1 and 2. The learned District Munsif of Badagara who tried it in the first instance decreed it in favour of the plaintiff melcherthdar; but on appeal the learned District Judge dismissed the suit. The ground on which the learned District Judge dismissed the suit arises out of the fact that there had been a previous melcherth. In 1922 the then jenmi gave a melcherth to defendant 7. Defendant 7 filed a suit and obtained a decree on that melcherth on 27th September 1923. By the terms of that decree, Ex. 7, defendant 7 had, as happens in most cases, to repay not only the kanartham, a mortgage amount, to the kanomdars but also had to pay to them the sum decreed as the value of improvements.

Defendant 7, however, did not do any of these things. He suffered his decree to lapse by doing nothing to execute it. At the time of the second melcherth in favour of the present plaintiff that decree had become inoperative. At first sight therefore, it appears that there was nothing to prevent the jenmi or his assignee, by way of melcherth, from exercising the right of eviction. The learned District Judge, however, arrived at the conclusion, that he could not do so. His reasoning is as follows: There is a decision of the Judicial Committee of the Privy Council, 56 All 561,[1] which lays down that a suit by a mortgagor to redeem a mortgage will lie even though a previous suit by the same plaintiff for the same relief had been dismissed, provided that there was no provision in the decree in the previous suit debarring the mortgagor from his right to redeem the property.

Founding on this judgment the learned District Judge held that defendant 7, the prior melcherthdar, had not lost his right under his grant to sue; and from that finding I am not prepared to differ. But the learned Judge went on to a conclusion with which, agreeing with learned counsel for the appellant, I do not agree. He held that so long as defendant 7 melcherthdar had a right to bring a suit to evict the existing tenant the jenmi himself had no such right; and a fortiori the assignee from the jenmi under the second melcherth had no such right. This finding is attacked on appeal by the plaintiff and I think that the learned District Judge's finding cannot be supported. The nature of a melcherth is that the grantee should redeem the kanom and enter on to the land and be in possession thereof as a tenant under the jenmi, paying him rent according to the terms of the melcherth agreement and that he should continue in that tenancy for a period ending with 12 years from the date of melcherth. The finding of the learned Judge amounts to this, that once having granted a melcherth the jenmi practically parts with the whole of his landlord's right and has no remedy at all if the melcherthdar for some reason as in the present case does not perform his part of the contract and enter into possession of the land. The existing kanomdar may be a very unsatisfactory tenant, a person who is always in arrears with his rent, a person who allows the land to deteriorate by bad methods of cultivation and so on, and the very purpose of the melcherth may be to evict that tenant and to substitute a more satisfactory tenant in the person of the melcherthdar himself. The finding of the learned District Judge means that if the melcherthdar does not act according to the terms of his contract, the jenmi, as I have already said, has no power to evict the tenant for twelve years. It appears to me that the reasoning of the learned District Judge is fallacious. Even if the melcherthdar has a right to bring another suit, I do not see why the jenmi has not also a right to bring a suit like the present in which defendant 7 is impleaded.

---

[1] Raghunath Singh v. Hansraj Kunwar, (1934) 21 A I R P C 205 = 151 I C 37=56 All 561= 61 I A 362 (P C).

Defendant 7 is impleaded as a person in possession of a right which he has failed to exercise. The learned District Judge has refused to rely on the case in 35 Mad 42[2] which has been relied upon and in my opinion very properly by the trial Court. In that case the facts were very much like the present. There had been a melcherth; the melcherthdar had instituted a suit to evict the kanomdar and had got a decree. He had allowed that decree to become barred by limitation. The learned Judges, Subramania Iyer and Boddam JJ., held that, since the melcherthdar's decree was no longer in force, there was nothing to prevent the jenmi's assignee from exercising his right of redemption. And also in that case there is an observation which is very pertinent in the present connexion. The learned Judges observed that if the melcherthdar's right to redeem under the previous decree was in force and executable, the right to redemption as between the melcherthdar and the jenmi would have been preferentially in the former. In that observation is implied the proposition which I have just stated, namely that in a suit like this even if the jenmi has granted away to a melcherthdar the right to redeem, then in proper circumstances he himself is not debarred from filing a suit to redeem and to evict the tenant. My own opinion is that it does not make any difference whether the melcherthdar has filed a suit and obtained a decree and has allowed the decree to become barred. If it is plain that he has no intention of implementing his melcherth, namely by exercising his preferential claim to redeem the kanom I see no reason why the jenmi himself or his assignee should not file a suit for that purpose provided that he impleads the melcherthdar.

I think therefore that the trial Court is right in holding that the plaintiff's suit was maintainable, and that it would make no difference even if the melcherthdar was at liberty himself to file another suit to evict the kanomdar. The learned District Judge's decree is dated 7th July 1936. Some months later in this Court in I L R 1937 Mad 545[3] a Full Bench decided the point now at issue. To put it very shortly, it was there decided that the jenmi's right to maintain a suit to evict the kanomdar was not affected by the circumstance that the period of a melcherth previously granted had not expired. That also was a suit in which the melcherthdar or rather his assignee had obtained a decree but had proceeded no further and had allowed his decree to become time-barred. So much for the main question at issue in this appeal. Learned counsel for the respondents has raised a point which is important. The plaintiff in this plaint stated that the kanartham in this case was more than 45 per cent. of the value of the jenmi's rights in the property. That averment was made in view of S. 17 (c), Malabar Tenancy Act. S. 17 provides that a kanomdar shall, on the expiry of the kanom under which he holds, be entitled to claim, and his immediate landlord shall be bound to grant a renewal of the demise. But cl. (c) of S. 17 provides amongst other things that nothing in that Section shall apply to a kanom in North Malabar where the kanartham exceeds 40 per cent. In the written statement the kanomdar defendants stated that they were persons who under S. 17 (a) were entitled to a renewal. Learned counsel for the respondents now urges that that point has not been tried and that it is necessary that it should be tried. The learned District Judge on appeal has said something about this matter. In para. 7 he says:

---

[2] Raman Nambudiri v. Achuta Pishurodi, (1912) 35 Mad 42=14 I C 415.

[3] Viroopakshan Nambudripad v. Tarwad Karnavan, (1937) 24 A I R Mad 214=168 I C 110=I L R (1937) Mad 545=(1937) 1 M L J 83(FB).

It is alleged in the plaint that the kanom amount exceeded 40 per cent. of the jenmi value and as such S. 17, Tenancy Act, does not apply.

(In other words the defendants were not entitled to a renewal of the tenancy.) The defendants disputed this in their written statement but no issue was raised on it and the only inference that could be drawn from this as well as the fact that absolutely no mention is made of it in the lower Court's judgment, is that this point was not pressed. There is no reference to it even in the grounds of appeal. For the first time at the hearing of the appeal the learned advocate for the appellants alludes to it. It is wholly an afterthought. The question for decision now is whether this point has been properly raised and should have been put in issue and tried. I do not think the point has been properly raised by the kanomdar defendants. Under S. 17 they are entitled to ask for a renewal when the tenancy expires. This tenancy expired in 1919. The Act was not in force in 1919; the landlord was not bound to grant a renewal then if it had been asked for, but that was no reason why the tenant should not have asked for it. There is no averment in the written statement of these defendants that they ever did ask for it at that time.

Or again under S. 23 (b) a further opportunity was afforded to these defendants of applying for a renewal. S. 23 (b) is "If the landlord sues to evict on ground (3) referred to in S. 20" (precisely the case here) "the tenant shall be entitled to make an application or fresh application under sub-s. (1) of S. 22," (that is to say, for the execution of a renewal deed) "and the suit shall abide and follow the result of such an application." Since therefore there was no previous application for renewal either at the time of the expiration of the tenancy or at any subsequent time, the opportunity to apply came again when this suit was filed and that opportunity was not availed of. It seems to me therefore to follow that the defendants of set purpose did not press their claim in the Court of first instance, that the provisions of S. 17 applied to them. If they really believed that, they would obviously have filed a petition under S. 23 (b) and the questions that have been raised in this suit would have had to abide and follow the result of that application. This form of procedure to my own certain knowledge is very well known in Malabar. I have no hesitation in agreeing with the lower Appellate Court that this point was not pressed. This is sufficient to dispose of the question raised in the appeal and my finding must be that the appeal of the plaintiff is allowed and the decree of the lower Appellate Court is set aside and the appellant will have his costs throughout.

A further point has arisen however at the hearing of the appeal with which the appellant himself is not concerned. It arises out of the fact that in a suit of this kind in Malabar a particular subject of contest is very often the amount which the plaintiff has got to pay to the outgoing tenant for the value of improvement effected by the latter. There is no dispute about the figure which the lower Court has decreed under the head. But a difficulty arose at the trial for the reason that the rights of the persons entitled to this money also had to be adjudicated by the Court. There were lessees under the kanomdars and there were sub-mortgagees under the kanomdars. There was a contest at the trial between these various persons as to how the money should be apportioned. In respect of one item of property, namely item 20, the trial Court directed that the value of the improvement attributable to this item should be paid to defendants 3 and 7. On appeal this decision was modified to a slight extent, the lower Appellate Court holding that out of the amount so declared payable to defendants 3 and 7, defendant 4 was entitled to get the amount of a usufructuary mortgage dated 7th November 1894, Ex. 3.

All the defendants got notice in this appeal and defendant 4 appeared by counsel and defendants 3 and 7 appeared by counsel and at the close of the hearing of the appeal learned counsel for the latter stated that he wished to challenge the findings of the lower Appellate Court and to obtain a restoration of the decree of the trial Court so far as it was to the advantage of his clients. The learned advocate for defendant 4 points out that he has had no notice of this claim. There is no reason why the claim if it involves a point of law should not be investigated on second appeal; but I am at present faced with a difficulty that I can only hear one side. It is better therefore that this question be left open for further hearing after learned counsel for defendant 4 has obtained instructions in the matter. It will be, I think, most convenient for all parties if on behalf of defendants 3 and 7 a statement in the form of an ordinary memorandum of appeal is filed and given to the learned advocate for defendant

4 and then some near date will be fixed for the hearing of this point.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 580

WADSWORTH AND PATANJALI SASTRI JJ.

Rm. L. M. L. V. Alagamai Achi and another — Appellants.

v.

VR. PL. M. Palaniappa Chettiar and another — Respondents.

Appeal No. 17 of 1937, Decided on 15th January 1940, against decree of Sub-Judge, Sivaganga, D/- 1st August 1936.

Hindu Law—Joint family— Business — Personal liability of junior coparcener participating in conduct of business is question of fact depending upon nature and extent of participation—Personal liability does not extend to antecedent transactions—Principle of ratification does not apply — Rule of estoppel cannot give rise to partnership quod general public — Personal liability of junior coparceners cannot be based on that ground.

The whole question whether a coparcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business and therefore no question of personal liability can arise. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between members of a joint family can be implied from participation, however active, in the conduct of the family business, a position which has received additional emphasis from the provisions of S. 5, Partnership Act : *A I R 1919 Mad 690 and 1930 M W N 371, Discussed.* [P 582 C 1]

But such liability does not extend, in either case, to antecedent transaction : *A I R 1939 Mad 6, Rel. on ; A I R 1926 Mad 1138, Ref.* [P 582 C 2]

In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of ratification, it is important to bear in mind that the doctrine presupposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu law the coparceners are powerless to disown, so long as they continue to remain in the joint family, unless it can be shown that the manager pledged the individual credit of the junior coparceners at the time when he entered into the transaction in question and that the junior coparceners having come to know of the transaction accepted or acquiesced in it : *A I R 1939 Mad 6 and 22 Mad 166, Expl.* [P 583 C 1]

Since the rule of estoppel can only preclude proof of facts against individuals actually misled it cannot give rise to a partnership *quod* the general public in the case of a joint Hindu family business carried on by the manager of the family and therefore the junior members participating in the conduct of the family business cannot be personally liable merely on that ground : *A I R 1936 Mad 94, Not approved.* [P 581 C 2 ; P 582 C 1]

K. S. Sankara Ayyar — *for Appellants.*

N. G. Krishna Aiyangar — *for Respondents.*

Patanjali Sastri J.—This appeal arises out of a suit brought by the appellant for recovery of Rs. 5982-14-9 from defendants 1 to 3 personally and from the family properties of all the defendants. Defendant 1 is the father of defendants 2 to 4, and defendant 5 is the son of defendant 1's deceased brother. The defendants constitute a joint Hindu family of which defendant 1 is the manager. The defendants are Nattukottai Chetties and were carrying money-lending and banking business under their family vilasam VR. PL. M. at Rangoon and other places in Burma. The amount claimed is said to be the stridhana money of plaintiff 1 deposited by her father, plaintiff 2 with defendant 1. The Court below decreed the claim against defendant 1 personally and against the family properties of all the defendants as it was a debt contracted by defendant 1 in the course of the family business. Not satisfied with this decree, the plaintiffs have appealed claiming a personal decree also against defendants 2 and 3, the respondents herein, and the only question for decision relates to their personal liability.

Such liability is said to arise on the ground that, as sons of defendant 1, they were managing the family business jointly with him and must, by virtue of such participation in management, be deemed to have become partners. A special ground of liability was also urged so far as respondent 1 was concerned, namely that he had expressly undertaken to pay the debt personally in certain letters written by him to appellant 2. The learned Subordinate Judge found that all that was established by the appellants was that respondent 1 was managing the business under a power of attorney dated 13th July 1931 executed in his favour by his father for a period of three years thereafter, and that respondent 2 was writing the accounts of the firm for some time and held, on these findings, that the respondents could not be said to have become partners or to have held themselves out as such, so as to be personally liable for the debts incurred in the course of the business. The learned Judge said nothing about the special ground urged as regards respondent 1, as the point was apparently not raised before him. Some criticism was directed against the finding that respondent 1 was managing the firm as under a power of attorney executed by defendant 1, and it was pointed out that the power of attorney was not produced by the respondents. We are not prepared to attach any importance to the non-production of the power as the appellant's own witness (P. W. 2) who was the agent of another Chettiar firm in Rangoon which had dealings with the respondents' firm, admitted that respondent 1 was acting as under a power executed by his father when he was managing the family business in Burma. But this is not, in our view, a material circumstance, for; we are clearly of opinion that even if he managed the firm in his capacity as a junior member of the family interested in the business, no personal liability could arise by virtue of such management, in the circumstances of this case. For, the deposits to which the suit relates, were all made prior to 10th December 1924 and duly stamped vouchers evidencing the terms of the deposits including the final deposit letter (Ex. A, dated 11th December 1930) on which the suit was brought, were all executed from time to time only by defendant 1, before the respondents began to participate in the conduct of the business in 1931. Assuming, therefore, that the respondents must be deemed to have become partners or to have held themselves out as such in relation to the family business in Burma by reason of such participation, they could not, in our opinion, be held to be personally liable in respect of the pre-existing debts of the firm.

On the question of personal liability of junior members of a joint Hindu family for debts incurred in the course of family business on the ground of their participation in the conduct or management of it, the decisions of this Court, to go no further, have been neither clear nor uniform. In 41 Mad 824,[1] it was held by Wallis C. J., and Spencer J. that the fact that the son had been assisting the father in the conduct of the business during his minority and had taken an active part in its management after attaining majority, did not make the son personally liable for obligations contracted during his minority, but that in respect of debts incurred since he attained majority such liability arose by reason of his conduct in taking an active part in the business. Both the learned Judges were of opinion that Ss. 247 and 248, Contract Act, did not apply to the case, and based their conclusion apparently on the principles of Hindu law. Sadasiva Ayyar J. held that both by virtue of those Sections and the rules of Hindu law, the son was personally liable for all the debts of the business including those contracted during his minority. This extreme view has never been followed in this Court and may be left out of consideration. The other two learned Judges however have not clearly indicated on what legal basis personal liability in such a case rests—whether it is based on implied partnership or estoppel by holding out or ratification. In 70 M L J 214[2] the view is expressed that personal liability where it arises in such cases, rests on the doctrine of holding out and that, "a partnership from the point of view of the general public comes into existence."

It is however somewhat difficult to see how the rule of estoppel which can only preclude proof of facts against individuals actually misled, can give rise to a partnership quod the general public. On the other hand, in 1930 M W N 371,[3] it was thought that, according to the majority view in 41 Mad 824,[1]

> unless they (i. e. the junior members of the family) were partners, they cannot be made personally liable for the debts of the business,

and the case was sent down to the lower Court for a finding on that point. That Court having found that the junior members had taken an active part in the management of the family business, the case came up again before Coutts-Trotter C. J. and Ramesam J. who however would seem to repudiate the doctrine of personal liability of a coparcener arising out of an active participation in the family business, and refused to hold the junior members personally liable in the absence of

> any other evidence of a consensual act whereby a definite new relation other than that of members

---

[1] Official Assignee of Madras v. Palaniappa Chetti, (1919) 6 AIR Mad 690=49 I C 220 = 41 Mad 824=35 M L J 473 (F B).

[2] Ramasami Chetty v. Srinivasa Ayyar, (1936) 23 A I R Mad 94=162 I C 371=70 M L J 214.

[3] Bala Venkata Sitarama Chettiar v. Sivagurunatha Chettiar, (1930) M W N 371.

of a joint Hindu family trading together was created: 1930 M W N 371.[3]

It seems to us however that this divergence of opinion is more apparent than real, for we venture to think that the whole question whether a coparcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. This is all, as it seems to us, that the learned Judges meant to affirm in the last mentioned case. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between members of a joint family can, in our opinion, be implied from participation, however active, in the conduct of the family business, a position which has received additional emphasis from the provisions of S. 5, Partnership Act, which postulate the possibility of members of a joint family carrying on the family business without becoming partners therein in the legal sense of the term. Again, the part taken by a junior member, while it may not be sufficient to justify an inference of partnership, may be such as to lead others to act on the belief that he is a partner, in which case the member will be precluded by the principle of estoppel from showing as against the person misled that he (the member) is not in fact a partner. Thus, in each case, the question is, as it seems to us, what is the proper inference to be drawn from the facts proved; and as pointed out by Varadachariar J. in (1938) 2 M L J 944[4] at p. 954, the extent of the personal liability incurred by the member will vary according as it is found to arise on the one ground or the other. But what is important for the purpose of this appeal is, that such liability does not extend, in either case, to antecedent transactions. As observed by the same learned Judge in the case referred to above :

> If the liability is to be based on the doctrine of holding out it is obvious that such liability can arise only in respect of transactions subsequently entered into and on the faith of his conduct. Even if it should be held that by such participation the coparcener becomes a partner in the business, it seems to us unreasonable to hold that he thereby incurs a personal liability in respect of the pre-existing debts of the business.

See also 49 Mad 930.[5] The appellants next relied on the following observations in 22 Mad 166[6] at p. 167 :

> No doubt where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such coparcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered into, as to warrant his being treated in the manner as a contracting party.

Appellants accordingly urged that the respondents must be taken by reason of their participation in the business to have "ratified and adopted" even the antecedent transactions in the business including the suit deposit and that, in any case, there has been such "acquiescence" on the part of the respondents in the course of the dealings had by the father as to warrant the respondents being regarded as contracting parties themselves in respect of the suit deposit. Our attention was also drawn to the approval by Varadachariar J. at pp. 955 and 956 of (1938) 2 M L J 944,[4] already referred to, of the observations in 22 Mad 166[6] quoted above. There is nothing in those observations which need arouse any dissent, for they do no more than envisage the possible application of the general principle of ratification by adoption or acquiescence to this class of cases. The principle itself is simple and well known, but the difficulty arises, as with so many other principles, in the application. In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of ratification, it is important to bear in mind that the doctrine pre-supposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu law the coparceners are powerless to disown, so long as they continue to remain in the joint family. As pointed out in the very case in which these observations occur, when

---

[4] Alagappa Chettiar v. Bank of Chettinad, (1939) 26 AIR Mad 6=179 I C 308=(1938) 2 M L J 944.

[5] Russa Engineering Works v. Kanara Transport, Co., (1926) 13 A I R Mad 1138=98 I C 257=49 Mad 930=51 M L J 506.

[6] Chalamayya v. Varadayya, (1899) 22 Mad 166 =9 M L J 3.

> the contract is of a character such as under the Hindu law entitle the manager to enter into *independently of the consent of the other members of the family so as to bind them thereby*, then it is clear that the scope of the manager's power is restricted to and does not extend beyond the family property (italics ours).

It would be wholly subversive of this well-established rule of Hindu law to hold that a coparcener is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family business. If it had been shown in this case that defendant 1 pledged the individual credit of the respondents at the time when he received the deposits in question and that the respondents having come to know of the transaction accepted or acquiesced in it, it might be possible to hold them personally bound on the principle of ratification; but nothing of the kind has been proved or even suggested in this case. We have therefore no hesitation in rejecting this contention.

It remains to consider the special ground of liability urged with reference to respondent 1, namely a personal undertaking to pay in consideration of the appellants' forbearance to sue. Reliance was placed upon Exs. J, J-2 and D to show that when appellant 2 demanded the money and threatened to sue, respondent 1 wanted time for payment promising to pay the debt personally and that in consequence the filing of the suit was delayed for over a year. We are unable however to read these letters as containing any undertaking by respondent 1 to pay the debt due to the appellants personally. The letters merely explained why there was delay in the payment of the debt and gave an assurance that as soon as conditions of trade improved, arrangement would be made to pay up the debt.

Though written by respondent 1, the letters bore only the family vilasam VR. PL. M. and were signed with an invocation of the family deity, the mode usually adopted for signing family letters in accordance with the practice prevailing among Nattukottai Chetties. The letters are thus consistent with respondent 1 having merely affirmed the pre-existing liability of the family such as it was, and contain no indication of his having undertaken any additional or extended liability for the debt. Nor is there any definite request in any of them for grant of time for payment. The suit was, no doubt, brought more than a year after the latest of them, namely Ex. D, but it does not appear that this delay was due to the appellants' having granted any time for payment. Appellant 2 who was examined as P. W. 1 does not say that time was granted in compliance with the request of respondent 1; nor was such a thing suggested in the cross-examination of respondent 1. On the other hand, the allegations in para. 7 of the plaint that "On several dates after the said date (that is after Ex. D) both personally and through agents demands were made on the defendants and a demand was made lastly on 30th June 1934, all to no purpose," are plainly destructive of any such suggestion. The appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 583

LAKSHMANA RAO J.

President, Panchayat Board, Meliyaputti — Petitioner.

v.

Surapu Veeranna — Respondent.

Criminal Revn. Case No. 940 and Petn. No. 888 of 1939, decided on 22nd February 1940, to revise order of Sheristadar Magistrate, Pathapatnam, D/- 26th July 1939.

Madras Local Boards Act (14 of 1920), S. 159 — View that question of establishing Board's title to alleged encroachment is purely of civil nature is erroneous.

The view that the question of establishing the Panchayat Board's title or claim to the alleged encroachment is purely of a civil nature is obviously erroneous and the Magistrate has to decide the legality or otherwise of the notice under Section 159 (1). [P 583 C 2; P 584 C 1]

B. Jagannadha Das — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order. — The accused was prosecuted for failure to remove an encroachment in a public street and he has been acquitted on the ground that "the question of establishing the Panchayat Board's title or claim to the alleged encroachment is purely of a civil nature." This is obviously erroneous and the Magistrate has to decide the legality or otherwise of the notice under Section 159 (1), Madras Local Boards Act. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 584

PANDRANG ROW J.

John Baptist D'Souza — Petitioner.

v.

Lizzie Jane Lobo — Respondent.

Civil Revn. Petn. No. 2094 of 1939, Decided on 15th December 1939, to revise order of Dist. Court, South Kanara, D/- 6th July 1939.

Divorce Act (1869), Ss. 7, 18 and 19—Application by wife for declaration that marriage with husband was void and for maintenance—Person cannot be said to reside at place where he spends day or two when he has fixed place of residence elsewhere—But where he has no fixed place of residence place where he actually lives must be taken to be place where he resides.

A person cannot be said to reside at a place where he spent only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence, the place where he actually lives must be taken to be the place where he resides. [P 585 C 2]

A petition under Ss. 7, 18 and 19 was filed by the wife for a declaration that her marriage with her husband was null and void and for maintenance. The parties who were natives of South Canara not only belonged to Mangalore but were married in Mangalore and were living in Mangalore on more than one occasion. They lived together on two occasions after the marriage, in Mangalore once in 1934 and a second time from the end of 1937 till April 1938. The husband had been employed for many years in the Telegraph Department in Burma and had been residing most of the time at Rangoon. The petition was filed in July 1938:

Held that the couple must be deemed to have resided together in Mangalore for the last time during the period in question in the absence of proof that the husband had a fixed residence in Rangoon at the time when he was actually living together with his wife in Mangalore from February 1938 to April 1938 or that he had any house of his own or a rented house or flat in Rangoon during that period. Merely because the husband had a lien, so to say, on his post in the Telegraph Office during his leave, he could not be regarded as a resident of Rangoon during the time when he was spending his leave at Mangalore with his wife in his own house. Therefore the Court at Mangalore had jurisdiction to entertain the application. [P 585 C 1]

E. Anthony Lobo and A. Viswanathan — *for Petitioner.*

G. A. Pais — *for Respondent.*

Order.—This petition raises a question of jurisdiction, namely whether the District Court of South Canara had jurisdiction to entertain the application presented to it by the respondent in the present petition under Ss. 7, 18 and 19, Divorce Act, for a declaration that the marriage of the petitioner with the respondent is null and void and for maintenance, etc. The petition was by the wife against her husband. Both of them are natives of South Canara and as would appear from the entry in the Marriage Register relating to their marriage in 1932, both are parishioners of the same parish in Mangalore. It appears however from the evidence that the respondent, i. e. the husband, has been employed for many years in the Telegraph Department in Burma and has been residing most of the time at Rangoon. The petition was however put in in 1938 in the District Court of South Canara on the ground that both the parties had last resided together at Mangalore in South Canara in the respondent's own house at Jeppu. This fact, namely that the husband and the wife lived together from at least February 1938 to the beginning of April 1938, in the respondent's house at Jeppu, is not denied, and it is further clear that this was the period during which the two last resided together, because thereafter the husband went away to Rangoon and the wife remained behind at Mangalore till the petition was filed in July 1938. The learned District Judge after taking evidence was satisfied that the husband and the wife did last reside together in Mangalore till the respondent left Mangalore for Rangoon on 5th April 1938 and that therefore he had jurisdiction to entertain and deal with the application.

The only question that is argued in this petition is that the finding of the District Judge is wrong on the admitted facts of the case. As observed already, the admitted facts of the case show that the parties not only belong to Mangalore but were married in Mangalore and were living in Mangalore on more than one occasion. They lived together on two occasions after the marriage in Mangalore, once in 1934 and a second time from the end of 1937 till April 1938, and on the latter occasion they lived together in the respondent's own house at Jeppu. A number of rulings have been quoted but it is not possible to say that the facts of the present case are clearly covered by any one of them. While it is obvious that a person who has no fixed residence elsewhere can be regarded as residing in any place in which he is actually found, nevertheless, where there is a fixed place of residence, a temporary sojourn in another place for a few days would not make him a resident of that place and give jurisdiction to the Court having jurisdiction over that place to entertain applications under the Act. In the present case, however, it is not established that the present petitioner (i. e. the husband) had a fixed residence in Rangoon at the time when he was actually living together with his wife in Mangalore from February 1938 to April 1938. It is not established that he had any house of his own or a rented house or flat in Rangoon during this period. In fact, the evidence contained in his own letter to his wife would show that he had wound up the establishment and left his 'chokra' at the house of a friend and perhaps a few belongings also and it is clear that even for some time before he actually left Rangoon, he was getting his food from outside.

It would seem therefore that during this period when he was living with his wife in Mangalore in his own house, he had no place in Rangoon which he could call his residence. In these circumstances, can it be said that merely because he had a lien, so to say, on his post in the Telegraph Office during his leave, he must be regarded as a resident of Rangoon even during the time when he was spending his leave at Mangalore with his wife in his own house? I am of opinion that the answer to this must be in the negative. It is possible to regard a person as residing in a place where he is physically not present when he has got a permanent place of residence, but where he has no permanent place of residence or any place of residence which he can call his own available to him at all times, it is impossible to adopt the idea of a fictional residence at a place where he is not. In other words, where there is a residence, it is possible to regard a person as residing there though he is not actually present in the flesh at that place. But where there is no place of residence, this fiction is not available, and the person must be deemed to be residing in the place where he actually lives. It is impossible to allow the contention that during this particular period the respondent did not reside anywhere at all. He actually lived in Mangalore during this period and this was the period during which the couple lived together for the last time. Unless it is shown that the respondent must be deemed to have resided in a different place in the eye of the law, the actual facts established in the case—and in fact admitted —are more than sufficient to show that the couple resided together in Mangalore for the last time during the period in question. As observed already, the petitioner has failed to show that during this period he can be reasonably regarded as having resided in Rangoon or in any place other than Mangalore.

In the view I have taken, it is unnecessary to deal with the different sets of facts which arose in the various cases that were quoted to me. The only principle that I can discover from the decisions is that a person cannot be said to reside at a place where he spent only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence, the place where he actually lives must be taken to be the place where he resides. This general principle which can be gathered from the cases that were quoted to me is sufficient to cover the present case because it has not been shown that during the period when the couple lived together at Mangalore in the petitioner's own house for the last time, the petitioner can be regarded as having resided elsewhere. The petition therefore fails and it is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 585

BURN AND LAKSHMANA RAO JJ.

Narayanan Chettiar — Applicant.

v.

Chidambaram Chettiar — Respondent.

Appeal No. 460 of 1938, Decided on 6th February 1940, against order of Sub-Judge, Devakottai, D/- 7th September 1938.

Civil P. C. (1908), O. 9, R. 13 — Court cannot order applicant pending trial to deposit costs of suit or furnish security for decree amount.

Court has no power to order, pending trial of an application under O. 9, R. 13 that the applicant should deposit the costs of the suit or furnish security for the decree amount. [P 585 C 2]

T. L. Venkatarama Ayyar — *for Applicant.*

G. N. Chari — *for Respondent.*

Judgment. — The order of the lower Court cannot be upheld. The learned Subordinate Judge had no power to order, pending trial of an application under O. 9, R. 13, Civil P.C., that the applicant should deposit the costs of the suit or furnish security for the decree amount. If he had dealt with the application on its merits and had decided to grant it, merely prescribing conditions under O. 9, R. 13, no appeal would have been entertained. No such order was passed and the learned Subordinate Judge has dismissed the application merely because the security was not furnished. That he could not do. The order dismissing the application is accordingly set aside. The application must be restored to file and disposed of according to law. Costs to abide and follow the result.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 586

LAKSHMANA RAO J.

In re T. Palaniswami Goundan and others — Appellants.

Criminal Appeal No. 653 of 1939, Decided on 6th March 1940, against order of Sess. Judge, Coimbatore, in Case No. 133 of 1939.

Penal Code (1860), Ss. 325 and 302—Several accused found guilty of rioting — One of them beat deceased on head with stick — Other accused causing injuries to deceased on head by throwing stone at him — Latter accused held could at best be convicted under S. 325 and not S. 302.

Several persons created a disturbance and were found guilty of rioting under S. 147, Penal Code. The deceased who had intervened received fatal injuries. One of the accused beat the deceased on the head with a stick while another picked up a stone from the scene of the crime and caused injuries to the deceased on the head by throwing the same at him :

Held that the latter accused was at best guilty of voluntarily causing grievous hurt under S. 325 and his conviction under S. 302 was not justified. [P 587 C 1]

K. S. Jayarama Aiyar for K. Periaswamy Gounder — *for Appellants.*

The Public Prosecutor — *for the Crown.*

Judgment. — There was a disturbance near the houses of P. Ws. 5 to 15 at Vengipalayam about 8 P. M. on 29th January 1939 and one Swami Goundan who intervened was fatally wounded. Grievous hurt was caused to P. Ws. 6 and 7 and simple hurt was caused to P. Ws. 5 and 8 to 15. The occurrence was reported to P. W. 18, the Village Munsif, without delay, and Swami Goundan died next morning of coma due to a depressed fracture of the frontal bone caused by a stone. He had also another injury on the head due to beating with a stick and P. W. 6 had two injuries on the head due to beating with sticks. The frontal bone at the base of one of these injuries was fractured and P. W. 7 had a contusion covering the outer side of the lower third of the left arm and elbow, with simple fracture of the left humerus.

The appellants are stated to have gone in a body and created the disturbance and all of them have been convicted under S. 147, I. P. C. Appellant 5 is alleged to have caused the fatal injury of the deceased by striking with a stone picked up from the scene of crime, and he has been sentenced to transportation for life under S. 302, I. P. C., for the murder of Swami Goundan. Appellant 1 is stated to have beaten him on the head with a stick and he has been sentenced to rigorous imprisonment for six months under S. 323, I. P. C. Appellants 2 and 3 are alleged to have beaten P. W. 6 on the head with sticks and they have been sentenced to rigorous imprisonment for two years under S. 325, I. P. C., for voluntarily causing grievous hurt to him. Appellant 1 is also alleged to have beaten P. W. 6 on the body with a stick and he has been sentenced to rigorous imprisonment for six months under S. 323, I. P. C., for causing hurt. Appellant 3 is also stated to have caused the fracture of the left humerus of P. W. 7 by beating with a stick and he has been sentenced to rigorous imprisonment for two years under S. 325, I. P. C., for voluntarily causing grievous hurt to P. W. 7. The other appellants have been sentenced to rigorous imprisonment for 18 months under Ss. 149 and 325, I. P. C., for the grievous hurt caused to P. W. 7 and appellant 4 has been sentenced to rigorous imprisonment for six months under S. 323, I. P. C., for causing hurt to P. W. 9. Appellant 8 has been sentenced to rigorous imprisonment for six months under S. 323, I. P. C., for causing hurt to P. W. 12 and the sentences have been directed to run concurrently.

That the appellants created the disturbance and are guilty of rioting under S. 147, I. P. C., was not disputed in this Court, nor were the findings of the Additional Sessions Judge regarding the beating of P. W. 6 on the head by appellants 2 and 3 and on the body by appellant 1, the assault of P. W. 7 on the left arm with a stick by appellant 3 and the beating of P. Ws. 9 and 12 by appellants 4 and 8 seriously questioned. There is also no reason to doubt the beating of the deceased on the head with a stick by appellant 1 but the story of P. Ws. 5, 6, 9 and 10 that the fatal injury on the deceased was caused by appellant 5 by beating with a stone in his hand is belated and considering that appellant 5 had given evidence against these witnesses previously it would be unsafe to accept their statement. He must have thrown a stone at Swami Goundan and as rightly conceded he would at best be guilty of voluntarily causing grievous hurt under S. 325, I. P. C. Appellant 1 would unquestionably be guilty under S. 323, I. P. C., for causing hurt to the deceased and P. W. 6, and appellants 4 and 8 would be guilty under S. 323, I. P. C., for causing hurt to P. W. 7 as he must have known that beating with a stick on the left forearm is likely to fracture the humerus and the rest would be guilty of that offence under S. 149, I. P. C. But of the two injuries on the head of P. W. 6 only one was grievous and it is not possible to say whether appellant 2 or 3 caused that injury. Neither of them can therefore be convicted under S. 325, I. P. C., and the conviction of both can only be under Section 323, I. P. C.

The conviction of appellant 5 under S. 302, I. P. C., is therefore set aside and he is convicted under S. 325, I. P. C., for the assault of the deceased. The conviction of appellants 2 and 3 under S. 325, I. P. C., for the assault of P. W. 6 is set aside and they are convicted under S. 323, I. P. C. The other convictions of all the appellants are confirmed and considering that he was not even armed appellant 5 is sentenced to rigorous imprisonment for 18 months under S. 325, I. P. C., for the assault of the deceased. Appellants 2 and 3 are sentenced to rigorous imprisonment for six months under S. 323, I. P. C., for the assault of P. W. 6 and the sentence of appellant 3 under S. 325, I. P. C., for the assault of P. W. 7 is reduced to rigorous imprisonment for 18 months. The other sentences are confirmed and all the sentences will run concurrently.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 587

LAKSHMANA RAO J.

Public Prosecutor — Appellant.

v.

Mahommad Abdullah and another — Respondents.

Criminal Appeal No. 239 of 1939, Decided on 20th March 1940, against order of Joint Magistrate, Negapatam, in Cri. Appeal No. 1 of 1939.

Emigration Act (1922), Ss. 30 (3) and 25 (2) (b) — Word 'assist' is not confined to financial assistance or entering into agreement to work for hire—Unskilled labourers not permitted to embark in steamer to Penang—Accused offering to send them to Penang by other steamer from different place and seeing them off—Conviction under Ss. 30 (3) and 25 (2) (b) is justified.

The word "assist" in Ss. 30 (3) and 25 (2) (b) is not confined to financial assistance or entering into an agreement to work for hire. [P 587 C 2]

The unskilled labourers who were bound for Penang were not permitted to embark at Negapatam. Their steamer fares were refunded and the accused offered to send them to Penang by a French steamer from Karaikal. The labourers paid the required amount to accused 1 and he secured the steamer tickets and sent them to Karaikal with the second accused who saw them safely into the boats which took them to the steamer:

Held that the accused were punishable under S. 30 (3) read with S. 25 (2) (b). [P 587 C 2]

Appellant in person.

T. R. Srinivasa Aiyer—*for Respondents.*

Judgment. — This is an appeal by the Provincial Government against the appellate order of acquittal of the respondents of an offence under S. 30 (3) read with S. 25 (2) (b), Emigration Act. The respondents were running a viduthi or rest house at Negapatam and as found by the Courts below, P. Ws. 1 to 5, the unskilled labourers who were bound for Penang and lodging in the viduthi, were not permitted to embark at Negapatam. Their steamer fares were refunded and the respondents offered to send them to Penang by a French steamer from Karaikal. P. Ws. 1 to 5 paid the required amount to respondent 1 and he secured the steamer tickets and sent them to Karaikal with respondent 2. Respondent 2 saw them safely into the boats which took them to the steamer, and as urged by the Public Prosecutor the respondents undoubtedly assisted P. Ws. 1 to 5 to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea which is made punishable under S. 30 (3) read with S. 25 (2) (b), Emigration Act. The view of the joint Magistrate that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted and the order of acquittal is unsustainable. The order of acquittal is therefore set aside and the respondents are convicted under S. 30 (3) read with S. 25 (2) (b), Emigration Act. The offence is serious and the respondents were sentenced to a fine of Rs. 100 each by the trial Court. They are therefore sentenced to a fine of Rs. 100 each with simple imprisonment for six weeks in default and one month is allowed for payment.

C.R.K./G.N. *Order set as wed.*

A. I. R. 1940 Madras 588

VARADACHARIAR J.

Koka Audinarayana Rao Naidu — Petitioner.

v.

Bhavaraju Lakshminarayana Rao — Respondent.

Civil Revn. Petn. No. 1248 of 1936, Decided on 22nd February 1939, to revise decree of Dist. Court, Ganjam in C. M. A. No. 66 of 1935.

(a) Principal and Agent—Suit by principal for accounts against agent residing elsewhere—Cause of action cannot be said to arise at place where principal resides.

The principle that debtor is bound to seek out his creditor and pay his debt is not applicable in India for the purpose of determining the local jurisdiction of particular Courts. Even assuming that the English rule either in terms or by analogy could be applied in India, the rule cannot be extended to the case where the contract itself is not one of loan but of agency. Hence, where a principal sues the agent for accounts it cannot be said that the cause of action arises at the place where principal resides: *A I R 1924 All 530, Rel. on; A I R 1927 P C 156, Expl.* [P 588 C 2]

(b) Contract Act (1872), S. 213—Words "on demand" suggest that demand should be made on agent at his place of business.

Section 213 imposes the duty on the agent to render accounts "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. [P 589 C 1]

B. Jagannadha Das — *for Petitioner.*

Ch. Raghava Rao and M. Sriramamurthi — *for Respondent.*

Order. — This civil revision petition arises out of a suit for accounts filed by a principal against his agent. Both the Courts have held that no part of the cause of action arose within the limits of the Chicacole Munsif's Court's jurisdiction and the plaint has been returned for presentation to the proper Court, as the conditions of cls. (a) and (b) of S. 20, Civil P. C., are not satisfied in the present case. The learned counsel for the petitioner contends that either as a matter of law or even as an inference of fact as to the intended place of performance of the contract, I should hold that the cause of action arose in whole or in part within the Chicacole Court's jurisdiction. I am unable to accede to this contention. As pointed out by the learned District Judge, the reasoning in 46 All 465,[1] where a very similar question arose, is clearly in favour of the view taken by the Courts below.

Mr. Jagannadha Das, the learned counsel for the petitioner, has mainly relied on the decision of the Judicial Committee in 5 Rang 451.[2] I am not able to accept his interpretation of that judgment. It is difficult to read that decision as laying down that as a rule of law, the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in this country, even for the purpose of determining the local jurisdiction of particular Court. Their Lordships have taken care to indicate at the end of the judgment that their decision was based upon the inference drawn from the terms of the contract itself or from the necessities of the case. In an earlier part of the judgment, they referred to the fact that the business transactions out of which the outstanding debts arose in that case took place in Rangoon, where a branch of the plaintiff's firm was situate, and from this circumstance and from the nature of the contract, they seem to have drawn the inference that the parties must have intended by necessary implication that the moneys were to be paid in Rangoon. Even assuming that the English rule either in terms or by analogy could be applied in this country, I am unable to extend it to a case like the present, which did not arise out of the relationship of debtor and creditor. Where the contract itself is one of loan, it might be possible to presume that payment must have been intended to be made at the creditor's place. But here the contract was one of agency and it is not disputed that though the principal was resident at Chicacole, the agent who was a resident of Coconada was to attend to business to be done at Coconada.

It seems to be necessary to emphasize the distinction between the contract itself and legal obligations or liabilities incidental to the contract of principal and agent; within the meaning of S. 182, Contract Act, the agent was employed to do acts for the principal at Coconada. The legitimate inference therefore is that the contract was to be performed at Coconada. It is only as one of the legal incidents arising out of the relationship of principal and agent that S. 213 provides that an agent is bound to render proper accounts to the principal. This cannot be read as if there was an express contract between the parties to render accounts so as to support the inference that the intention must have been to render the account at the principal's place.

---

[1] Tika Ram v. Daulat Ram, (1924) 11 AIR All 530=80 I C 661=46 All 465=22 A L J 591.

[2] Soniram Jeetmul v. R. D. Tata and Co. Ltd., (1927) 14 AIR P C 156=102 I C 610=54 I A 265=5 Rang 451 (P C).

It is also noteworthy that the Section imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. Every consideration of convenience is also in favour of that view because the books relating to the business of the agency and all material information in connexion therewith might naturally be expected to be available at the place of business of the agency.

Mr. Jagannadha Das contended that if on the taking of accounts it should be found that money was payable by the agent to the principal, the relationship of debtor and creditor would arise between the agent and the principal. But it is equally conceivable that on the taking of accounts it might be found that money would be payable by the principal to the agent. It does not therefore seem to me right to base any inference as to the intended place of performance on the possible result of the taking of accounts. It is the nature of the main contract that must determine the intended or presumed place of performance. The suit itself has been rightly framed as a suit for accounts and it is on that basis that the question of jurisdiction must be determined. I am of opinion that the Courts below were right in the view they took that no part of the cause of action arose at the principal's place of residence, in the circumstances of the case. The revision petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 589

HORWILL J.

Puzhakkrat Kozhuvammal Ammad and another — Appellants.

v.

Cheriath Manayil Paru Amma — Respondent.

Second Appeal No. 1150 of 1936, Decided on 12th December 1939, against decree of Dist. Court, North Malabar, in A. S. No. 73 of 1936.

(a) Civil P. C. (1908), S. 35—Order for costs —Second appeal lies where lower Courts apply wrong principles or there is error of law in awarding costs.

Where in the Courts below wrong principles have been applied or there is some error of law in awarding the costs, then the High Court can interfere in second appeal. [P 589 C 2]

(b) Civil P. C. (1908), S. 35 — Costs are discretionary with trial Court—Discretion can be interfered with in appeal only when it is improperly exercised.

The trial Court has a discretion in the matter of costs and that discretion should only be interfered with in appeal if the trial Court has exercised its discretion improperly. The Appellate Court should not consider the matter of costs as if it had been trying the suit itself. [P 589 C 2]

K. Kuttikrishna Menon — *for Appellants.*

K. P. Ramakrishna Ayyar — *for Respondent.*

Judgment.—A suit was brought for redemption and was decreed, the mortgagee being ordered, for special reasons stated by the trial Court, to personally pay the costs of the plaintiff. On this question of costs an appeal was preferred to the District Court; and the District Judge came to the conclusion after considering the facts of the case that the defendant should not have been called upon to personally pay the costs. It is contended that no second appeal lies against an order for costs and certain authorities have been quoted; but there can be no doubt that if in the Courts below wrong principles have been applied or there is some error of law in awarding the costs, then this Court can interfere in second appeal. If in the present case, for example, I can be satisfied that the lower Court had considered the matter from the right point of view and had found after consideration of the facts that the first Court had wrongly exercised its discretion, then it would not be open to me to interfere with the lower Court's finding. It is argued that the lower Appellate Court misunderstood the facts upon which its decision was based; but even if it did not, it does not seem that the lower Appellate Court considered the question of costs from the right angle. The trial Court has a discretion in the matter of costs and that discretion should only be interfered with in appeal if the trial Court has exercised its discretion improperly. It nowhere appears in the judgment of the lower Appellate Court that the District Judge asked himself whether the trial Court had properly exercised its discretion. He clearly considered the matter of costs as if he had been trying the suit himself. That was not the proper way of approaching the question. The appeal is therefore allowed and the first appeal remanded to the District Court of North Malabar for fresh disposal. The Appellate Court will have full liberty to reconsider the facts bearing on this question. The costs of this appeal will abide the result. The Court-fee paid in this Court to be refunded.

C.R.K./G.N. *Appeal allowed.*

* A. I. R. 1940 Madras 590

KING AND LAKSHMANA RAO JJ.

Subhadrammal—Appellant.

v.

Kannammal—Respondent.

City Civil Court Appeal No. 28 of 1939, Decided on 21st February 1940, against decree of Addl. Judge, City Civil Court, Madras, D/- 7th March 1939.

*** (a) Provident Fund Rules, R. 17, Note 1—Hindu wife obtaining decree for separate maintenance from husband is not judicially separated from husband.**

The main purpose of the rules is to preserve for the members of the depositor's family the right to receive his Provident Fund and the framers of the Rules have not intended to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and there is no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to husband's conduct should for any purpose be considered as outside the list of those who are entitled to benefit under the rules. [P 591 C 1, 2]

(b) Provident Fund — Proceeding to recover provident fund after depositor's death—Parties need not obtain succession certificate.

The parties to a proceeding to recover provident fund after depositor's death are under no liability to obtain any succession certificate; the amount vests in them upon the death of the depositor. [P 591 C 2]

A. V. Viswanatha Sastry and S. Amudachari — *for Appellant.*

A. Subramaniam and C. Vedagirirama Sastry — *for Respondent.*

King J. — The subject-matter of this appeal is the sum standing to the credit of one D. G. Chetty in Provident Fund. D. G. Chetty was a Government servant who died in the year 1937. In 1928, the present plaintiff, who is D. G. Chetty's widow filed a suit against him for separate maintenance and in May 1929 was given a decree. In August 1929, D. G. Chetty made a fresh nomination under the rules of the Provident Fund by which he appointed defendant 1 his mistress, as the person entitled to receive the amount of the fund in case of his death. The question before us is whether the plaintiff or defendant 1 is entitled to this money, or to put it in other words, whether the nomination made by the subscriber in August 1929 is a valid nomination under the rules or not. The learned Additional City Civil Judge has held that the nomination is valid and comes within the scope of Note 1 to R. 17. R. 17 deals with the disposition of a provident fund upon the death of a subscriber before retirement and mentions the various contingencies which will arise. Under Note, 1, it says that:

> A husband may make a written application for the exclusion of his wife from participation under cl. (b), if she has been judicially separated from him ....

The question before us can therefore once again be stated in this way. "Is a Hindu wife who has obtained a decree for separate maintenance judicially separated from her husband?" If she is judicially separated from him, it is conceded that the nomination in this case is within the powers of the depositor under the rule. If she has not been, the effect of the Provident Fund Rules is to vest the whole of his fund in the plaintiff. The learned Additional City Civil Judge holds that the words 'judicially separated' in this note must be given an extended meaning. In para. 32 in setting out the argument of the learned Advocate for defendant 1, he says that "judicially separated" has to be interpreted as "meaning and including the judicial recognition or adjudication of the right of a person to live separately from her spouse." The learned City Civil Judge then goes on to point out various analogies between the position of a Hindu wife who has obtained a decree for separate maintenance and a Christian wife who has obtained a decree for judicial separation in the technical sense. We are emphatically of opinion that in arriving at the meaning of the words "judicially separated," we must take their technical meaning rather than a more popular and extended meaning unless there are very good reasons shown to the contrary from an analysis of the Provident Fund Rules themselves. The expression "judicial separation" and its cognate form "judicially separated" are not expressions to be found in the ordinary language. They are expressions of the law with a distinct and exact technical meaning. It is impossible in technical language to speak of a Hindu wife or husband as being judicially separated from one another. No doubt, if the words were construed apart from their legal context, it might be possible to say that when a Judge holds that a wife was justified in living apart from her husband, she had been separated from her husband by judicial action. But, as we say, there must be cogent reasons to compel up to adopt any such extended meaning for these words.

When we examine the Provident Fund Rules as a whole, we are led to the irresistible conclusion that their main purpose is to preserve the rights of the family of the subscriber to receive his provident fund in the event of his untimely death. The word 'family' is defined in the rules and of course includes the depositor's wife. We think that there must be some strong reasons why a person who is still a member of the depositor's family should be excluded from the benefit of these rules. According to the interpretation which the learned advocate for the respondent would have us adopt, the plaintiff, although she has herself suffered ill-treatment from her husband, has to be excluded from the benefit of these rules. We can see no reason why if the general purpose of the Provident Fund Rules is to ensure that a depositor's fund shall go in the absence of other members of his "family" to his wife, the fact that a wife has been driven by her husband's conduct to live apart from him and to sue for the maintenance to which she is entitled as a wife, should prevent her from receiving the amount of his provident fund after his death. The provisions of the law with regard to judicial separation are contained in Ss. 22 to 25, Divorce Act, (4 of 1869). According to S. 22 a decree for judicial separation is to replace a decree which had theretofore been in force for a divorce *a mensa et toro*. According to S. 24 :

> In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

According to Section 25 :

> In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into or done, omitted or incurred by her during the separation.

Under S. 23, a decree for judicial separation may be granted on the application of either the husband or the wife. As already mentioned, the learned City Civil Judge has drawn several analogies between the position of a Hindu wife who obtains a decree for separate maintenance and a Christian wife who obtains a decree for judicial separation under the Divorce Act. But this analysis of the Sections of the Divorce Act shows that judicial separation is a separation far wider than the relationship existing between a Hindu husband and wife in the situation of the depositor and the plaintiff in this case. We think that the first note to R. 17 of the rules was inserted not in order to give the depositor wider latitude in the disposition of his own property, but in order to exclude for the purposes of the rules a wife who has been in the strict sense of that term "judicially separated" because such a wife although not completely divorced from him and therefore not completely excluded from his family, is yet, partly excluded from his family, to the considerable extent shown by the various Sections to which we have referred. A Christian wife judicially separated from her husband is therefore very near in status to a stranger, and we think the intention of the framers of the rules of the provident fund must have been to allow the depositor to ignore her as if she had been completely divorced from him.

When we look at the rules from this point of view, that their main purpose is to preserve for the members of the depositor's family the right to receive his provident fund, we can see no reason to think that the framers of the rules would have intended to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and we can see no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should for any purpose be considered as outside the list of those who are entitled to benefit under the rules. We accordingly are of opinion that the decision of the learned Additional City Civil Judge is wrong, and that this appeal must be allowed and that the plaintiff's suit with respect to the provident fund must be decreed with costs throughout. The learned Additional City Civil Judge has appended a note to para. 43 of his judgment to say that

> the decree in this suit shall not be treated as exonerating either the plaintiff or defendant 1 or defendant 2 from obtaining the necessary certificate under the Succession Act or the Administrator General's Act.

It was, in our opinion, quite unnecessary for this note to have been added to the judgment. The parties to a proceeding of this kind are under no liability to obtain any succession certificate; the amount vests in them upon the death of the depositor.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 592

HORWILL J.

Pandita Viswanadha Yegneswara Sastri — Appellant.

v.

Secretary of State — Respondent.

Second Appeal No. 1052 of 1936, Decided on 1st December 1939, against decree of Sub-Judge, Cocanada, in Appeal Suit No. 216 of 1935.

Madras Revenue Recovery Act (2 of 1864), S. 58—Suit for declaration that area of land was wrongly estimated and that therefore Revenue authorities arrived at wrong assessment is barred.

Suit for declaration that the area of plaintiff's land has been wrongly estimated by the Revenue authorities and that they therefore arrived at a wrong figure in regard to the assessment due by him is barred by S. 58. Even if S. 58 does not operate as a bar to the granting of a declaration as to the area, it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of S. 58. [P 592 C 1, 2]

D. Narasa Raju and P. S. Sarma — *for Appellant.*

B. Sitarama Rao, Government Pleader— *for Respondent.*

Judgment. — The plaintiff's contention seems to be that the area of his land has been wrongly estimated by the Revenue authorities and that they therefore arrived at a wrong figure in regard to the assessment due by him. The trial Court dismissed his suit on the ground that a Civil Court was prohibited by S. 58, Revenue Recovery Act, from considering the question raised by the plaintiff and that decision was upheld in appeal. There is no doubt in my mind that the lower Courts were right. In disputing the area of his land the plaintiff is disputing the amount of the assessment; for the assessment is calculated on the basis of the areas of wet and dry lands. It is realized by the learned advocate for the appellant that to some extent S. 58 acts as a bar; but the plaintiff is now willing to forgo his claim to a refund of what he alleges to be an excess assessment and is prepared to confine his appeal to his right to a declaration that the area of his land is 25·35 acres and not 27·91 acres as shown in his patta. S. 58 does not merely prohibit the passing of a decree with regard to assessment; but also prohibits a Civil Court from taking into consideration or deciding any question as to the amount of the assessment fixed. In considering whether the area is 25·35 acres or 27·91 acres, the Court is necessarily deciding a question with regard to the amount of assessment. After all, what the plaintiff is interested in is not so much the area of the lands shown in his patta as the amount of assessment that he has been called upon to pay.

Even if S. 58 does not operate as a bar to the granting of a declaration as to the area, it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of Section 58, Revenue Recovery Act. The learned advocate for the appellant has quoted several authorities which he considers to be helpful, but I will only refer to the two upon which he lays most stress. The first is 27 Mad 386,[1] which was a case in which the revenue authorities taxed a man for encroachment of his pials on a public road. It was there held that the Government had no right to assess such encroachment and that a Civil Court was entitled to say so. The remark in judgment of Bhashyam Ayyangar J. is relied upon:

> Civil Courts have jurisdiction to decide whether or not the land or person is at all under liability to be assessed for land revenue.

That is true; if in the present case the wrong area were due to the fact that the Government had insisted on including some item of land in his patta which was not his at all, then the plaintiff would no doubt have some cause of action in a Civil Court. 48 Mad 282[2] is a decision of Devadoss and Jackson JJ. which has been overruled by their Lordships of the Privy Council and is not therefore of much value as an authority. In so far as that judgment referred to the effect of S. 58, Revenue Recovery Act, their Lordships of the Privy Council said that they expressed no opinion. Devadoss J. said on that point:

> Such assessment being illegal and ultra vires, the plaintiff is not debarred from bringing this suit by the provisions of S. 58, Revenue Recovery Act.

If the revenue authorities had acted ultra vires, by assessing some property on which they had no right to levy assessment—such as was found to be the case in 27 Mad 386[1] — then no doubt a Civil Court can say so. The appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

[1] Madathapu Ramaya v. Secy. of State, (1904) 27 Mad 386.

[2] Secy. of State v. Ramanujachariar, (1925) 12 A I R Mad 355=85 I C 419=48 Mad 282=47 M L J 780.

** A. I. R. 1940 Madras 593

SPECIAL BENCH

LEACH C. J., KING AND
KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras — Petitioner.

v.

V. Nadimuthu Pillai — Assessee — Respondent.

O. P. No. 220 of 1937, Decided on 23rd February 1940; reference by Commissioner of Income-tax, Madras.

**** (a) Income-tax Act (1922), S. 4 (2) — Assessee, a resident of British India, owning immovable property in Saigon in Indo China — Assessee keeping account with bank at Saigon and having right to overdraw to certain limit — Assessee paying his net income in his account with bank and reducing amount of over-draft —In year of account assessee withdrawing certain sum less than net income and remitting it to British India—Remittance held remittance of profit within meaning of S. 4 (2).**

Assessee, a resident of Tanjore District, owned immovable property in Saigon in Indo China from which he derived income in the shape of rent. He had kept an account with a bank in Saigon in Indo China and had the right to overdraw it to certain limit. In the year of account he paid out of his net income into his account and reduced his overdraft to certain extent. While the overdraft was still at that figure he withdrew certain sum which was less than the net income and remitted it to British India:

Held that the remittance could not be treated merely as a remittance of the proceeds of a loan. The remittance could be properly assessed under S. 4 (2) as a receipt of foreign income in British India: *Case law discussed.* [P 595 C 1]

(b) Income-tax Act (1922), S. 4 (2)—In order to attract provisions of S. 4 (2) it is not necessary that assessee should receive profits in India in exact form in which they were made.

A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits, but because he brings or receives them into British India. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them in India substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted. [P 596 C 1]

(c) Income-tax Act (1922), S. 4 (2)—Available profits more than sufficient to cover remittance — Remittance is presumed to be out of profits.

If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittances came out of the profits, though ultimately the question to a large extent is one of fact: *(1935) 19 Tax Cas 41, Rel. on.* [P 597 C 1]

K. V. Sesha Iyengar — *for Petitioner.*
T. R. Venkatarama Sastriar and M. Subbaraya Iyer — *for Respondent.*

1940 M/75 & 76

Leach C. J. — The assessee derives income from immovable property, trade in cloth, money lending and other sources existing within the jurisdiction of the Income-tax Officer, Tanjore Circle. He is also the owner of considerable house property in Saigon in Indo China. For some years he has kept an account with the Saigon branch of the Banque Franco-Chinoise and has the right to overdraw it to the limit of $50,000. On 1st April 1935 his overdraft amounted to $20,149. It is unnecessary to embark on an inquiry into the purposes for which the $20,149 was used, but it is common ground that it was used in part for paying for repairs to the assessee's properties in Saigon and meeting taxes levied thereon. The period of account was the year from 1st April 1935 to 31st March 1936 and the assessee's net income from his Saigon properties during that year was $18,414. As the result of payments into his account of the income from these properties he had reduced his overdraft to $12,165 by 30th November 1935. On 7th December 1935, while the overdraft still stood at that figure. he withdrew from the account a further sum of $5719, the equivalent of Rs. 10,000. The $5719 represented a remittance which he made to British India, and the question which the Court is called upon to decide is whether this remittance represents a remittance of profits derived from his Saigon properties. After making the remittance the assessee continued to draw on the account for various purposes and to make payments in from the rents he received in Saigon. The payments into the account from 7th December 1935 to the end of the financial year amounted to $11,570 and the year closed with his overdraft standing at the figure of $9441. It is conceded by the assessee that the $11,570 has been rightly treated as being net income.

The assessee says, however, that the payments into his banking account both before and after 7th December 1935 should be treated as payments in reduction of the overdraft. He contends that inasmuch as throughout the year he was still overdrawn, in spite of his payments into the account from the income from his properties, the income-tax authorities are bound to treat the remittance of $5719 on 7th December 1935 as being a remittance of borrowed money. In the course of his argument Mr. Venkatarama Sastriar admitted that if the overdraft had been completely discharged by payments in of further profits after the new financial year commenced, the position would have been different but the overdraft had not been paid off. On the other hand, the income-tax authorities say that the true position cannot be gathered by treating the payments into the account and the withdrawals as being entirely separate transactions. They maintain that the net result of the assessee's payments in and his withdrawals from the account is that he has reduced his overdraft by $12,695 and has remitted the balance of his total profits ($18,414 less $12,695) to British India.

I am unable to accept as being correct the contention of the assessee that payments into the account from his profits must be treated as separate transactions and regarded in toto as payments in reduction of the overdraft. I consider that the income-tax authorities are right in saying that the account must be examined as a whole and that when this is done the remittance cannot be treated merely as a remittance of the proceeds of a loan. The principles which govern this case are in my opinion to be found in the decisions in 6 I T C 54,[1] 8 I T R 20[2] and (1935) 19 Tax Cas 683.[3] In 6 I T C 54,[1] a Bench of three Judges of this Court considered the case of a Nattukottai Chetty firm which was carrying on a banking business in Rangoon and Saigon with headquarters at Karaikudi in the Madras Presidency. The assessee firm received in Rangoon, which was then in British India, a sum of Rs. 1,00,000 from its agent in Saigon. The agent had been instructed by the office at headquarters to borrow and remit that amount to the Rangoon branch. The remitted sum was made up of borrowings amounting to $59,000 and the realization of outstanding loans. The question was whether the $59,000 represented a remittance of foreign profits. It was found that the Saigon branch had accumulated profits which were more than sufficient to cover the remittance and that it had repaid the whole of the borrowed amount within 28 days. It was held that the $59,000 represented in these circumstances a remittance from profits and not from capital. In 8 I T R 20,[2] this Court applied the same principle.

The facts in 19 Tax Cas 683[3] are very similar to the facts in the present case. The assessee there had plantations in Ceylon and during each of the years ending 5th April 1928 and 5th April 1931 was for more than six months resident within the United Kingdom. In the year ending 5th April 1928 he received from his agents in Ceylon for the credit of his account with the National Bank of India, Limited, in London, a total sum of £2200, and in the year ending 5th April 1931 a total sum of £1400. His income from his plantations in Celyon during these two years was more than sufficient to meet the cost of the remittances. During the whole of the time when the remittances were taking place the assessee was indebted to his agents in Ceylon with whom he had an account. The account started with a debit balance of some Rs. 35,000 and ended with a debit balance of some Rs. 7000. In the interval between the commencement and the end of the account there were very great variations, some upwards and some downwards, but at all material times the assessee had an overdraft with his agents. There were other transactions which affected the amount of the balance from time to time, but in so far as the balance was reduced, the reductions were due to no other cause than the payment into the account of income from the assessee's possessions in Ceylon. The case was decided by the Court of Session in Scotland and the Lord President (Lord Normand) stated that he was unable to understand on what principle the assessee was to escape income-tax

> upon the income arising from his Ceylon possessions on the full amount of the actual sums being remittances received by him in this country and ultimately traceable to his income.

The Lord President went on to observe:

> It is suggested that the mere existence of an overdraft precludes his liability to tax on the ground that any money paid out of an overdraft and remitted to this country is the money of the lender and not of the recipient. Learned counsel for the appellant did not hesitate to say that that would apply although there was a very large income in Ceylon, and an overdraft was specially arranged for the purpose of bringing this alleged principle into play. I am quite unable to accept that proposition. A man may have an income in Ceylon and may receive remittances of that income in this country through an account in which he is debtor during the whole period in which the remittances are made. There is no difference between income arising from Ceylon and income arising from this country in that respect. A man may have an income and still be in debt, and the amount of his income may be remitted to him through the hands of his creditor. I can see nothing in (1935) 19 Tax Cas 33,[4] which is in any way

---

[1] V. V. R. Firm v. Commissioner of Income-tax, Madras, (1932) 19 A I R Mad 573 = 139 I C 173=63 M L J 227=6 I T C 54 (S B).

[2] Commissioner of Income-tax, Madras v. Meyyappa Chettiar, (1940) 27 A I R Mad 416 =(1940) 1 M L J 543=(1940) 8 I T R 20 (SB).

[3] Fellowes Gordon v. Commissioners of Inland Revenue, (1935) 19 Tax Cas 683.

[4] Kneen v. Martin, (1935) 1 K B 499 = 104 L J K B 361=152 L T 337=19 Tax Cas 33=79 S J 31.

inconsistent with what I have just said. It is perfectly true that it may not be sufficient to say that you had an income in Ceylon and you have received remittances of less amount than that income in this country. But here the reasonable inference is that what was received in this country was not derived from some realization of capital or from some capital account, but was in truth derived from the income arising from possessions in Ceylon, and I think that the Commissioners, on the facts of the case, were entitled to arrive at the conclusion at which they did arrive, and that the appeal should be dismissed.

As in that case the assessee in the present case had a debit balance with his bankers at the beginning of the period and a debit balance of lesser extent at the end of the period and it is not suggested, nor can it be, that the inference may here be drawn that the remittance was from the realization of capital. The assessee had made profits in Saigon far in excess of his remittance to British India. By merely increasing his overdraft to pay for the remittance does not mean that the remittance was in substance a remittance of borrowed money. Having made the remittance the assessee paid into the account out of his profits from his properties in Saigon far more than was necessary to meet the cost of the remittance. The Court must look at the substance of the transaction, and if it does that, I consider the proper conclusion to be drawn is that there was here a remittance of profits. If the assessee's contention was to be accepted it would mean that by manipulating an overdraft account kept abroad and keeping it permanently in debt an assessee would be able to escape taxation of his remittances of profits. The test is from where did the money for the remittance come and in the words of Lord Normand it must be ultimately traceable to his income in Saigon. I can see no difference in principle between the two cases. I would answer the question referred by saying that on the facts of this case the remittance was properly assessed under S. 4 (2), Income-tax Act, 1922 as a receipt of foreign income in British India, and I would award the income-tax authorities the usual costs granted by this Court in such cases, namely Rs. 250.

King J. — I agree.

Krishnaswami Ayyangar J. — The question that has been referred for our decision is :

> Whether on the facts of this case the sum of Rs. 10,000 was properly assessed under S. 4 (2) as a receipt of foreign income in British India.

The amount mentioned represents a sum of money remitted to the assessee in British India from Saigon in French Cochin China on 7th December 1935, a date which fell within the year of account 1935-36. The income-tax authorities have included this remittance in the assessable income of the assessee, on the ground that it represented foreign profits received in British India within the meaning of S. 4 (2), Income-tax Act, 1922. The assessee objected that the remittance was not of income liable to be taxed under the Section but came out of capital being the proceeds of a loan borrowed in Saigon; and he therefore claimed that it should be excluded in the calculation of his assessable income. This contention has been negatived by the Department, but at the request of the assessee, the Commissioner of Income-tax has referred the question set out above for the opinion of this Court. The Commissioner's conclusion that the remittance was made out of profits available to the assessee in Saigon is obviously in the nature of an inference drawn from facts proved, rather than a finding on a pure question of fact. There is no direct proof adduced to establish a connexion between the profits available to the assessee in Saigon and the remittance in question, in the sense that it was wholly or in part identifiable with those profits. But such identification is not necessary, if in substance the remittance is shown to have come out of the profits, and is traceable to that source. The only question, which is of course a question of law is whether the inference drawn can be said legitimately to follow from the facts found.

The facts found are these : The assessee, a resident of the Tanjore District in this Province, owns extensive immovable properties in Saigon, in French Cochin China, from which he derives income in the shape of rents. In connexion with these properties, he has to incur expenses, for taxes, repairs, etc. It also appears from the statement furnished by the Commissioner in response to the requisition contained in our order dated 14th November 1938 that the assessee also lends and borrows moneys in Saigon. His monetary transactions are carried on through the agency of the Banque Franco Cinoise at Saigon which has allowed him an overdraft at first limited to $15,000 but subsequently increased to $50,000. Into his account with this Bank his receipts by way of income from his immovable properties are paid from time to time. Whenever the need arose he drew on the Bank, utilizing the money drawn mostly in Saigon but occasionally for remittance to this country for his use here. In the beginning of December 1935 the assessee's account with the Bank shows that he had overdrawn his account by $12,165·23. The remittance in question was, as I have said, made by the Bank on 7th December 1935 and appears as a debit in the account of $5,719·33 which is the equivalent of the Rs. 10,000. By reason of the remittance the overdraft swelled to $17,884. Further credits and debits followed according as the assessee paid in or withdrew moneys, and the account shows that there was at the end of the account year, that is on 31st March 1936, a debit balance of $9,441·70 against the assessee.

It has been found as a fact that the net income of the assessee from his Saigon properties during the account year amounted up till the date of remittance to $10,184, the total income at the end of the year being $18,184 so that whichever date is taken, there was an available income far in excess of the amount remitted. But from this circumstance alone however, it is not right to infer that what the assessee received was income and not capital. The decision in (1935) 19 Tax Cas 683,[3] most relied on by learned counsel for the Income-tax Commissioner, concedes this position. The Lord President has said in that case :

> It is perfectly true that it may not be sufficient to say that you had income in Ceylon and you have received remittance of less amount than that income in this country.

Any other view would inevitably result in consequences which the Statute could never have intended. A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits, but because he brings or receives them here. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them here substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted, though even here it is necessary to exercise caution so as to avoid the error pointed out by the Privy Council in 8 I T R 95[5] where machinery purchased in a foreign country with profits made in that country and imported into British India was held not to give rise to a case of profits received within the meaning of S. 4 (2) of the Act. The illustrations given in the last paragraph of their Lordships' judgment are instructive, and indicate the danger of regarding traceability by itself as a conclusive circumstance. On the other hand, it is equally clear that the mere existence of an overdraft cannot save foreign income from liability to taxation, as money paid out of the overdraft and remitted to this country is not necessarily the money of the lender, and may be that of the recipient. It is easy to imagine cases, where under cover of an overdraft, income might in truth be remitted and received as such. A man might so manipulate his dealings with a bank, as to leave a permanent debit balance against himself, and yet be held liable to be taxed on his remittances, if it appears that he took advantage of a banking facility as a convenient shield to conceal a receipt of profits. The position is not altered by the absence of deliberate intent, if the true nature and effect of the payments and withdrawals is such as to bring about the same result. There is no abstract rule of law to be applied generally to cases of this kind, and I do not understand the Court of Session to have laid down any such rule in the case cited. The question in each case is, what is the correct inference to be drawn and the Court is entitled to get behind appearances in order to discover the truth.

A man with profits available in a foreign country and wanting to bring them into this country may find it necessary as a measure of convenience to obtain a temporary overdraft, or resort to a temporary borrowing which he proceeds to make good immediately out of his profits. In such a case, the remittance though in *forma specifica* is a remittance of capital, it is in truth a remittance of profits, and is taxable as such. The loan or the overdraft as the case may be and its repayment by the assessee out of profits may be so connected together by proximity of time or otherwise, as to lead to the reasonable inference that the remittance was in substance a remittance of profits though to start with, it might appear or is made to appear as if it came out of a capital source. The decision of this Court in 6 I T C 54[1] and 8 I T C 20[3] are illustrations in point. Granting that ordinarily a remittance of borrowed money is not to be deemed a remittance of profits,

---

[5] Income-tax Commissioner, Bombay v. Ahmedabad Advance Mills Ltd., (1940) 27 A I R P C 36=185 I C 821=67 I A 115=(1940) 8 I T R 95 (P C).

Beasley C. J. in the former case held that the facts there present, namely the existence of available profits, the fact of the money being borrowed and remitted on the instructions of the assessee, and its repayment within 28 days out of profits collected, justified the finding that it was a remittance not of capital but of profits.

In this connexion it may be mentioned that learned counsel for the assessee fairly conceded that a remittance out of borrowed money beginning in a capital source, would be turned into a remittance of profit, the moment profits were realized and applied to the discharge of the loan. Otherwise, it would become possible for an assessee to evade forever the payment of tax on his foreign income again and again brought into this country by adopting the expedient every time of first borrowing and then utilizing his income for the repayment of the loan borrowed. The presumption underlying the decision in (1903) 4 Tax Cas 591[6] would come to the rescue of the Department in such a case to prevent the Crown being cheated out of its revenue. If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittances came out of the profits, though ultimately the question to a large extent is one of fact: (1935) 19 Tax Cas 41. If I followed Mr. Venkatarama Sastriar aright, his only point was that the conversion of what was originally a capital remittance into a remittance of profits takes place not when the remittance is made but when the profits are applied to the discharge of the loan borrowed and remitted. In my judgment it is the proposition conceded, which I think was rightly conceded, that furnishes the true ground of decision in this case.

If we are to confine attention to the transactions of the assessee with the Banque Franco Cinoice during the year of account only, the answer to the reference should in my view be in favour of the assessee. It should be mentioned at the outset that there is no suggestion in this case that the transactions with the bank were other than what they purport on their face to be. There is no reason to think that the assessee has adopted a device or invented a scheme through the instrumentality of his banking account to find a way of escape from legitimate taxation. If an inference is to be drawn against him, it must be on a proper consideration of the transactions as disclosed in the account. That his ownership of the Saigon properties and his other affairs in that place rendered it genuinely necessary or expedient for him to spend or invest his money there is beyond question. As already mentioned he has had to incur expenses for repairs, taxes, etc., and has also lent and borrowed moneys in the foreign country. These are facts which have not been disputed, and indeed they plainly appear from the evidence before the income-tax authorities. For these transactions he had drawn from his banking account in which all the withdrawals appear as debits against him. The debits amounted on 7th December 1935, the date of the remittance, to the sum of $12,165. The whole of the assessee's income during the year, as found by the Commissioner, being less than this sum, why is it to be presumed or inferred that the profits did not go in reduction of the overdraft, but were in part remitted to this country?

I can see at least two reasons against such an inference being drawn, but none in its favour. It was perfectly open to the assessee to apply his income to the discharge of his debts to the Bank on his overdrawn account, with the double advantage of saving himself from the payment of interest to the bank, and income-tax to the Crown. In the absence of evidence to the contrary, a man must be presumed to have done that which was to his advantage, rather than that would result in a detriment. In the second place, and again in the absence of anything to the contrary, when there are debits and credits in an account, the credits should be appropriated towards the discharge of the earlier debits seriatim in the order of dates. This is the rule of appropriation laid down in *Clayton's case*[7] and embodied in Ss. 59 to 61, Contract Act, and if this rule is applied to the assessee's account with the Bank, there would still remain a debit balance even after appropriating the whole of the year's income towards the debits prior to the remittance. On this footing there would be a total absence of profits from which the remittance could be deemed to have come.

With very great respect, I am unable to agree that (1935) 19 Tax Cas 683[3] furnishes a parallel governing the decision of the present case. It was proved and found in that case as in this, that the assessee had derived profits in Ceylon in the years there in question to an amount in excess of the remittances. The account produced there unlike in the present case was of a fragmentary character, showing the debit balances on the various dates of the remittances against the assessee with no information regarding the dealings in the intervening periods. It does not appear from the statement of account there produced, whether or not the whole of the opening balance on 27th April 1927 and 5th July 1930 would be wiped out if the revenue receipts for those years had been appropriated in accordance with the rule in *Clayton's case*,[7] whereas in the present case it is quite clear it is the other way about. This difference in fact strikes me as a material one capable of affording a legitimate ground of distinction. It is also to be observed that the chief arguments on behalf of the assessee in that case were (i) that the account showed a debit balance at the date of each of the remittances and (ii) that it was not material to know from what source the advances made by his agent, were repaid. I may say at once that the first point affords insufficient basis for a correct inference. The second ignores what is to my view an essential source of material information. Against these arguments, the Crown contended, I think quite rightly, that the fact that his current account with his agent was overdrawn at the dates when the remittances were made was not sufficient evidence that the remittances were from a capital source. There are indications in the judgment of the Lord President that this insufficiency influenced the decision. He has drawn pointed attention to it by observing as follows:

---

[6] Scottish Provident Institution v. Allan, (1903) A C 129=72 L J P C 70=88 L T 478=4 Tax Cas 591=19 T L R 482.

[7] (1816) 1 Mer 605=15 R R 161.

> The account starts with a debit balance of some Rs. 35,000, and it ends with a debit balance of some Rs. 7000. In the interval between the commencement and the end of the account there were great variations, some upwards and some downwards. *We are not exactly informed what other transactions took place in Ceylon which affected the amount of the balance from time to time*, but this much is certain, that, in so far as it was reduced, the reductions were due to no other cause than the payment into the account of his agents, of income from the appellant's possessions in Ceylon. It therefore appears that the income in Ceylon was in excess on the whole, of the total amount of the remittances received in this country by the appellant. That being so, I am unable to understand on what principle he is to escape income-tax upon the income arising from his Ceylon possessions on the full amount of the actual sums, being remittances received by him in this country and *ultimately traceable to his income*.

The italics are mine. There is no reference in this judgment to the principle of appropriation arising by reason of the rule in *Clayton's case*[7] or the presumed intentions of the party, as the necessary material for the application of the principle was not available. In its absence it would be perfectly legitimate to hold that the presumption arising from (1903) 4 Tax Cas 591[6] had not been rebutted, and I think that this was the real basis of the Lord President's conclusion. Otherwise, it will be difficult to reconcile the decision with what the Lord President himself stated lower down in his judgment where he pointed out that the existence of profits, and the fact of a remittance are by themselves insufficient. If the matter stood there, I should be prepared to answer the question referred in favour of the assessee. But the matter does not rest there. From the additional information furnished by the Commissioner it appears that in the year 1933-34, the assessee received a remittance of $8000 from Saigon through his Bankers and out of this amount debited in the account, a portion only, namely $1680 or Rs. 2300 had been taxed in 1934-35 as a remittance of profit, leaving a balance of $6320 untaxed in that year. According to the proposition of law conceded by Mr. Venkatarama Sastriar and referred to already, if this balance has been wiped out by the revenue receipts of the year 1935-36, it is automatically turned into a remittance from an income source though in origin it was from a capital source. The income during the account year was admittedly sufficient to discharge the whole of that balance and certainly to the extent of the whole of the remittance sought to be assessed to tax. It is this fact, which in my judgment turns the scale in favour of the Crown, and I accordingly agree in the answer given by my Lord though as I have explained, I rest my decision on a different ground.

C.R.K./D.S. *Answer in affirmative.*

---

* * A. I. R. 1940 Madras 598

SPECIAL BENCH

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras— Petitioner.

v.

Madras and Southern Mahratta Railway Co. Ltd. — Respondents.

O. P. No. 225 of 1939, Decided on 14th March 1940, Reference by Commissioner of Income-tax, Madras.

*** * Income-tax Act (1922), S. 4 — Madras and Southern Mahratta Railway Co., in accordance with contract of 1882 paying into Bank of England certain amount as its share of capital and Secretary of State undertaking to pay in London out of revenue of India interest on this amount—Guaranteed interest received by company in London in year of account held liable to assessment.**

In accordance with the contract entered into in 1882 the Madras and Southern Maharatta Railway Co. constructed, equipped and maintained the railway to which the contract related and supplied the necessary staff for its working. The Secretary of State provided the land required for the railway and also the moneys necessary for its construction and working. The company undertook to pay into the Bank of England to the credit of the Secretary of State a sum £3,000,000 and the Secretary of State undertook during the continuance of the contract to pay half yearly to the company out of the revenues of India interest at the rate of 3½ per cent. per annum on the amount. The £3,000,000 was duly paid by the company into the Bank of England to the credit of the Secretary of State, who paid to the company in London half yearly the amount required to meet the interest due. The net receipts of the undertaking were divided at the end of each year between the Secretary of State and the company in proportion to their respective shares in the capital. The distribution of the profits rested with the Secretary of State, who was entitled in calculating the surplus to deduct the equivalent in rupees of the amount he had paid to company by way of guaranteed interest in the course of the year. In the year of account the company returned certain income and in arriving at this figure, the company deducted certain amount which it had received from the Secretary of State as interest under his guarantee:

Held that all the profits of the company accrued or arose in British India and hence the guaranteed interest received by the company was liable to assessment: *(1928) 12 Tax Cas 1111, Approved; A I R 1922 Cal 503, Disapproved.* [P 601 C 2]

K. V. Sesha Ayyangar — *for Petitioner.*

Nugent Grant and C. Krishnaswami Iyer — *for Respondents.*

Leach C. J. — The assessee in this case is the Madras and Southern Mahratta Railway Co. Ltd., which was incorporated in England in 1882. The main object of the incorporation of the company was the fulfilment of a contract with the Secretary of State for India in Council for the construction and carrying on of a railway in India. After the incorporation, the contract was duly entered into and in accordance therewith the company constructed, equipped and maintained the railway to which the contract related and supplied the necessary staff for its working. The Secretary of State provided the land required for the railway and also the moneys necessary for its construction and working. All the assets of the undertaking including the rails, plant, machinery and rolling stock were to be and are his property. The company manages the railway under the supervision and control of the Secretary of State, who is empowered to appoint one member of the Board of Directors. The Court has been informed that the director appointed by the Secretary of State possesses a power of veto. By virtue of the contract of 1882 the company undertook to pay into the Bank of England to the credit of the Secretary of State a sum £3,000,000, and the Secretary of State undertook during the continuance of the contract to pay half yearly to the company out of the revenues of India interest at the rate of 3½ per cent. per annum on the amount. The £3,000,000 was duly paid by the company into the Bank of England to the credit of the Secretary of State, who has paid to the company in London half yearly the amount required to meet the interest due, but the Secretary of State has reimbursed himself at the end of the year out of the profits of the undertaking. The £3,000,000, represented the company's capital and the Secretary of State guaranteed interest on it at the rate mentioned. The contract also provided for division of the surplus profits between the Secretary of State and the company according to their respective shares in the capital of the undertaking.

The contract of 1882 continued to govern the relations between the company and the Secretary of State until 26th June 1908 when a further contract, expressed to be supplemental to the contract of 1882, was entered into. The contract of 1908 provided for the continuance of the original contract subject to certain variations and modifications. It was agreed that the capital of the undertaking should be taken to be the sum of £1,62,50,000 of which £1,27,50,000 was to be the capital of the Secretary of State, and £35,00,000, to be the capital of the company. The Secretary of State was given the right to require the company to issue new capital stock not exceeding £15,00,000 to be allotted as fully paid up to such share-holders as he might direct. This new stock was issued in the same year with the result that the amount of the company's capital became £50,00,000 the figure at which it now stands. After the issue of this new stock the capital of the Secretary of State was deemed to be £1,12,50,000 for the purpose of determining the proportion in which the profits should be distributed. All moneys received by the company in the course of the working of the railway have to be paid over to the Secretary of State. The company is not entitled to use any of the receipts of the undertaking for the purposes of meeting working expenses. These expenses are met from a grant made each year by the Secretary of State. As I have indicated the net receipts of the undertaking are divided at the end of each year between the Secretary of State and the company in proportion to their respective shares in the capital. The distribution of the profits rests with the Secretary of State, who is entitled in calculating the surplus to deduct the equivalent in rupees of the amount he has paid to the company by way of guaranteed interest in the course of the year. The surplus has always been more than sufficient to enable the Secretary of State to reimburse himself.

The reference arises out of the assessment of the company for the year 1937-38. The company returned an income of Rupees 24,36,479 for 1936-37. In arriving at this figure, the company deducted Rs. 23,33,333 which it had received from the Secretary of State as interest under his guarantee. This deduction was in accordance with the practice which had been previously followed, a practice which received the approval of the Calcutta High Court in 49 Cal 815.[1] This decision however conflicts with a later decision in England affecting the company, (1928) 12 Tax Cas 1111,[2] and it is this conflict which has given rise to the reference. The income-tax authorities say that the Calcutta decision is wrong and that the company in calculating its annual profits must include the amount of guaranteed interest received in London. In order that the question may be decided the Commissioner of Income-tax, in agreement with the company, has referred to this Court under the provisions of S. 66 (1), Income-tax Act, 1922, the following question:

> Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts dated 1st June 1882 and 26th June 1908 between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936-37 is liable to assessment in the hands of the company?

In 49 Cal 815[1] that Company was called upon to pay tax on an income of Rupees 1,72,60,595, which included a sum of Rs. 13,07,440 being the equivalent of the amount of the guaranteed interest paid in sterling by the Secretary of State on the share of the capital of the Company. For the purposes of the present reference the contract of the Company with the Secretary of State may be taken to be on all fours with the contract of the Bengal Nagpur Railway Company Limited with the Secretary of State. The Bengal Nagpur Railway Company Limited claimed that it was only taxable in respect of the amount which it received in India at the end of the year as its share of the surplus profits. A Full Bench of the Calcutta High Court held that the Company was only liable in respect of its share of the surplus profits received in return for its services in the management of the railway, and not in respect of the moneys received in London. It was considered that the payment of the guaranteed interest in London was independent of the earnings of the railway and that the repayment of the amount of the guaranteed interest constituted the payment of a debt due from the Company to the Secretary of State.

In (1928) 12 Tax Cas 1111,[2] the question was whether the Company was liable to Corporations profits tax in respect of the amount which it received from the Secretary of State as guaranteed interest. Admittedly, there is no difference in principle between assessment in England to the Corporations profits tax and assessment to Indian income-tax. It was held by Rowlatt J. that the guaranteed interest paid by the Secretary of State formed part of the Company's profits and that the recoupment to the Secretary of State out of the surplus profits represented a distribution of profits within the prohibition of deduction from profits in S. 53 (2), Finance Act, 1920. Rowlatt J. put the question this way:

> Are the profits of the Company for the purpose of Corporation profits tax the amount of their share before the Secretary of State is recouped, or are they only the balance which is left to them after the Secretary of State is recouped? That is what the question is, or to put it in another way, are they to be taxed on that balance, or are they to be taxed on the balance plus the amount of the guaranteed interest, which is only putting the same thing in another way?

In deciding the case against the Company, the learned Judge said:

> If you put it in commercial or financial language or look at it from the commercial or financial point of view, the position simply is that these share-holders have been paid out of the proceeds of the working of the railway, and the revenues of India have not paid them a penny. The money

---

[1] B. N. Ry. Co. v. Secy. of State, (1922) 9 A I R Cal 503=70 I C 46 = 49 Cal 815=27 C W N 34.

[2] M. & Sm. Ry. Co. v. Commr. of Inland Revenue, (1928) 12 Tax Cas 1111.

they have got is simply because the railway has been so successful, and for no other reason they have got it. If it had not been successful they would have got some of it from the Secretary of State for India, but that position has not arisen; or, if you use language framed more exactly with respect to tax law, this, in my judgment, is the position, that the Railway Company have earned all these profits, all their one-fifth share, or whatever it is, of the profits of the Railway Company, and it does not matter in the least that they have had to apply those profits, being profits from the working of the railway, in making good to the Secretary of State a guarantee which he had honoured provisionally in favour of the shareholders. . . . . . .The Secretary of State is recouped out of what is called the company's share of the surplus receipts and as I have pointed out, the extent of his recoupment depends upon the amount of the profits. I think that this is a distribution of profits within the prohibition in S. 53, sub-s. 2 (b), Finance Act, 1920. I think it is a distribution of profits. It is a distribution of profits in recoupment of a guarantor who guaranteed those profits—guaranteed them if you like to the shareholders, but what he guaranteed are the profits. He has guaranteed that the people who put up the capital shall have a return on the capital, and if the profits unaided give that return, the person who gives the guarantee gets them to make good his guarantee. It seems to me the very simplest case of the application of profits, after they have become profits, by way of distribution of them to make good to somebody who has taken the risk of those profits not reaching that amount.

Both the Company and the income-tax authorities accept the decision of Rowlatt J. in (1928) 12 Tax Cas 1111[2] as correctly stating the law and consequently are agreed that 49 Cal 815[1] ought not to be followed. While accepting the judgment of Rowlatt J. in (1928) 12 Tax Cas 1111[2] Mr. Grant has contended on behalf of the Company that the payment of interest on the £50,00,000 in London cannot be regarded as profits accruing or arising in British India within the meaning of S. 4, Income-tax Act, 1922. In fact this is the only point taken on behalf of the Company. As the correctness of the decision in (1928) 12 Tax Cas 1111[2] is not challenged, I fail to see any basis for the argument that the receipt of the interest in London must be taken to be income earned there. The decision of Rowlatt J. emphatically negatives the contention. The basis of his judgment is that all the profits of the undertaking are earned in India and the payment by the Secretary of State in London is merely a provisional payment which he recovers out of the profits in India. There are cases arising under the Income-tax Act, which also militate against Mr. Grant's contention. In 5 I T C 108,[3] the Bombay High Court had to consider whether S. 4 (1), Income-tax Act, 1922, applied in these circumstances. A company registered in Indore, a Native State, entered into an agreement with a firm in Bombay under which the firm was to open and maintain at the company's expense shops in Bombay and elsewhere for the sale of the company's goods, to keep the books of account in Indore in respect of all sale proceeds and disbursements of the company to charge a commission of 1¼ per cent. on the gross sale proceeds of all cloth and yarn produced by the company, and to pay itself out of the moneys of the company all sums due to it by way of commission or otherwise. The sale proceeds of the Bombay shop were all sent to Indore and the commission was paid there. It was contended that in these circumstances no income accrued or arose in British India, but the contention was rejected and the decision was approved of by the Privy Council in I L R 1938 Bom 752.[4] In 5 I T C 454,[5] the Allahabad High Court held that a sum of money paid annually in London to the Bishop of Lucknow by the trustees of a certain fund as a gratuitous and unconditional personal allowance of the holder of the Lucknow See was income accruing or arising in British India and was assessable as salary under S. 7 (1) of the Act: In I L R (1937) 2 Cal 327,[6] the Calcutta High Court held that commission earned by an assessee in British India for services rendered there as an employee of a company, which was received by him in the United Kingdom while on leave, was income which had accrued or arisen in British India within the meaning of S. 4 (1).

It is not necessary to carry the discussion any further. There is ample authority in the cases which I have quoted to support the contention of the Income-tax authorities that all the profits of the company accrue or arise in British India, and therefore I would answer the question referred in the affirmative. I would add that the Court is not called upon to consider whether the payment in London would constitute profits arising in British India in the event of the working of the undertaking not realizing sufficient to reimburse the Secretary of State at the end of the year, as this situation has not arisen. As the reference has been made by consent in order that there should be a pronouncement by the Court on the question there will be no order as to costs.

---

[3] Sarupchand Hukamchand v. Commissioner of Income-tax, Bombay, (1931) 18 A I R Bom 236 =33 Bom L R 882=55 Bom 231=5 I T C 108.

[4] Commissioner of Income-tax, Bombay v. Chunilal B. Mehta, (1938) 25 A I R P C 232 = 65 I A 332=I L R (1938) Bom 752 (P C).

[5] Saunders v. Commissioner of Income-tax, United Provinces, (1932) 19 AIR All 151=137 IC 84=54 All 223=1931 A L J 1107=5 I T C 454.

[6] In the matter of V. G. Every, (1937) I L R (1937) 2 Cal 327=41 C W N 823.

King J. — I agree.

Krishnaswami Ayyangar J. — I also agree.

C.R.K./D.S. *Answered in affirmative.*

A. I. R. 1940 Madras 602
SPECIAL BENCH

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras
v.
Harveys Ltd., Tuticorin.

O. P. No. 160 of 1939, Decided on 4th March 1940; reference made by Commissioner of Income-tax, Madras.

(a) Income-tax Act (1922), S. 10 (2) (vi) — Original cost of asset is question of fact—Contract for purchase of assets — Price mentioned therein is not conclusive proof of original cost —Income-tax authorities can go behind contract where price seems fictitious and ascertain true value.

The original cost of any particular asset is entirely a question of fact, and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of S. 10 (2) (vi) the original cost is the amount shown in the document. The income-tax authorities are entitled to go behind the contract where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets and it is open to them to refuse to accept that price and to ascertain what the true value is: *(1897) A C 22, Disting.* [P 605 C 1, 2]

(b) Income-tax Act (1922), S. 10—Assessee company contracting with mill to mill cotton for it for certain period at reduced rate — As consideration mill exchanging its 20,000 shares with company's 1000 shares—Transaction is of capital nature to extent of value of 1000 shares—Difference in values of shares is profit in hands of company—Fact that gain is not in money but shares is immaterial.

The assessee company entered into a ginning contract with the mills whereby it undertook to mill cotton for the mills for a period of ten years at a reduced rate and as a consideration the mills exchanged their 20,000 shares for the 1000 shares of the company. The assessee company contended that the exchange of the shares and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature and since the mills had been allowed to treat it as being a transaction of a capital nature the company must be allowed to treat it in the same way:

Held that the transaction was of a capital nature only to the extent of the value of the shares of the company allotted to the mills and the difference in the values of the exchanged shares was profit in the hands of the company received in the year of payment and was assessable to the tax. The fact that the gain was not in money but in money's worth, namely shares, was immaterial: *(1935) A C 431, Expl.; (1925) 9 Tax Cas 331 and (1928) 12 Tax Cas 955, Disting.; (1928) 12 Tax Cas 1102, Rel. on.* [P 608 C 1, 2]

Held further that the income-tax authorities were right in adopting the market value in respect of the 20,000 shares of the mills allotted to the company. [P 608 C 2]

K. V. Sesha Ayyangar — *for Petitioner.*

Advocate-General and M. Subbaroya Ayyar — *for Respondents.*

Leach C. J. — The assessee company is a private company having been incorporated in British India in May 1933. The capital is Rs. 5,00,000 divided into 5000 shares of Rs. 100 each and all the shares have been issued. The share-holders and their holdings are as follows: (i) the firm of A. and F. Harvey, 3998 shares; (ii) the Madura Mills Co. Ltd., 1000 shares and the Comorin Investment and Trading Co. Ltd., two shares. For the sake of brevity I will refer to the assessee company as "the Company" to the firm of A. and F. Harvey as "the Firm" and to the Madura Mills Co. Ltd., as the "Madura Mills." The firm consists of three partners, namely, Mr. A. Harvey, Mr. J. C. Harvey and the Tuticorin Co. Ltd., the share-holders of which are mostly certain employees of the firm. Mr. A. Harvey and Mr. J. C. Harvey are brothers. The profits of the firm are divisible between the partners in the following proportions: Mr. A. Harvey: 63/128; Mr. J. C. Harvey: 63/128; and the Tuticorin Co. Ltd.: 2/128. The capital of the Comorin Investment and Trading Co. Ltd., is divided into 10000 shares of which Mr. A. Harvey and Mr. J. C. Harvey hold between them 9999 shares.

In April 1933 it was arranged that on incorporation the Company should purchase for Rs. 15,00,000 the assets of a cotton ginning business owned by Messrs. A and J. C. Harvey as individuals and not as members of the firm. The assets consisted of lands, buildings, plant and machinery. Of the purchase consideration Rs. 4,71,383 was allocated to the lands and buildings, and Rs. 10,28,617 to the plant and machinery. For several years Messrs. A and J. C. Harvey had ginned cotton for the Madura Mills. The rates charged for the years 1930, 1931 and 1932 averaged Rs. 12-8-0 per candy. Before the incorporation of the Company negotiations took place between Messrs. A and J. C. Harvey and the Madura Mills for the conclusion of an arrangement under which the Madura Mills should allot 20,000 shares to the company and as consideration the company should allot to the Madura Mills 1000 shares and enter into a contract under which the company should agree to gin cotton for the Madura Mills at a flat rate of Rs. 8 per candy for a period of ten years from 1st April 1933. An agreement was arrived at on this basis after the incorporation of the company and 1000 of its shares were allotted to the Madura Mills on 24th July 1933. The formal contract with the Madura Mills was executed on 26th August 1933, and the allotment to the company of the 20,000 shares of the Madura Mills duly followed. The Company paid no cash for the assets which it had acquired from Messrs. A and J. C. Harvey. Of the Rs. 15,00,000 stated to be the consideration, Rs. 5,00,000 was satisfied by the issue of shares and the balance of Rs. 10,00,000 by the issue of debentures. On 2nd June 1933 the company passed the following resolution:

> Resolved unanimously that the sum of Rupees 10,00,000 be raised by the issue of two debentures for Rs. 5,00,000 each bearing interest at 7 per cent. per annum charged upon its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital if any and goodwill in the form now submitted to the meeting and that in consideration of the Finchlay Investments Limited, and the Kochadai Investments Limited, having each paid to the company the sum of Rs. 5,00,000 that the above mentioned two debentures be sealed and issued to the above companies.

The Finchley Investments Limited and the Kochadai Investments Limited are two private companies registered in Canada and controlled by Messrs. A and J. C. Harvey through their wives. The Finchley Investments Limited has an authorized capital of $50,250, divided into 50 Class A Cumulative Preferred shares of $5 each, and 10,000 Class B shares of $5 each, of which all the Class A shares and 5990 of the Class B shares have been issued. All the Class B shares are held by Mrs. A. Harvey. This company has taken authority to issue debentures to the value of $1,000,000 and has in fact issued $5,99,000, all of which are also held by Mrs. A. Harvey. The Kochadai Investments Limited has an authorized capital of $25,250 made up of 50 Class A Cumulative Preferred shares of $5 each and 5000 Class B shares of $5 each, of which all the Class A shares and 1990 of Class B shares have been issued. Mrs. J. C. Harvey is the holder of the 1990 Class B shares. This company has authority to issue debentures to the amount of $500,000. Of these debentures $199,000 have been issued and $6000 of them have been redeemed. The outstanding debentures are all held by Mrs. J. C. Harvey. Of the debentures issued by the Finchley Investments Limited the amount of $169,000 was issued on 17th October 1933, and of those issued by the Kochadai Investments Limited a similar amount was issued on 12-10-1933.

On the passing of the resolution, which I have just quoted, two cheques for Rupees 5,00,000 each were drawn by the firm in favour of the company, but it was not intended that they should be presented for payment. In the course of explanations given on behalf of the company in answer to questions put by the income-tax authorities it was stated that the two cheques were issued by the firm on behalf of the Canadian Companies in pursuance of an oral arrangement between Messrs. A and J. C. Harvey on the one side, and the agents of the Canadian Companies on the other with a view to avoiding costly cross remittances. It was also stated that Mrs. J. C. Harveys had received Rs. 5,00,000 from the Kochadai Investments Limited and that Mrs. A. Harveys had received an equal sum from the Finchley Investments Limited. It turned out that the payments to these ladies did not represent cash but merely the issue to them of debentures by the Canadian companies. Therefore the position was that instead of the vendors receiving Rs. 10,00,000 in cash the Canadian Companies which they controlled received debentures for this amount and the Canadian companies in turn issued their own debentures to the wives of the vendors. The fact that the vendors received by this roundabout way debentures in lieu of cash will not affect the legal position if the transaction is a genuine one, but the Income-tax authorities say that it is not. They contend that the issue of debentures represents an artificial transaction undertaken to give an appearance of reality to the inflation in the value of the assets acquired by the company and a scheme to defeat the payment of income-tax.

It is made abundantly clear by the Commissioner of Income-tax in the statement of the case that the Rs. 15,00,000 representing the purchase consideration is in fact a highly inflated figure. All the assets of the business had been purchased by Messrs. A and J. C. Harvey between the years 1897 and 1931 for about Rs. 10,50,000. The following statement shows the dates of construction of purchase of the various assets, their original cost, their written down value according to the accounts of the firm, and the values placed upon them at the time of the sale to the assessee:

* * * * * *

It is not necessary to examine these figures in detail to show that Rs. 15,00,000 was out of all proportion to the real value of the assets. It will be sufficient if attention is drawn to the machinery statement. The press at Sattur was purchased in 1914 for Rs. 101,411-13-2 and 19 years later was sold for Rs. 2,06,250. The gins at Sattur were purchased between 1905 and 1915 for Rs. 1,05,683-14-2 and were sold for Rupees 2,06,250. The press at Dindigul was acquired during the years 1928 and 1929 for Rupees 84,944-13-10, and was also sold for Rupees 2,06,250. The gins at the same place were purchased during these years for Rupees 60,892-10-11 and they were sold for Rupees 2,06,250. The total assets stood in the books of firm at Rs. 5,00,000 and notwithstanding that there must have been considerable depreciation they were passed on to the company at the figure of Rs. 15,00,000. It has not been suggested by the company that the value of the assets had increased owing to special circumstances. On the contrary, it had to be admitted to the income-tax authorities that the value of ginning factories had been seriously affected by the depression prevailing in the textile trade. Indication of the extent of depression may be gathered from the fact that a factory built by another company at Sattur at a cost of over Rupees 2,00,000 was acquired by the company in 1934 for Rs. 40,000.

The company was assessed by the Income-tax Officer, Tuticorin, for the year 1934-35 on a total income of Rs. 82,643. The previous year was the year ended 31st March 1934 and the assessment was completed on 31st August of that year. In arriving at the figure of Rs. 82,643, the Income-tax Officer allowed a deduction of Rs. 61,130 as interest on the debentures which were issued to the Canadian companies. The true nature of the transaction with those companies had not then been realized, but further investigations carried out by the Income-tax Officer led to the disclosure of the position which I have stated. It was also discovered that the company had not declared any dividend out of the profits of the year ended 31st March 1934 and that out of the total book profits amounting to Rs. 85,225 during the two years ended 31st March 1935 only Rs. 25,000 had been distributed by July 1935. The explanation given on behalf of the company was that the year 1933-34 was the first year of its working and that having regard to the world depression the directors had decided on the ground of prudence not to pay a dividend in respect of that year. Not being satisfied with this explanation and being of the opinion that the real object of not distributing profits was to enable Messrs. A and J. C. Harvey to avoid a large amount of super-tax, the Income-tax Officer asked the Assistant Commissioner to give his approval under Sec. 23-A (2), Income-tax Act, 1922 to an order being passed that the sum payable as income-tax by the company should not be determined and that the proportionate share of each member in the profits and gains should be included in the total income of the member for the purpose of assessment to tax. After giving the company an opportunity of being heard the Assistant Commissioner passed the order asked for by the Income-tax Officer. The Income-tax Officer then computed the income of the company for the year 1933-34 which had escaped assessment in 1934-35 at Rs. 7,11,316. This figure included the following major items :

(a)	Rs. 48,149	...depreciation allowed in excess of the original assessment.
(b)	Rs. 61,130	...interest on debentures allowed in the original assessment.
(c)	Rs. 600,000	...advance received on account of ginning charges.

The Income-tax Officer regarded the transaction between the company and the Madura Mills as involving a payment on account of ginning charges of Rs. 6,00,000. This figure was arrived at after allowing the company to treat the allotment of 1000 of its shares to the Madura Mills as a capital transaction. The market value of the 20,000 shares of the Madura Mills which the company acquired was Rs. 7,00,000. The 1000 shares of the assessee which the Madura Mills received in exchange in consequence of the arrangement had no market value, but the Income-tax Officer took the nominal value of Rs. 1,00,000 to be their true value. The difference between Rs. 7,00,000 and the Rs. 1,00,000 represented the payment by the Madura Mills to the company on account of ginning charges for the period of ten years. The company appealed to the Assistant Commissioner against this new computation of income and objected to the inclusion of the three items (a), (b) and (c) in the total income. The Assistant Commissioner accepted the Income-tax Officer's computation and dismissed the appeal. The company then applied to the Commissioner of Income-tax for revision of the Assistant Commissioner's order under S. 33 and asked in the alternative that certain questions of law be referred to this Court under S. 66 (2). Messrs. A. and F. Harvey also appealed against the order passed under S. 23-A. That appeal is pending but the question of the validity of the order does not arise in the present proceedings. The Commissioner acceded to the request of the company for a reference and has asked the Court to decide the following questions :

1. Whether the Income-tax authorities were justified in law in going behind the contract for the sale of the assets of the Harvey Brothers to the petitioner company for Rs. 15,00,000 ?

2. If the answer to the above is in the affirmative, (a) whether there was any material before the Income-tax Authorities to justify their finding that the original cost of those assets to the petitioner Company was not Rs. 15,00,000 and (b) if there was such material was there any material for their finding that the cost of the assets was Rs. 5,00,000 ?

3. Whether there was any material before the Income-tax Authorities to justify their conclusion that the debenture loan of Rs. 1,00,000 was illusory and colourable and that the interest paid thereon is not therefore allowable as a deduction ?

4. Whether the transaction of exchange of the Madura Mills shares with the shares of the petitioner Company is an isolated transaction and of a capital nature ?

5. Whether on the facts of the case the difference if any between the values of exchanged shares could be said to be profit in the hands of the petitioner assessable to tax ?

6. Whether the Income-tax Authorities were correct in adopting the market-value in respect of the 20,000 Madura Mills shares allotted to the petitioners ?

7. Whether there was any material before the Income-tax authorities to justify their finding that the difference in value between the 20,000 shares of the Madura Mills Ltd. received by the petitioners and the 1000 shares of their own Company allotted by the petitioners to the Madura Mills amounted to 6,00,000 ?

Question 1. —By virtue of S. 10 (2) (vi), Income-tax Act, 1922, an assessee is entitled to an allowance on account of depreciation in respect of buildings, machinery or furniture which belong to him and are used for the purposes of his business. The Commissioner rightly observes that the original cost of any particular asset is entirely a question of fact and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of S. 10 (2) (vi) the original cost is the amount shown in the document. I also agree with the statement of the Commissioner that where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax Authorities to refuse to accept that price and to ascertain what the true value is.

On behalf of the Company the learned Advocate-General has contended that the Court cannot go behind the contract, and in support of this argument has quoted the decision of the House of Lords in (1897) A C 22,[1] but I fail to see what bearing that case has here. A leather merchant and a boot manufacturer sold his business to a limited company which had a nominal capital of 40,000 shares of £1 each. Before the incorporation of the Company the vendor entered into a contract with the trustee of the future Company settling the terms upon which the transfer was to be made. One of the conditions was that part payment might be made to the vendor in debentures of the Company. The memorandum of association was signed by the vendor, his wife, a daughter and four sons all of whom subscribed for one share each. In part payment of the purchase consideration debentures were issued to the vendor to whom was allotted 20,000 shares which were paid for out of the purchase money. The total number of shares issued was 20,007 and with his 20,000 shares the vendor had complete control of the company. At the time of the sale the business was solvent, but bad times came and the company was forced to go into liquidation. The question was whether the vendor as the holder of the debentures was entitled to preference over the other creditors of the company. Overruling the Court of Appeal, the House of Lords held that it was not contrary to the true intent and meaning of the Companies Act, 1862, for a trader to sell his business to a limited liability company consisting of himself and the members of his family, the business then being solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with. There had been no fraud upon the creditors or shareholders and the liquidator was not entitled to rescission of the contract of purchase.

---

[1] Aron Salomon v. Salomon & Co. (1897) A C 22.

In the present case the Court is not considering a situation analogous to the situation in (1897) A C 22,[1] and it is not considering the provisions of the Companies Act but the provisions of the Income-tax Act. To accept the argument of the learned Advocate-General would mean that where an assessee had placed a fictitious value on his assets he would be entitled to the statutory allowance for depreciation on the fictitious figure and consequently would escape payment of income-tax. Therefore to accept the argument would be to go against the true intent and meaning of the Income-tax Act. As I hold that the income-tax authorities have the right to look behind the contract of sale it follows that my answer to the first question is in the affirmative.

Question 2.—I have shown the basis on which the company says that the figure of Rs. 15,00,000 is arrived at and I am of the opinion that there was material to justify the finding of the income-tax authorities that the original cost of the assets acquired was not Rs. 15,00,000. The purchase consideration was the allotment of shares of the face value of Rs. 5,00,000 and debentures of the nominal value of Rs. 10,00,000 but the shares and the debentures had no value beyond the value of the assets acquired. The company adduced no evidence of the value of the assets. It relied entirely on the figure stated in the contract of sale. In these circumstances the income-tax authorities took the true value to be the figure at which the assets stood in the books and as this was the only evidence before them I consider that they were justified in their conclusion, especially in view of the age of most of the assets. If the company had placed before the income-tax authorities evidence to show that the assets stood in the books of the firm at a lower figure than their true value the position would have been different. But it did not do so and the inference is that it was not in a position to show that the assets were of higher value. I would answer both parts of the second question in the affirmative.

Question 3.—I have already stated the facts relating to the debenture issue and I consider that these facts provide material amply sufficient to justify the conclusion that the debenture loan of Rs. 10,00,000 was illusory and colourable. It follows that in my opinion the interest paid on the debentures is not allowable as a deduction.

Questions 4, 5, 6 and 7.—These questions may be dealt with conveniently together. The learned Advocate-General has contended that the exchange of the shares of the Madura Mills for the shares of the company and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature. He has also said that as the Madura Mills has been allowed to treat it as being a transaction of a capital nature the company must be allowed to treat it in the same way. I am unable to accept either of these propositions. The main part of the consideration which the Madura Mills received for its 20,000 shares was the benefit to be derived from the ginning contract. For ten years the company has to mill cotton for the Madura Mills at a price far below the market price. I consider that the Income-tax authorities were justified in regarding the transaction of a capital nature only to the extent of Rs. 1,00,000, represented by the shares of the company allotted to the Madura Mills. The company in return for an immediate gain of Rs. 6,00,000 agreed to reduce its probable annual gains over a period of ten years. In other words instead of getting a probable income of Rs. 6,00,000 spread over ten years it obtained a lump sum payment in one year. Nor do I regard the fact that this gain was not in money but in money's worth, namely shares, makes any difference.

In my opinion the Income-tax authorities were also justified in taking the value of the 20,000 shares which the company received from the Madura Mills to be the market value at the date of the transaction. It has been argued by the learned Advocate-General that to place on the market at once a block of 20,000 shares would mean a depression in the price. As the Commissioner has remarked the shares were not put on the market and were not intended to be put on the market. In support of his argument that the answers to these four questions should be in favour of the company, the learned Advocate-General has quoted to us (1925) 9 Tax Cas 331,[2] (1935) A C 431;[3] (1928) 12 Tax Cas 955[4] and 59 I A 206,[5] but I can find no support for him in these judgments.

---

2. Howley v. Commissioner of Inland Revenue, (1925) 9 Tax Cas 331.
3. Van Den Berghs Ltd. v. Clark, (1935) A C 431 =104 L J K B 345=153 L T 171=19 Tax Cas 390=51 T L R 393.
4. Short Brothers Ltd. v. Commissioners of Inland Revenue, (1928) 12 Tax Cas 955=136 L T 689.
5. Commissioner of Income-tax v. Shaw Wallace and Co., (1932) 19 A I R P C 138=136 I C 742 =59 I A 206=59 Cal 1343 (P C).

In (1925) 9 Tax Cas 331,[2] the facts were these. In consideration of an advance of £7000 made by the assessee to a company in 1905, he received debentures of the nominal value of £7000 repayable after December 1914, by half yearly instalments of £500 and from a director 5600 £1 ordinary shares of which he was to transfer 400 shares on receiving each payment of £500 in respect of the debentures. He was also to receive one-fifth of the profits each year upto December 1914, and thereafter a share of the profits corresponding in effect to the proportion of the debentures remaining unpaid from time to time. The assessee received no share of the profits for the years 1915, 1916 and 1917 until 1920 when he received a sum of £6000 in settlement of what was due to him by way of profits for those years. In May 1921, he was paid £10,000 in full settlement of the liability under the agreement up to December 1921, the prospective date of its termination. The sums of £6000 and £10,000 were assessed to supertax for the years 1920-21 and 1921-22 respectively as forming part of his total income for the years 1919-20 and 1920-21. It was held that he was entitled under the original contract to have his share of the profits paid to him each year and that for the purpose of computing his income for supertax the £6000 and £10,000 must be spread over the years in respect of the profits of which they were paid, subject to the entire exclusion from liability to supertax of such part of the sum of £10,000 as represented a composition of his right to receive a share of the profits of the year 1921. In the case now before us there was no arrangement by which the payment was to be spread over a period of years. The contract was one under which the company got an immediate gain in consideration of its reducing its charges. It must be regarded as a contract entered into in the ordinary course of its ginning business and nothing else. (1935) A C 431[3] was a decision of the House of Lords. The facts are even further away from the facts in the present case but an observation of Lord Macmillan has application here, not in favour of but against the argument of the learned Advocate-General. An English company carried on a large business in the manufacture of margarine, another substitute for butter. In 1908 the company entered into an agreement with a Dutch company of rival manufacture under which the two companies undertook to share profits and losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. In 1913 there was an extension of the agreement which was to be prolonged till the end of 1940. The two companies carried on their business separately until the end of 1913. During the last war the agreement could not be observed, but in 1920 a third agreement was entered into by which the former agreements were amended. One of the terms of the amended agreement was that the results of trading in the year 1914, and later years should be ascertained by accountants on each side and that any dispute arising under the agreements should be settled by arbitration. Disputes did arise and there was a submission to arbitration. The arbitration proceedings were however settled on terms by which the agreements were rescinded and the Dutch Company paid the English Company a sum of £4,50,000 as damages. The question was whether the £4,50,000 was in the nature of a capital asset or a receipt of income to be included in the profits of the English Company. It was held that the payment was in the nature of a capital asset. The passage in the judgment of Lord Macmillan which has bearing in the present case is this :

> Now what were the appellants (the English company) giving up? They gave up their whole rights under the agreements for 13 years ahead. These agreements are called in the stated case 'pooling agreements', but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed.

Lord Macmillan's judgment was accepted by all the members of the House of Lords who heard the appeal and therefore we have here authoritative indication, that if a payment represents a lump sum payment of profits which would otherwise be received over a series of years it may be regarded as representing income. The decision in (1928) 12 Tax Cas 955[4] was that the compensation paid in cancellation of certain contracts was chargeable to excess profits duty as a receipt of profits in the course of the company's ordinary trade, and must be included in the profits for the accounting period in which it became payable and was in fact paid. This case certainly does not help the company. 59 I A 206[5] was quoted because the Privy Council there said that the word "income" connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. It cannot be suggested that the allocation of the 20,000 shares of the Madura Mills was in the nature of a windfall. The contract fell within the scope of the memorandum of association of the company and it seems to me that the resulting benefit to the company must be classed as income.

A decision which is far more in point is that of Rowlatt J. in (1928) 12 Tax Cas 1102.[6] A company owned a chalk quarry and contracted to supply a purchaser with a specified quantity of chalk yearly for ten years. The contract also included in its terms that the quarry company should build a wharf at which the purchaser's ships could load the chalk. As the result of the war of 1914 the agreement was suspended and after the war the purchaser did not wish to take further deliveries. It was then agreed between the quarry company and the purchaser that in consideration of a payment of £900 a year for the remaining four years of the term the purchaser should be relieved of his liability under the contract. Subsequently, the quarry company accepted a lump sum payment of £3000 in lieu of the four annual payments of £900 and the £3000 was applied by the quarry company in writing down the cost of the wharf. It was held that the £3000 was chargeable to excess profits duty as a trading profit of the quarry company and therefore must be included in the profits of the year in which it was agreed to be paid. Rowlatt J. refused to graft a distinction upon the decision of the Court of Appeal in (1928) 12 Tax Cas 955.[4] He considered that if a sum represented profits in a new form then that was income and income in the year in which it was received.

The answers which I would give to the four questions are these: *No. 4*: The arrangement by which a proportion of the shares of the Madura Mills was issued to the company in respect of the ginning contract is not a transaction of a capital nature and the benefit received by the company represents profits received in the year of payment. *No. 5.* On the facts of the case the difference between the values of the exchanged shares must be allocated to the ginning contract and as such is profit in the hands of the company assessable to the tax. No. 6. The Income-tax authorities were right in adopting the market value in respect of the 20,000 shares of the Madura Mills allotted to the company. *No. 7.* There was material before the Income-tax authorities to justify their finding that the difference between the 20,000 shares of the Madura Mills received by the company and the 1000 shares of the company allotted to the Madura Mills amounted to Rs. 6,00,000.

The result is that the Income-tax authorities have succeeded on all the questions raised and therefore are entitled to their costs, which we fix at Rs. 250.

King J. — I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 608

LAKSHMANA RAO J.

N. Gopalaswami Rao — Petitioner.

v.

Chinna Ponnusawmy Chetty — Accused.

Criminal Revn. Case No. 1051 and Petn. No. 987 of 1939, Decided on 22-2-1940.

Madras Local Boards Act (14 of 1920), S. 164 — Failure to comply with requisition under S. 164 (2)—It is wrong to hold that Local Board should establish its title and possession of land in Civil Court.

The view that in case of failure to comply with a requisition under S. 164, cl. 2 the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act, is obviously erroneous and it is incumbent on the Magistrate to decide the legality or otherwise of the requisition. [P 608 C 2]

M. Raghupati Reddi — *for Petitioner.*

C. R. Krishna Rao — *for Accused.*

Public Prosecutor — *for the Crown.*

Order.—The accused was prosecuted for failure to comply with a requisition under S. 164, cl. 2, Madras Local Boards Act, and he has been acquitted on the ground that the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act. This is obviously erroneous and it is incumbent on the Magistrate to decide the legality or otherwise of the requisition. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

C.R.K./D.S. *Order set aside.*

---

[6] **Commissioners of Inland Revenue v. North Fleet Coal and Ballast Co. Ltd., (1928) 12 Tax Cas 1102.**

A. I. R. 1940 Madras 609

WADSWORTH J.

Bhavanasi Virupakshayya—Petitioner.

v.

Vinayakam Chinna Subbarayudu and another — Respondents.

Civil Revn. Petn. No. 892 of 1939, Decided on 23rd February 1940, to revise decree of Dist. Court, Anantapur, D/- 9th April 1938.

(a) Appeal — Powers of Appellate Court — Court cannot, in case of co-defendants against whom alternative claim is preferred, give decree against one of them who was not made party to appeal.

It is an elementary principle that no Court has jurisdiction to pass a decree against any person who is not a party to the proceeding before it. Hence, an Appellate Court has not in an ordinary case of co-defendants against whom an alternative claim is preferred, jurisdiction to give a decree against one of those defendants who has not been made a party to the appeal : *A I R 1929 Cal 315, Dissent.* [P 609 C 2]

(b) Appeal — Suit dismissed — Plaintiff in appeal choosing to implead only one of co-defendants against whom alternative claim was made—Co-defendant impleaded shifting liability on other not impleaded — Court should not remand appeal to be re-heard after impleading other defendant.

If a plaintiff whose suit has been dismissed chooses to implead in his appeal only one of two co-defendants against whom an alternative claim was made, he has only himself to blame if the respondent in the appeal succeeds in shifting the liability on to the defendant who has not been impleaded in the appeal. It is not necessary or desirable in the interests of justice in such a case merely because a wrong decree passed against one who was no longer a party has been challenged in revision, to direct the appeal to be re-heard and to allow the plaintiff to do that which he should have done in the first instance, namely implead both the defendants. [P 609 C 2; P 610 C 1]

Kasturi Seshagiri Rao — *for Petitioner.*

A. Gopalacharlu and E. Vinayaka Rao — *for Respondents.*

Order. — This revision petition is preferred against the decree passed in appeal against the dismissal of a suit to recover a sum of Rs. 679-8-0 due on a promissory note executed by defendant 1 (who is the petitioner here) in favour of defendant 2 who is the brother of the plaintiff. Plaintiff's claim was based on an allegation that, in a partition of the family, this promissory note had fallen to his share. The suit underwent various vicissitudes and was finally dismissed by the trial Court. The plaintiff appealed, impleading only his brother, defendant 2. In hearing the appeal, the learned District Judge appears to have lost sight of the fact that the promisor had not been made a party to the appeal, and, coming to the conclusion that the promissory note had not been discharged as alleged by the promisor in the trial Court, he exonerated defendant 2, that is to say, the plaintiff's brother, except as regards costs and gave a decree against defendant 1, the promisor, who was not a respondent in the appeal and who has therefore brought the present revision petition.

It is not seriously contended that an Appellate Court has, in an ordinary case of co-defendants against whom an alternative claim is preferred, jurisdiction to give a decree against one of those defendants who has not been made a party to the appeal. My attention has been drawn to an observation in A I R 1929 Cal 315,[1] which seems to suggest that O. 41, R. 33, Civil P. C., might authorize an Appellate Court to pass a decree even against a person who is not a party to the record. If that is the meaning of the passage quoted, I must express respectful dissent. It seems to me to be an elementary principle that no Court has jurisdiction to pass a decree against any person who is not a party to the proceeding before it. No doubt, the lower Appellate Court could have impleaded defendant 1 and after hearing him, passed the decree which is now under consideration. But this was not done. I am asked to remand the appeal so that defendant 1 may be impleaded and the appeal re-heard. The ground on which this request is made is that it is necessary in the interests of justice.

I have been referred to various cases, for instance, 82 I C 600,[2] in which such a procedure has been followed. But all the cases quoted before me arose out of the appeals preferred by one of two or more co-defendants without impleading the others. When the appellant was a defendant challenging the decree against himself, it has been thought fit to implead the co-defendant against whom the plaintiff might claim in the alternative before relieving the appellant of the burden of the decree against him. It seems to me that the position is quite different when the appellant is the plaintiff. If a plaintiff whose suit has been dismissed chooses to implead in his appeal only one of two co-defendants against whom an alternative claim was made, he had only himself to blame if the respondent in the appeal succeeds in shifting the liability on to the defendant who has not been impleaded in the appeal. It is not in my opinion either necessary or desirable in the interest of justice in such a case as this, merely because a wrong decree passed against one who was no longer a party has been challenged in revision, to direct the appeal to be re-heard and to allow the plaintiff to do that which he should have done in the first instance, namely implead both the defendants. In this view, I allow the petition with costs as against the plaintiff-respondent and set aside the decree of the lower Court so far as it relates to defendant 1 petitioner here.

---

[1] Bijoy Kumar Sen v. Kusum Kumari Devi, (1929) 16 A I R Cal 315=123 I C 246.

[2] Padarath Mahton v. Hitan Singh, (1924) 11 A I R Pat 773=82 I C 600=5 P L T 509.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 610

KING J.

Vythinatha Padayachi — Appellant.

v.

Ammalu Ammal and another — Respondents.

Appeal No. 94 of 1938, Decided on 16th January 1940, against decree of District Court, South Arcot, in A. S. No. 180 of 1936.

(a) Limitation Act (1908), Art. 182 (5) — Application need not be successful in order to be "in accordance with law."

For an application to be in accordance with law it is not necessary for it to be successful. It may be dismissed for a variety of reasons: *24 Cal 778; 37 Bom 42; A I R 1935 Mad 161 and A I R 1937 Mad 239, Rel. on.* [P 610 C 2]

(b) Civil P. C. (1908), O. 21, R. 16 — Mortgage decree — Transfer can be effected by registered instrument only — Application by person claiming transfer through unregistered instrument is not "in accordance with law" within meaning of Art. 182 (5), Limitation Act.

Order 21, R. 16 contemplates transfer of the decree-holder's interest in a decree. In the case of a mortgage decree such a transfer can be effected only by a registered instrument. If an instrument is not registered, no matter what its terms may be, it cannot effect a transfer. Therefore an application for execution by a person claiming transfer of the mortgage decree through an unregistered instrument cannot be said to be in accordance with law within the meaning of Article 182 (5), Limitation Act, the reason being that he is not competent to apply: *24 Cal 778; 37 Bom 42; A I R 1935 Mad 161; A I R 1937 Mad 239; A I R 1938 Bom 309; 6 M L J 31 and A I R 1924 Mad 673, Disting.* [P 611 C 1]

S. Jagadisa Aiyar — *for Appellant.*

T. E. Ramabhadra Chariar — *for Respondents.*

Judgment. — The question involved in this appeal is the interpretation of the expression "in accordance with law" in Art. 182 (5), Limitation Act. The appellant is the transferee of the decree in O. S. No. 1239/26 and in February 1936 applied to execute it. He had previously applied in November 1934, and the learned District Judge of South Arcot has held that that previous application was not in accordance with law and accordingly dismissed the present application as barred by limitation. The reason given by the learned District Judge is that in 1934 appellant had no right to apply in execution as the deed of transfer which he then filed was unregistered and incapable therefore of effecting any transfer. Against this decision appellant appeals. The decree in question was a mortgage decree and it is not, of course, contended for the appellant that in 1934 he did in fact possess any legal title to his ownership. The argument in appeal is that the requirements of O. 21, R. 16 are satisfied by a mere 'assignment in writing' and in support of it I have been referred to a number of rulings.

I may say at once that none of the rulings cited really covers the point at issue. It is true, no doubt, that in order for an application to be in accordance with law it is not necessary for it to be successful: 24 Cal 778.[1] It may be dismissed for a variety of reasons: 37 Bom 42,[2] 68 M L J 261[3] and 44 M L W 528.[4] But none of these four cases in any way affects the competence of the petitioner to make his application. In A I R 1938 Bom 309[5] it was held that a transferee's application was in accordance with law even though the Court had not in fact recognized the validity of his transfer, but here again no question arose as to the transferee's status as such. The only cases which appear at first sight to support appellant's contention are 6 M L J 31[6] and 47 Mad 641.[7] Both these cases however deal with applications accompanied by a valid deed of transfer, in which it was held that the transferee's rights to the decree must give way before the rights of third parties — in 6 M L J 31[6] the sons of the transferee to whom he had previously executed a deed of relinquishment; in 47 Mad 641[7] a creditor who had attached the transferred decree. Though these facts would entail the dismissal of an application by a transferee they would not present any legal obstacle to his filing an application.

---

[1] Adher Chandra Dass v. Lal Mohan Das, (1897) 24 Cal 778=1 C W N 676.

[2] Bando Krishna v. Narasima, (1913) 37 Bom 42=17 I C 210=14 Bom L R 861.

[3] Subramania Desika v. Rangaswami Chettiar, (1935) 22 A I R Mad 161=155 I C 327=68 M L J 261.

[4] Nandamani Ananga Bhima Deo v. Modona Mohono Deo, (1937) 24 A I R Mad 239=165 I C 659=I L R (1937) Mad 320=71 M L J 604=44 M L W 528.

[5] Dayalbhai Ramji v. Dayahbai Dula Chand, (1938) 25 A I R Bom 309=176 I C 152=40 Bom L R 411.

[6] Arasappan v. Pulugusari, (1896) 6 M L J 31.

[7] Rajitagiripathy v. Bhavani Shankaran, (1924) 11 A I R Mad 673=80 I C 103=47 Mad 641 =47 M L J 4.

It seems clear then, that the appellant can find no real assistance in the rulings on which he relies, and I can see no legal principle for holding that the learned District Judge was worng. The question is really very simple. O. 21, R. 16 contemplates transfer of the decree-holder's interest in a decree. In the case of a mortgage decree, such a transfer can be effected only by a registered instrument. If an instrument is not registered, no matter what its terms may be, it cannot effect a transfer. There is therefore in this case no transfer, and no transferee, and the only person with any title to execute the decree is the original decree-holder. An application filed on the assertion that a transfer has been effected when in fact no transfer has been effected cannot be an application in accordance with law. Appellant's learned advocate was himself prepared to concede that an application by a petitioner who, e. g. personates a decree-holder or presents a forged transfer deed is not in accordance with law and the only reason why this is so must be because he is not competent to apply. In the present case the appellant in 1934 was neither the original decree-holder nor a transferee of his interest in the decree, and therefore the Civil Procedure Code gives him no right to apply, and his application is obviously not in accordance with law. The appeal is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 611

HORWILL J.

Katta Virayya and others — Appellants.

v.

Official Receiver, Kistna and others — Respondents.

Second Appeal No. 1015 of 1936, Decided on 4th December 1939, against decree of Sub-Judge, Bezwada, in A. S. No. 67 of 1935.

Insolvency — Sale in — Setting aside — Civil Court cannot set aside sale merely on ground of inadequacy of price.

An ordinary Civil Court has no power or control over the acts of the Official Receiver. Presumably, a sale can be set aside in a Civil Court only on grounds similar to those on which a contract could be set aside. A mere irregularity or inadequacy of price would be no ground for setting aside a sale in a suit: *A I R 1931 Rang 122, Disting.* [P 612 C 1]

P. Satyanarayana Rao and S. Srinivasachari — *for Appellants.*

A. Lakshmayya and S. Venugopal Rao — *for Respondents.*

Judgment.—This suit has been brought by three creditors to set aside a sale of the insolvents' property on the grounds of fraud and collusion, material irregularity, want of proclamation, and the knocking down of the property for a grossly inadequate sum. Both the Courts below have found that there was no fraud or collusion or material irregularity and have therefore dismissed the suit. It is argued here that even though the findings of the Courts below as to the absence of fraud and material irregularity are true; yet the insufficiency of consideration is in itself a sufficient ground to warrant the Court in setting aside the sale; for the Insolvency Court is not limited to the same considerations as a Civil Court under O. 21, R. 90, Civil P. C. 9 Rang 231[1] has been quoted as an authority for this position. It was there held that the Insolvency Court has always full control over the acts of the Official Receiver and can therefore set aside a sale where it is of opinion that it has been unfair or has caused any wrongful loss to the creditor; and that therefore the Court is not circumscribed by the narrow provisions of O. 21, R. 90, Civil P. C. That case however does not bear very much resemblance to the present one, as there was an undoubted hardship there to a particular creditor who had been attending the auctions and who, on account of the incorrect information given by the bailiff, was not actually present when the property was knocked down to the highest bidder. He at once went to the Court and was obviously distressed by his misfortune. It was held that under S. 68, Provincial Insolvency Act, the Insolvency Court had every right to set aside the sale on such a ground, even though there was no fraud or material irregularity. In the present case all that can be said for the appellants is that the sum realized was inadequate. Even on that point the lower Appellate Court is not satisfied; but the fact that the appellants have deposited in Court Rs. 2000 since the filing of this appeal is some indication that they considered the property to be worth very much more than the Rs. 250 for which it was knocked down.

---

[1] Vencatachalam Chettiar v. Murugesan, (1931) 18 A I R Rang 122 = 131 I C 732 = 9 Rang 231 (S B).

In the present case there is another obstacle in the way of the appellants. They did not put in an application under S. 68, Provincial Insolvency Act, as the creditor in 9 Rang 231;[1] and the Court that tried the present suit was not the Insolvency Court at all. An ordinary Civil Court has no power or control over the acts of the Official Receiver. Presumably, a sale can be set aside in a Civil Court only on grounds similar to those on which a contract could be set aside. A mere irregularity or inadequacy of price would be no ground for setting aside a sale in a suit. In either event therefore the appeal fails and is dismissed with costs of respondent 3. The amount deposited in Court by the appellants will be refunded.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 612

SPECIAL BENCH

LEACH C. J., KING AND
KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras — Petitioner.

v.

Salem District Urban Bank Ltd., Salem — Respondent.

O. P. No. 256 of 1939, Decided on 6th February 1940, from reference made by Commissioner of Income-tax, Madras.

(a) Income-tax Act (1922), S. 3 — "Individual" — Meaning of — It includes co-operative society — Co-operative Bank some share-holders of which are persons while majority consists of co-operative societies is "association of individuals" within meaning of S. 3.

A corporate body created by a statute is an individual within the meaning of S. 3 and therefore a co-operative society registered under the Co-operative Societies Act must fall within the same category. It is a corporate body and has perpetual succession. Consequently a Co-operative Bank registered under the Co-operative Societies Act some of the share-holders of which are persons while the majority of them consists of co-operative societies is an association of individuals within the meaning of S. 3 and can be assessed to income-tax as an association of individuals: *A I R 1932 Bom 106, Rel. on; A I R 1939 Bom 363, Not approved.* [P 612 C 2; P 613 C 2; P 614 C 1]

(b) Income-tax — Mutual Benefit Society — Co-operative Bank carrying on business with non-members is not mutual benefit society.

A Co-operative Bank carrying on an ordinary banking business with non-members cannot maintain a claim to be a mutual benefit society. It can only escape taxation under the provisions of the notification published by the Central Government under S. 60, Income-tax Act: *A I R 1927 Mad 1078 (SB) and AIR 1938 Mad 148 (S B), Rel. on.* [P 614 C 1]

K. V. Sesha Ayyangar — *for Petitioner.*

M. S. Venkatarama Iyer and P. R. Srinivasan — *for Respondent.*

Leach C. J. — The assessee is a Co-operative Central Bank registered under the Co-operative Societies Act of 1912. This statute has been replaced so far as this Presidency is concerned by the Madras Co-operative Societies Act, 6 of 1932, but nothing turns on this. The assessee corporation consists of 671 share-holders. Of the share-holders 138 are persons and 533 co-operative societies. For the year of assessment 1937-38 the income-tax authorities have held that the assessee had a total income of Rs. 37,445 made up as follows: Rs. 5293 interest on taxed securities; Rs. 1519 interest on tax free securities: Rs. 4009 interest obtained on deposits and Rs. 26,624 profits made on its transactions. The assessee does not confine its business to its share-holders but carries on an ordinary banking business as well. By virtue of a notification of the Government of India under S. 60, Income-tax Act of 1922, the "profits" of a co-operative society are exempt from income-tax, but the notification stipulates that the profits shall be taken into account in determining the total income for the purposes of the Income-tax Act. After excluding the Rs. 1519 representing the interest on tax-free securities of the assessee and the Rs. 26,624 made on its business the income-tax authorities have assessed the assessee on an income of Rs. 9302, but by taking into account the Rs. 26,624 they have held that the assessee must pay tax on the Rs. 9302 at the rate which would be payable on an income of Rupees 37,445. The assessee challenged the correctness of this decision and asked the Commissioner of Income-tax to refer to this Court under the provisions of S. 66 (2) of the Act certain questions. The Income-tax Commissioner considered that only two questions of law arose and these he has referred. They are as follows:

(a) Whether the Bank is an association of individuals within the meaning of S. 3 of the Act and whether it can be assessed to income-tax as an association of individuals.

(b) Whether the Bank is not a Mutual Benefit Society and as such can be said to have derived a profit of Rs. 26,624 as a co-operative society to be included in its total income.

The assessee is satisfied with the reference of these two questions and therefore the Court is not called upon to go beyond them. The first question arises out of a contention advanced on behalf of the assessee that the assessee was not liable to income-tax at all as the assessee does not come within the charging S. 3. S. 3 says :

> Where any Act of the Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.

The argument is that the word "individual must be taken to be used merely as denoting a person and therefore the words "and other association of individuals" cannot apply to a corporate body which for the most part is composed of co-operative societies. In support of this contention, great reliance is placed on the judgment in I L R (1939) Bom 451.[1] In that case it was held that the expression "association of individuals" in S. 3 means an association of human beings. The question which the Court had to decide was whether the Ahmedabad Millowners Association which was composed of 61 members, 60 of whom were limited liability companies and one a person, was assessable to income-tax. The case was decided by Beaumont C. J., and Wadia J. In the course of his judgment, the learned Chief Justice stated that he was disposed to agree with the Commissioner of Income-tax that if one merely took the dictionary meaning of the word "individual" it would include a limited liability company, but he considered that to do so would not be in accordance with its popular use by people speaking the English language. He concluded his judgment with this statement:

> The question is whether 'other association of individuals' includes an association of companies. It seems to me quite clear on the context that it cannot do so. "Individuals," where first used, must mean human being, because it is used as something distinct from a joint family, firm and company. The whole expression seems to me to mean "every human being, Hindu undivided family, company, firm and other association of human beings." One cannot give to the word 'individuals' in the expression 'association of individuals' a different meaning to that which the word "individual" bears in the same phrase.

This opinion is in direct conflict with the opinion expressed by the learned Chief Justice in an earlier case : 5 I T C 484.[2] One of the questions in that case was whether a corporation styled "the Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust" which had been created under an Act passed by the Governor-General in Council was to be deemed to be an "individual" within the meaning of S. 3, Income-tax Act. The income-tax authorities had assessed the corporation as an "association of individuals," Beaumont C. J. held that the corporation was an "individual" within the meaning of the Section and not an "association of individuals." The question of the legality of the assessment was taken to the Privy Council and although the question of the statuts of the corporation was not directly raised before the Board it falls to be observed that the decision of the Bombay High Court was affirmed.

I consider that the opinion expressed in 5 I T C 484[2] is preferable to that expressed in I L R (1939) Bom 451.[1] While it is true that ordinarily in conversation the use of the word "individual" would be taken to denote a person, the word has in fact a far wider meaning. The first definition of the word given in the Oxford Dictionary is "One in substance or essence; forming an indivisible entity; indivisible." It is also defined as "existing as a separate indivisible entity, numerically one, single." If a corporate body created by a statute is an individual within the meaning of the Section—and I hold that it is—a co-operative society registered under the Co-operative Societies Act, must fall within the same category. It is a corporate body and has perpetual succession. I consider that it is not reasonable to suppose that the Legislature intended that there should be a difference in the meaning of the word "individual" and the plural "individuals." If the word "individual" includes a corporation, the words "association of individuals" must embrace an association of corporate bodies, and therefore the assessee is an "association of individuals." Support for the opinion that the assessee comes within S. 3 is to be found in the decision of the Allahabad High Court in

---

[1] Commissioner of Income-tax, Bombay v. Ahmedabad Millowners' Association, (1939) 26 A I R Bom 363=184 I C 470=ILR (1939) Bom 451=41 Bom L R 656.

[2] Currimbhoy Ebrahim Baronetcy Trust v. The Commissioner of Income-tax, Bombay, (1932) 19 AIR Bom 106=136 I C 488=33 Bom L R 1549=5 I T C 484.

8 I T C 69[3] and of the Lahore High Court in 9 I T C 246.[4] In the former case a Bench of the Allahabad High Court held that the word "individual" in the proviso to S. 55, Income-tax Act, includes an undivided Hindu family. In the Lahore case, which was also decided by a Bench, a "ginning factories union" which was composed of two firms and a Hindu undivided family was assessed to income-tax on the basis that it was an association of individuals. To give the word "individual" the meaning of "person" only would, it seems to me, to be to disregard the scheme of the Act and to rob the word of an accepted meaning. It follows that in my opinion the first question referred should be answered in the affirmative.

The second question requires little discussion. The income-tax authorities have held that the assessee is carrying on an ordinary banking business. It carries on a banking business with non-members and therefore cannot maintain the claim to be a mutual benefit society. It can only escape taxation under the provisions of the notification which the Central Government has published under S. 60 of the Act, which means that it must pay tax at the rate applicable to the amount of its total profits, namely Rs. 37,445. The principle stated in 2 I T C 386[5] and repeated in I L R (1938) Mad 183 = 47 M L W 24,[6] applies. I would answer the second question in that sense. As my learned brothers agree with me, the assessee must pay the costs which we fix at Rs. 250.

King J.—I agree.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Order accordingly.*

---

[3] Ramratan Das Madan Gopal v. Commr. of Income-tax, Central and United Provinces, (1935) 22 A I R All 444=157 I C 1000=57 All 745=1935 A L J 364=8 I T C 69.

[4] Mian Channu Factories Union v. Commr. of Income-tax, (1936) 23 A I R Lah 548=166 I C 150=9 I T C 246.

[5] Trichinopoly Tennore Hindu Permanent Fund Ltd. v. Commr. of Income-tax, (1927) 14 A I R Mad 1078=107 I C 291=53 M L J 881 =2 I T C 386 (S B).

[6] Trichinopoly Tennore Hindu Permanent Fund Ltd. v. Commr. of Income-tax, (1938) 25 A I R Mad 148 = 173 I C 998=I L R (1938) Mad 183=(1938) 1 M L J 130=47 M L W 24 (S B).

A. I. R. 1940 Madras 614

PANDRANG ROW AND HORWILL JJ.

Hindu Religious Endowments Board, Madras — Appellant.

v.

Namburu Krishnamacharyulu and others — Respondents.

Appeal No. 141 of 1937, Decided on 14th February 1940, against decree of Dist. Court, Guntur, D/- 15th December 1936.

Madras Hindu Religious Endowments Act (2 of 1927), Ss. 18 and 62—Suit for modification of scheme—Hindu Religious Endowments Board's general power of supervision over trustees and appointing staff made subject to final control by District Judge—Restriction conflicts with Act which gives unrestricted powers of supervision to Board in aforesaid matters and must be removed.

In a suit for modification of a scheme for the management of a temple the District Judge has no power to make the general power of supervision exercised by the Hindu Religious Endowments Board over the work of the trustees and in respect of the appointment of the staff subject to the final control of the District Judge even for a time as the restriction conflicts with the statute which gives absolutely unrestricted power of supervision to the Board in these matters and must therefore be removed. [P 615 C 1]

P. V. Rajamannar and K. Subba Rao — *for Appellant.*

V. Subramanyam — *for Respondents.*

Pandrang Row J.—In this appeal which is preferred by the Hindu Religious Endowments Board, Madras, through its President, the only point pressed is that certain modifications in the scheme sanctioned by the District Judge of Guntur should be made. The scheme was one for the management of the well-known temple of Sri Lakshmi Naraswimhaswami at Mangalagiri in the Guntur District. This scheme has been in operation from 1917 onwards (vide Ex. A, the Rajinama scheme). The present suit was instituted by a worshipper with the sanction of the Board for the removal of the existing trustees, for the appointment of proper trustees and for a modification of the scheme. The District Judge held that there was no necessity to remove any of the trustees or to consider any of the prayers in the plaint except the prayer for a modification of the scheme and directed certain modifications. It would appear that though the Board put its views before the Court in its written statement, nevertheless, when the case came up for hearing the Board was not represented by anyone and the modifications made by the learned Judge in the Court below were made without the advantage of the Board's suggestions in the matter. The objection taken now in appeal relates to two different matters. One is to the addition of certain words in paras. 18 and 19 to the original scheme and the other to the provision regarding the appointment of trustees contained in cl. 3 of the decree. Paras. 18 and 19 provide that the general power of supervision exercised by the Hindu Religious Endowments Board over the work of the trustees and in respect of the appointment of the staff should be subject to the final control of the District Judge for the time being. This restriction appears to be in conflict with the statute which gives absolutely unrestricted power of surpervision to the Board in these matters and we therefore accept the appeal so far as this point is concerned and direct that the words "subject to final orders of the District Judge for the time being" and "subject to the final control of the District Judge for the time being" found in paras. 18 and 19 be deleted.

The other objection is to the provision contained in cl. 3 of the decree providing that the place of the retiring trustee should be filled by the District Judge after calling for applications and after considering the views of the Hindu Religious Endowments Board and the remaining trustees. We do not think that there is anything really objectionable in this provision and we see no reason to interfere with this provision in the decree. The parties will bear their own costs, and they will be at liberty to take their costs out of the endowment.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 615

VARADACHARIAR AND
ABDUR RAHMAN JJ.

P. S. Sathappa Chettiar and another — Appellants.

v.

N. K. Pr. S. Pr. Chockalingam Chettiar and another — Respondents.

Appeal No. 323 of 1934, Decided on 16th November 1938, against decree of Court of Sub-Judge, Devakottai, D/- 22nd August 1934.

(a) Civil P. C. (1908), O. 21, Rr. 17 and 57—Court rejecting application under R. 17—No application in accordance with law must be deemed to have been filed—Rejection does not amount to dismissal under R. 57—Fact that application was numbered as execution petition indicates that rejection was in limine as not complying with legal formalities.

When the Court exercises its power of "rejection" under R. 17, the legal position is that no execution petition in accordance with law must be deemed to have been filed. This is made clear by cl. 2 of R. 17. Therefore there can be no scope for the application of R. 57. The circumstance that the application was not even numbered in the ordinary course as an execution petition clearly indicates that its rejection by the executing Court was merely in limine as not complying with the formal requirements of law: *C. M. S. A. No. 31 of 1935, Expl.* [P 616 C 2]

(b) Civil P. C. (1908), O. 21, R. 57—Applicability—R. 57 deals with case where on petition ultimately dismissed attachment has taken place—R. 57 should be applied with caution in cases where attachment has taken place before judgment or on prior application.

In interpreting R. 57, it must be remembered that it deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such a case the execution petition must *ex hypothesi* have been taken cognizance of an execution ordered and it is only at a later stage that it must be dismissed as contemplated by R. 57. The words of the Rule must be applied with caution to cases in which the attachment has taken place before judgment or on a prior execution application. It is in this latter class of cases that the distinction between a "rejection" under R. 17 and a "dismissal" under R. 57 becomes material. [P 617 C 1]

S. Ramachandra Ayyar — *for Appellants.*

T. L. Venkatarama Iyer — *for Respondents.*

Varadachariar J. — This appeal arises out of a mortgagee's suit for sale. The only question for determination in the appeal is whether the lower Court was right in exonerating item 3 from liability to the plaintiff's claim. This item was purchased by defendant 2 on 26th January 1933 in execution of the decree which he had obtained against the mortgagors in O. S. No. 406 of 1926 on the file of the District Munsif's Court of Kumbakonam. During the pendency of that suit he had attached this item before judgment on 5th October 1926 and the mortgage in plaintiff's favour was executed only on 28th October 1926. The decree in O. S. No. 406 of 1926 was passed on 20th September 1927. If matters had not been complicated by what happened in connexion with one of the execution applications in the money suit, defendant 2's title would of course have prevailed against the mortgage in the plaintiff's favour. It has however been contended on behalf of the plaintiff that by reason of an order passed by the executing Court on 1st August 1932 the attachment came to an end and that defendant 2's title was not derived under the attachment which subsisted on the date of the mortgage in the plaintiff's favour. The lower Court has declined to accede to this contention. The same contention has been pressed before us. We have come to the conclusion that the lower Court's view is correct. After obtaining the decree in O. S. No. 406 of 1926, the present defendant 2 took several steps in execution before we come to the petition on which the order dated 1st August 1932 was passed. But it is unnecessary to refer in detail to the earlier steps, because it has not been contended that anything that happened then has put an end to the attachment. On 24th June 1932, the application for execution marked Ex. 9 in the present case was presented. It was returned on 30th June 1932 with the following endorsement: "Sale papers to be filed. Returned, time two weeks." Two more weeks' time was taken by the petitioner's advocate and there was a representation; but on 20th July there was a further endorsement by Court "Stamp the application." Then the application was represented on 25th July 1932. It is on this representation that the order dated 1st August 1932 was made. The office note runs in these words:

> Order of return, dated 20th July 1932, has not been complied with. Cause title has not been correctly given. No affidavit put in as to legal representative of defendant 1. Sale papers have not been duly put in. Amounts have not been correctly claimed.

The Court's order consists of the word "rejected." The learned counsel for the plaintiff contends that this amounts to a "dismissal" under O. 21, R. 57, Civil P. C., and that the attachment has accordingly come to an end. The lower Court has held that this is only a "rejection" under O. 21, R. 17, Civil P. C., and such an order does not attract the consequences of a "dismissal" under O. 21, R. 57. We may mention in passing that the statement relating to the sale papers is inaccurate as pointed out by the learned Subordinate Judge. Sale papers do seem to have been put in as indicated in the docket. This was in fact so stated in the next application Ex. 10 bearing the same date. The other defects pointed out in the office note, namely, as to incorrectness in the cause title and in the amounts claimed and the absence of an affidavit stating that one of the respondents was the legal representative of defendant 1, are, as the learned Subordinate Judge has stated, defects of the kind contemplated in R. 17 of O. 21. That Rule provides that the Court may either allow the defect to be then and there remedied or within a time to be fixed by it or the Court may reject the application. When the Court exercises its power of "rejection" under R. 17, the legal position seems to us to be that no execution petition in accordance with law must be deemed to have been filed. This is made clear by cl. 2 of R. 17, which says that when an application is amended under the provision of R. 1 it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented; the provision in cl. 4 of the same Rule says that when the application is admitted, the Court shall enter in the proper register a note of the application and shall order execution of the decree according to the nature of the application.

The learned counsel for the plaintiff-appellant admits that if the correct view is that there was no proper execution application before the lower Court on 1st August 1932 there will be no scope for the application of O. 21, R. 57. But he asks us to hold that there was an application which was dealt with by the lower Court as an execution application and was dismissed by it, whether rightly or wrongly, on the ground of the decree-holder's default. We are not prepared to accede to this contention. The circumstance that Ex. 9 was not even numbered in the ordinary course as an execution petition is not without some significance. It clearly indicates that the executing Court had not decided to admit the execution petition at all, but merely rejected it in limine as not complying with the formal requirements of law. Our attention has been drawn to the judgment of Burn J. in C. M. S. A. No. 31 of 1935, where the learned Judge held an order of rejection to amount to an order of dismissal under O. 21, R. 57, though it appeared even in that case that the execution petition had not been given a number. So far as we can gather from that judgment the application was rejected because the decree-holder failed to supply certain particulars required by the Court. The argument based on the distinction between a "rejection" under R. 17 and a dismissal under R. 57 does not seem to have been urged before the learned Judge. What the particulars called for by the Court in that case were, we are not in a position to gather from the papers available here and we are therefore unable to say whether they merely related to formal defects within the meaning of Rr. 11 to 14 of O. 21, Civil P. C.

In interpreting R. 57, it must be remembered that it deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such a case the execution petition must *ex hypothesi* have been taken cognizance of an execution ordered and it is only at a later stage that it must be dimissed as contemplated by R. 57. The words of the rule must be applied with caution to cases in which the attachment has taken place before judgment or on a prior execution application. It is in this latter class of cases that the distinction between a "rejection" under R. 17 and a "dismissal" under R. 57 will become material. On the facts already stated, we should have felt great hesitation in holding that if in this case there had been an order of dismissal on 1st August 1932 it could have been justified as a dismissal "for default of the decree-holder." We agree with the learned counsel for the appellant that it may not always be open to the Court in later proceedings to consider whether the dismissal was right or wrong if that order had been allowed to become final. But where an order is passed in ambiguous terms and terms like "reject" or "struck off" are used and the Court is called upon to consider whether there was in fact an order of "dismissal" within the meaning of R. 57, the Court is entitled to take the circumstance into consideration in coming to a conclusion as to whether a dismissal was intended at all or not. We agree that there has been no dismissal in this case within the meaning of O. 21, R. 57. The appeal therefore substantially fails. Objection has also been taken to the amount awarded by the lower Court's decree for costs in defendant 2's favour. It is stated that the item in which he is interested is worth only about Rs. 3000 and that there was no justification for the lower Court assessing his costs on the basis of one-half of the plaint claim, which comes to nearly Rs. 13,000. We think this objection is well founded. We accordingly reduce the amount of pleader's fee allowed to defendant 2 in the lower Court to Rs. 200 instead of Rs. 403-13-10. In other respects the lower Court's decree is confirmed and the appeal dismissed. Respondent 2 will be entitled to the costs of this appeal.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 617

WADSWORTH J.

Subramania Gurukkal — Appellant.

v.

Abhinava Poornapriya A. Srinivasa Rao Sahib — Respondent.

Second Appeal No. 1149 of 1934, Decided on 16th November 1938, against decree of Dist. Court, North Arcot at Vellore, in A. S. No. 291 of 1933.

(a) Civil P. C. (1908), O. 41, R. 22 — Suit by, against dismissed archaka of temple for possession of lands connected with archaka service— Court dismissing suit but making specific declarations not prayed for by plaintiff to safeguard interests of temple — Appeal by plaintiff — Archaka filing no cross-objections against declarations — Declarations must be deemed to be conclusive by reason of O. 41, R. 22.

On the dismissal of an archaka of a temple the trustee brought a suit against him for possession of the lands connected with the archaka service. The Court while dismissing the suit as incompetent added certain specific declarations to the dismissing decree which were not prayed for by the plaintiff in order to safeguard the interests of the temple. The plaintiff appealed and the defendant raised no cross-objections against the declarations:

Held that the correctness of the declaration embodied in the trial Court's decree could not be allowed to be canvassed in appeal in the absence of memorandum of cross-objections by reason of O. 41, R. 22, Civil P. C., and the declarations must be deemed to have become conclusive. [P 618 C 2]

(b) Madras Court of Wards Act (1 of 1902), Ss. 57 and 58 — Ss. 57 and 58 do not authorize Court of Wards to function as trustee in absence of notification — On death of old jagirdar Court continuing to administer trust properties of temple of which ward was hereditary trustee and dismissing archaka of temple—Court must be deemed to be de facto trustee under S. 9 (13), Madras Hindu Religious Endowments Act, and entitled to dismiss archaka — Dismissal cannot be questioned in Civil Court by reason of Madras Hindu Religious Endowments Act, Ss. 73 and 43.

Sections 57 and 58 do not authorize the Court of Wards in the absence of a notification to continue to function as trustee of a temple of which the ward is the hereditary trustee. Therefore, where on the death of the old jagirdar his successor takes no steps to assume the control of the trust properties and the Court of Wards continues to administer those trust properties under the impression that it was legally entitled to do so, the position of the Court of Wards would be that of a de facto trustee. A de facto trustee of a Hindu temple has those powers which are conferred upon a trustee under the Hindu Religious Endowments Act for the definition of "trustee" in S. 9 (13) of that Act includes de facto trustee. A de facto trustee of a Hindu temple in actual management of that temple and acting bona fide in the interests of the institution can validly pass an order dismissing a temple servant or officer, provided that the dismissal is for good grounds and the procedure is one to which no objection can be taken. The validity of the dismissal cannot be questioned in a Civil Court by reason of Ss. 43 and 73, Madras Hindu Religious Endowments Act : *A I R 1938 Mad 972, Rel. on.* [P 619 C 1, 2]

(c) Trustee — Temple— De facto trustee can sue to recover temple lands.

A de facto trustee in possession and management of a temple can bring a suit for the recovery of temple lands : *A I R 1932 Mad 267 and 1913 M W N 181, Rel. on.* [P 619 C 2]

A. Sundaresan — *for Appellant.*

K. Kuttikrishna Menon — *for Respondent.*

Judgment. — The appellant who was the defendant in trial Court is an archaka in possession of lands alleged to belong to a temple in a village situated within the Arni estate. On 27th January 1932 the Court of Wards which was then in charge of the estate dismissed the defendant from his office of archaka on the ground that he had failed to render service and had failed to give any explanation to the charges connected with his default. After the dismissal the suit was filed by the Jagirdar represented by his next friend the manager of the estate under the Court of Wards as trustee of the temple to recover possession of the lands connected with the archaka service. Certain dates are of importance. The late jagirdar of Arni died on 25th June 1931. The order of dismissal of the defendant was passed on 27th January 1932. The suit was filed on 22nd April 1932; and on 23rd November 1932 after the suit had been filed but before it was decreed there was a notification making the new jagirdar a ward under the Court. It is common ground that in the interim between the death of the old jagirdar and this notification the Court of Wards continued in charge of the estate. In the trial Court the defendant pleaded that the trusteeship did not vest in the jagirdar that the land was not recoverable, that the dismissal was invalid, that the defendant had established adverse possession and that the suit was not maintainable when no fresh archaka had been appointed.

The trial Court held that the plaintiff was the trustee of the temple that the dismissal was not valid owing to the absence of evidence of failure to render service, that the inam is the property of the temple, that the plea of adverse possession was bad and that the suit was not maintainable when no new archaka had been appointed. As a result of these findings the learned District Munsif gave a decree in the interests of the institution declaring that the plaintiff was the trustee of the suit temple, that the suit lands were inam lands dedicated to the temple and that the defendant was an archaka under the plaintiff; but the suit was dismissed so far as it prayed for possession of the lands. There was an appeal by the plaintiff and no memorandum of cross-objections by the defendant. The lower Appellate Court therefore held that the declarations embodied in the trial Court's decree would hold good in the absence of any memorandum of cross-objections. On the other issues the lower Appellate Court held in favour of the plaintiff and decreed the suit with costs.

Now the main contentions in appeal relate (1) to the refusal of the lower Appellate Court to re-open the question of the trusteeship in the absence of a memorandum of cross-objections, (2) to the question of limitation, (3) to the validity of the dismissal, and (4) to the effect of the absence of any notification declaring the new jagirdar a ward of the Court (a) on the order of dismissal and (b) on the maintainability of the suit. There is little substance in any of the contentions except the last one. I am of opinion that the lower Appellate Court was quite right in not allowing the correctness of the declarations embodied in the trial Court's decree to be canvassed in the absence of a memorandum of cross-objections. So much follows from the terms of O. 41, R. 22, Civil P. C. It is not a case in which the dismissal of the suit can be supported without traversing the grounds upon which the defendant has failed to convince the trial Court. It is a case of a specific declaration not prayed for by the plaintiff but added to the dismissing decree by the trial Court expressly in order to safeguard the interests of the institution. If the defendant had a grievance against the embodiment of this positive declaration in the decree, he should have taken objection to it in a formal way and no such objection having been taken, it must, I think, be inferred that the lower Court's declaration is conclusive.

Nor is there any substance in the contention based on limitation and adverse possession. The contention is that there was an earlier dismissal order in 1914 which the defendant ignored remaining in possession of the lands and rendering such service as he thought was obligatory. If these facts stood alone, it might be argued that he had at least established a right to retain the lands subject to the minimum of service which he admitted to be required of him.

But there was another proceeding in 1923 in the course of which the defendant gave an explanation to the trustees which can only be read as admitting the power of the trustee to control his office and his enjoyment of the emoluments thereof. In such circumstances there can, I think, be no question of any prescriptive right in the defendant adverse to the trust. The argument regarding the invalidity of the dismissal has no merits unless it can be based on the technical ground that the Court of Wards had no authority at the time of the dismissal. There were proper charges framed relating to the service; the defendant was given due notice of those charges and required to submit an explanation which he contumaciously refrained from giving. In such circumstances the only possible course for the controlling authority would be to remove him from office and if that authority was empowered to do so, no Court could rightly hold that the dismissal was wrong.

There remains the question of the consequence of the absence of any notification under the Act at the time when the dismissal order was passed and when the suit was filed. S. 57, Madras Court of Wards Act, gives certain limited powers to the Court of Wards to retain possession of an estate on the death of the ward. S. 58 imposes certain limitations on the successor to the estate when the Court of Wards has decided thus to retain possession. Neither of these Sections can, in my opinion, be taken to authorize the Court of Wards, in the absence of a notification, to continue to function as trustee of a temple of which the ward is the hereditary trustee. Therefore, on the death of the late jagirdar, his successor having taken no steps to assume the control of the trust properties and the Court of Wards continuing to administer those trust properties under the impression that it was legally entitled to do so, the position of the Court of Wards would be that of a de facto trustee. It was managing the temples in the interests of the trusts under the bona fide impression that it had a power and a duty to do so. It seems to me that a de facto trustee of a Hindu temple has those powers which are conferred upon a trustee under the Hindu Religious Endowments Act. S. 9 (13) of that Act defines a trustee as,

> a person, by whatever designation known, in whom the administration of a religious endowment is vested and includes any person who is liable as if he were a trustee.

This definition clearly would include a de facto trustee administering the trust honestly and holding himself liable for the properties of the trust. Under S. 43, the control of office holders and servants attached to the temple is vested in the trustee and a special machinery is provided for appeals by any such office holder or servant who is aggrieved by the decision of the trustee. I have held in a recent case, (1938) 2 M L J 516,[1] that the provisions of S. 43 read with S. 73 of the same Act were intended to oust the jurisdiction of the Civil Court to question the propriety of any order of dismissal. From this it follows that any technical defect in the legal qualifications of the Court of Wards to function as trustee at the time of this dismissal would not enable the dismissed person to question the validity of the dismissal in a Civil Court.

I am moreover inclined to think, quite apart from these statutory provisions, that a de facto trustee of a Hindu temple in actual management of that temple and acting bona fide in the interests of the institution can validly pass an order dismissing a temple servant or officer, provided that the dismissal is for good grounds and that the procedure is one to which no objection can be taken. To hold otherwise would be to hold that when for any reason a religious trust is without a legal trustee the temple servants would be entirely uncontrolled and would be at liberty to ignore their obligations towards the trust. There is moreover no doubt as to the capacity of a de facto trustee in possession and management of a temple to bring a suit for the recovery of temple lands. This power has been recognized in 61 M L J 887[2] and 1913 M W N 181,[3] as well as in numerous other decisions. Moreover, it seems to me to follow from first principles that such a power must exist. It is the duty of the Court to protect trust property from misappropriation and diversion from the objects to which it was dedicated. When trust property is without a legal guardian owing to any defects in the machinery for the appointment of a trustee or owing to the unwillingness of the legal trustee to act, it would be a monstrous thing if any honest person recognized as being in charge of the institution and actively controlling its affairs in the interests of the

---

1. Ramanatha Gurukkal v. Arunachalam Chettiar, (1938) 25 AIR Mad 972 = 179 I C 504= I L R (1939) Mad 81 =(1938) 2 M L J 516.
2. Appasami Pillai v. Ramu Tevar, (1932) 19 AIR Mad 267=136 I C 340=61 M L J 887.
3. Kasi Chetti v. Srimathu Devasikamoney Nataraja Dikshitar, (1913) M W N 181=16 I C 622.

trust should not be entitled, in the absence of anyone with a better title, to take those actions which are necessary to safeguard the objects of the trust. In this view I dismiss the appeal with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 620

HORWILL J.

Secretary of State — Appellant.

v.

Malraju Venkata Narasimharao Bahadur and another — Respondents.

Second Appeals Nos. 261 and 262 of 1937, Decided on 21st February 1940, against decree of Sub-Judge, Ellore, in A. S. Nos. 233 and 188 of 1936.

(a) Madras Survey and Boundaries Act (8 of 1923), S. 14—In suits under S. 14, Government is neither necessary nor proper party.

The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Government in no sense represent them in their actions under the Survey and Boundaries Act. They are statutory officers given statutory powers and they act in a quasi judicial manner; and their decisions are binding on parties in the absence of a suit. The Government is not in the least interested in the result of the suits; for the Survey Officer, in making his decision acts not as an agent of the Government, but as a statutory officer specially empowered under the Act. Therefore the Government is neither a necessary nor a proper party in suits under S. 14. [P 620 C 2]

(b) Costs—Trial Court's discretion should not be interfered with in absence of sufficient grounds.

The trial Court in the exercise of its discretion allowed the defendant his costs on the ground that he was not a necessary party:

Held that the discretion exercised by the trial Court could not be interfered with in absence of sufficient grounds. [P 621 C 1]

B. Sitarama Rao, Govt. Pleader — *for Appellant.*

K. Kameswara Rao — *for Respondents.*

Judgment. — These appeals arise out of suits under S. 14, Survey and Boundaries Act. The position in these two suits is a very curious one. The plaintiff was the same in the two suits and, before they were actually filed, he seems to have come to some arrangement with the two second defendants; for they filed no written statement. The common defendant 1 was the Secretary of State; and all the issues were framed because of the written statement of defendant 1. The trial Court found that the Secretary of State was not a necessary party; and while decreeing the suits, as defendant 2 in each case did not oppose, ordered that defendant 1 be given his costs on the ground that he was not a necessary party. The appeals were heard by two Judges. In A. S. No. 233 of 1936, the Judge held that the Secretary of State was not a necessary party; but that his attitude in supporting the case of defendant 2 and joining issue with the plaintiff disentitled him to receive costs. He thought moreover that although the Secretary of State was not a necessary party, he was a proper party. In A. S. No. 188 of 1936 (S. A. No. 262 of 1937) the Principal Subordinate Judge found that defendant 1 was a necessary party in each case. The appeals of the plaintiff against the orders as to costs were allowed and the Government was ordered to pay its own costs in both Courts in both suits.

The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Government, in no sense represent them in their actions under the Survey and Boundaries Act. They are Statutory Officers given statutory powers and they act in a quasi-judicial manner; and their decisions are binding on parties in the absence of a suit. The Government was not in the least interested in the result of the suits; for the Survey Officer, in making his decisions acted not as an agent of the Government, but as a statutory officer specially empowered under the Act. The learned Principal Subordinate Judge in A. S. No. 188 of 1936 says:

> If the Government is not a party to the proceeding, I do not think any order passed by a Civil Court may be binding (on the Government),

and, later, "it is the Government that demarcates the survey numbers." This is incorrect. It is not the Government that makes the survey; but a Survey Officer specially empowered by the statute. Clearly, the lower Appellate Court was wrong in thinking that the Government was a necessary party. For the same reasons, the Government is not a proper party. The dispute was between—and only between—the two persons interested in the common boundary. Upon the decision of the Civil Court, the survey authorities would have to make the necessary changes in their registers. It is not denied in this Court that the Government was neither a necessary nor a proper party. The orders of the lower Appellate Courts are however supported on the ground that Government, instead of contenting itself with merely stating that it was not a necessary party, tried to uphold the finding of the Survey Officer. The Government says in para. 1 of its written statement in each case :

> The allegations in the plaint are not true and this defendant puts the plaintiff to strict proof of all the allegations that are not expressly admitted herein.

Then, in paragraph 5 :

> The allegation that defendant 2 encroached upon the suit lands after the inclusion of the suit lands, in his adjoining land, is also absolutely false. But this defendant submits that defendant 2 and his ancestors were in possession of the suit land even prior to the block survey.

Paragraph 1 set out above may be excused on the ground that allegations were made in the plaints that the changes were brought about by the collusion of defendant 2 with the village officers. But even if it were true that some collusion had taken place, the Government would still not have been either a necessary or a proper party, as no relief was asked against the Government by way of damages or otherwise. Para. 5 cannot be defended in any way. The Government certainly should have adopted a neutral attitude on this point. However, although the Government adopted an attitude which was not strictly neutral and adopted pleas which were beyond what were directly necessary for the defence of their own subordinates, yet the primary responsibility for raising all these various issues was upon the Court. In fact, the District Munsif should at the outset have realized that defendant 1 was not a necessary party; and if he had done that, no issue would have been framed. If there had been any doubt about it, the question whether defendant 1 was a necessary party could have been raised as a preliminary issue. However that may be, even if the learned Munsif had any discretion in disallowing the costs of defendant 1 on the ground that he had raised pleas which were not necessary, he did not do so. The lower Appellate Court, for reasons which I have held to be wrong, considered that the first Court should have disallowed defendant 1's costs. If the trial Court had a discretion, it exercised it in favour of defendant 1; and there are no sufficient grounds for interfering with that discretion. The appeals are therefore allowed with costs and that defendant 1 given its costs in all three Courts. Advocate's fee one set in this Court.

C.R.K./G.N. *Appeals allowed.*

A. I. R. 1940 Madras 621

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Calicut Bank Ltd., (in Liquidation) through manager P. C. Gopalan — Appellant.

v.

Devani Ammal and others — Respondents.

Appeals Nos. 74 and 75 of 1938, Decided on 10th February 1939, against orders of Gentle J., in O. P. Nos. 234 and 210 of 1938, D/- 16th November 1938.

Companies Act (1913), S. 153 — Fact that shareholders and creditors of company have approved of scheme of compromise does not mean that Court is bound to accept scheme.

The fact that share-holders and creditor of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153 does not mean that the Court is bound to accept the scheme. It is the Court's duty to examine the proposals and decide whether they are fair and reasonable taking everything into consideration. That the share-holders and creditors have approved of a scheme will of course carry weight, but there may be more important considerations. (In the particular case taking several facts into consideration the Court rejected the scheme.) [P 622 C 2]

Ch. Raghava Rao and M. Chinnappan Nayar — *for Appellant.*

A. B. Nambiar, P. G. Menon, King and Partridge, K. Bhashyam Ayyangar, V. P. Chakravarthy and S. Kothandarama Nainar — *for Respondents.*

Leach C. J. — These appeals arise out of an order passed by Gentle J. rejecting a scheme put forward by the directors of the Calicut Bank Limited under S. 153, Companies Act, and directing the compulsory winding up of the company. It has been conceded here, as it was conceded below, that if the scheme is not one which the Court can sanction, a compulsory winding up order must necessarily follow. The appellants are the directors and they are supported by a number of creditors. The company was registered in 1908. Its head office was at Calicut and it had thirteen branches in British India, one at Cranganore in the State of Cochin and another at Colombo. Its issued capital was Rupees 2,77,280 divided into 27,728 fully paid up shares of Rs. 10 each. As the result of a run on the bank it was compelled to close its doors on 16th August last year. The day before the closing of the doors the directors filed a petition in this Court asking for the sanction of the scheme with which Appeal No. 75 is concerned. On 19th August a petition for the compulsory winding up was filed by the respondents and on the 30th of that month Gentle J. appointed provisional liquidators, who on 31st October presented a report which shows that the company's liabilities amount to Rs. 15,58,830 and its realizable assets to Rs. 10,52,955 leaving a deficit of Rupees 5,05,874. It is common ground that this report accurately states the position of the Bank.

The report also shows that certain directors, their friends and relations had obtained advances from the bank to the extent of Rs. 5,19,372 of which Rs. 4,54,611 is considered to be irrecoverable. The figures in the provisional liquidators' report do not take into account the position in Cranganore nor in Colombo. The reason for this is that the officials of the bank failed to present statements showing the state of affairs at these two branches and we are informed by the learned advocate who appears for the official liquidators who were appointed on the passing of the winding up order that the information has not even yet been received. It is alleged that after the date of the appointment of the provisional liquidator a sum of Rs. 17,000 was withdrawn by the manager of the bank from the funds at Cranganore and Colombo and this matter is being investigated by the Master.

The scheme which the directors desire the Court to sanction is not a scheme of reconstruction but is really a scheme for the voluntary liquidation of the bank spread over a number of years, and if adopted it would only give the depositors part of what is due to them. Broadly speaking the proposals so far as the depositors are concerned are these : (1) The depositors to be paid two annas in the rupee with interest at the contract rate up to 15th August 1938 as and when their deposits fall due; after that date interest on fixed deposits to be three per cent., on savings bank deposits two per cent. and on sums on current accounts one per cent; (2) the depositors to be paid eight annas in the rupee spread over a period of four years (two annas each year) with interest at the rate of three per cent. per annum; (3) the depositors to convert two annas in the rupee into fully paid up shares of the company; (4) four annas in the rupee to be written off "provisionally," but the only hope of restoration being the collection of debts considered to be bad or doubtful. The scheme also provides that the share-holders are to give up twelve annas in the rupee of their paid up capital 'to be set apart as part of the provision for bad and doubtful debts." Considering that the loss on the business amounts to nearly twice the capital this is a remarkable provision. The scheme further provides that the share-holders are to forgo their rights in the reserve fund. According to the books the reserve fund amounts to Rs. 1,29,500 but the report of the provisional liquidators shows—and here again it is accepted as disclosing the true position — that no fund exists. The entry is merely a book entry without any cash to support it.

The learned Judge directed that the scheme should be submitted to meetings of shareholders and creditors. A shareholders' meeting was held on 18th October 1938 when 35 of them were present in person, representing 1894 shares, and 252 shareholders, holding 16,029 shares, were present by proxy. The scheme was approved by 253 shareholders, representing 14,949 shares. Nine shareholders, representing 717 shares, disapproved. There was a large majority in favour of the scheme. The creditors' meeting was held on 25th October. There were present at this meeting 56 creditors, representing Rs. 4,15,554 and 1666 depositors representing Rs. 7,49,348, sent proxies. The scheme was approved by 1669 creditors representing Rs. 9,38,770, and was disapproved by five creditors, representing Rs. 30,692. The application for the approval of the scheme and the application for the compulsory winding up of the company came before Gentle J. on 10th and 11th November. The learned Judge after a careful examination of the scheme and of the position of the company came to the conclusion that the proper course was to reject the scheme and direct the compulsory winding up of the company. We consider that the decision which he arrived at is the proper one.

The fact that shareholders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153, Companies Act, does not mean that the Court is bound to accept the scheme. It is the Court's duty to examine the proposals and decide whether they are fair and reasonable, taking everything into consideration. That the shareholders and creditors have approved of a scheme will of course carry weight, but there may be more important considerations. In this case justice demands that the resolutions passed at the respective meetings should be disregarded. In the first place, it is obvious that as the result of a letter signed by certain creditors of which a director of the company was one, the position of the company was misrepresented. This letter was circulated to all the shareholders and creditors before the meetings took place. It held out hopes that if the scheme was approved the position of the company would be restored and it would be able to continue its business. This is shown by the following passage :

> Thus, it will be seen that we have to provide for about Rs. 6,50,000 to meet the bad and doubtful debts. If the shareholders will forgo eight annas in the rupee of their shares and the entire reserve fund, we would get Rs. 2,68,140 and if the depositors allow four annas in the rupee to be written off we get Rs. 3,82,545. Thus, in all, we can set apart a sum of Rs. 6,50,685 as reserve for bad and doubtful debts, which is sufficient to put the Bank again on its legs.

Now when this letter was issued, there was no intention of reconstructing the company. The company had no money with which to carry on business. All that the directors had in mind was a voluntary liquidation which would take years to complete. The learned advocate who appears for the appellant frankly told us that the intention was not to re-open the bank, and that no reconstruction was contemplated was also made clear by the learned Advocate-General who appeared for the directors when the case was before Gentle J. The misleading character of this letter does not end with the passage just quoted. No reference was made in the letter to the expenses of continuing the business and no reference was made to the fact that certain directors, their friends and relations had withdrawn from the company over Rs. 5,00,000 of which Rs. 4,50,000 was considered to be completely lost. If the true position had been placed before the creditors, it is inconceivable that they would have accepted the scheme.

But even if the resolutions passed by the shareholders and creditors had been passed after a disclosure of the true position the scheme could not be accepted. The company is hopelessly insolvent, and the scheme confess no apparent benefit on any one, in fact it ignores creditors who are not depositors. There is at least one creditor who is not a depositor, namely the P. & O. Banking Corporation to which is due Rs. 15,000. According to the judgment under appeal this amount at the date of the presentation of the petition was Rs. 49,000. It does not appear how it came to be reduced to Rs. 15,000. The immediate payment of two annas in the rupee which the scheme contemplates requires a sum of Rs. 1,92,500, but on 10th October the total amount of cash available was only Rs. 1,11,000. The scheme therefore is in itself not a feasible one. But there are other grounds for its rejection and the insistence on a compulsory winding up. The bank's officials have refused to disclose the position at Cranganore and Colombo and an allegation of unlawful withdrawal of funds after the appointment of provisional liquidators has been made. Then there is the fact that the directors and their friends have received large advances from the company and most of these advances are considered to be irrecoverable. Taking these factors into consideration and remembering the misleading statement which was issued by certain of the creditors before the meetings were held there is, in our opinion, an overwhelming case for the rejection of the scheme and the enforcement of the order for the compulsory winding up of this company. It is necessary that the assets that do exist should be realized for the benefit of the creditors, and their realization can best be carried out by the official liquidators. A compulsory winding up will also result in a close inquiry into the conduct of the directors, past and present. For these reasons the appeals will be dismissed with the costs of Appeal No. 74 of 1938 against the appellant and the supporting creditors in favour of the creditors who oppose the appeal (one set). There will be no order for costs in Appeal No. 75 of 1938 as the two appeals have been heard together.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1940 Madras 623

LAKSHMANA RAO J.

South Indian General Assurance and Co. Ltd. and others — Petitioners.

v.

Registrar of Life Insurance Companies, Madras — Respondent.

Criminal Revn. Cases Nos. 799 and 800 of 1938, and Cri. Revn. Petns. Nos. 759 and 760 of 1938, Decided on 9th December 1938, to revise order of Second Presidency Magistrate, G. T., Madras, D/- 13th October 1938.

Criminal P. C. (1898), S. 248—Withdrawal of complaint as against some of the accused does not involve withdrawal of whole complaint.

There is nothing in S. 248 which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused : *A I R 1924 Lah 595, Rel. on.* [P 624 C 1]

V. Rajagopalachari and A. S. Mannadi Nair — *for Petitioners.*

The Crown Prosecutor — *for the Crown.*

Order.—The complaints were sought to be withdrawn against some of the accused and the Magistrate acquitted them. There was no formal withdrawal of the complaint and as pointed out in 5 Lah 239[1] at p. 251, in which all the decisions were considered, there is nothing in S. 248 which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused. There is therefore no substance in these petitions and they are dismissed.

C.R.K./D.S. *Petitions dismissed.*

---

[1] Anantia v. Emperor, (1924) 11 A I R Lah 595 =81 I C 117=25 Cr L J 629=5 Lah 239.

A. I. R. 1940 Madras 624

MOCKETT J.

Sri Sri Narasimha Pattamahadevi — *Petitioner* — Appellant.

v.

Seemala Annan Naidu and others — Respondents.

Civil Revn. Petn. No. 246 of 1938, Decided on 20th October 1939, to revise order of the Sub-Judge, Chicacole, D/- 27th November 1937.

(a) Civil P. C. (1908), O. 21, R. 90, Proviso (Madras) — Application under O. 21, R. 90 admitted—Court cannot order deposit of security after admission—Order for security is discretionary with Court — Decree-holder cannot claim it as of right.

Under O. 21, R. 90, Proviso (Madras) the Court has no power to order the judgment-debtor to deposit security after his application to set aside sale under O. 21, R. 90 has been admitted. The proviso leaves the orders for deposit of security in the discretion of the Court and specifically excludes the right of the decree-holder to apply to the Court for such orders : *A I R 1939 Pat 248, Rel. on.* [P 625 C 1]

(b) Civil P. C. (1908), O. 21, R. 90, Proviso (Madras)—Word 'admission'—Meaning of.

The word 'admission' conveys that point of time when an application or suit, as the case may be, is received into Court and accepted for decision and that stage is when notice is given to the opposite side : *A I R 1939 Pat 248, Rel. on.* [P 625 C 1]

P. Somasundaram — *for Appellant.*

V. Govindarajachari — *for Respondents.*

Order. — In execution of a decree, a sale was ordered on 15th March 1937. On 10th April 1937, the judgment-debtor petitioned the Court to set aside the sale under O. 21, R. 90. Notice went to the decree-holder and on 1st May 1937 he put in a counter-affidavit in which he prayed that the judgment-debtor should deposit security. On the same day the Court ordered the judgment-debtor to deposit security by 15th June 1937. On 14th June 1937 he put in a petition to the Court saying that the Court had no power to order the deposit because the order to furnish security was made after the petition to set aside the sale was admitted. On 28th June 1937 that petition was dismissed. Time was extended to 2nd July 1937. On that day the judgment-debtor stated he was unable to make the necessary deposit and his petition was dismissed. He appealed and the learned Subordinate Judge of Chicacole decided in his favour that the Court should not order a deposit after a petition was admitted. The order of the District Munsif was as follows :

> It has been argued before me that the order directing the deposit should be made before admitting the application (E. A. No. 298 of 1937) under the amendment to R. 90 of O. 21. It is no doubt true that such an order can be passed even before admitting the petition on file but there is no restriction anywhere that no such order can be passed at no other time.

The learned Subordinate Judge passed the following order reversing the order of the District Munsif :

> The lower Court has obviously misapplied the first proviso to O. 21, R. 90. Security or deposit must have been 'called for' and that 'before' the admission of the application to justify the dismissal of the petition. The order of the lower Court is accordingly set aside. . . .

It is argued before me now by the counsel on behalf of the decree-holder that the order of the Subordinate Judge is wrong and that of the District Munsif right. O. 21, R. 90 provides for applications to set aside sales on the ground of irregularity. On 20th October 1936 it was amended by introducing the following proviso :

> Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less or to deposit such amount into Court.

The question before me is whether the power of the Court to call upon the applicant to furnish security is confined to a time anterior to admitting the application to set aside or whether, as argued by the petitioner before me, it can be done not only before but after. No authority has been cited to me dealing directly with the question. I was referred to the decision of a Full Bench of five Judges of the High Court of Patna, A I R 1939 Pat 248[1], which is in relation to O. 21, R. 90 as it is in Patna. In the course of that decision Harries C. J. dealing with the term "admission," says that

> admission of the application presumably means the stage when the Court decides to issue notice upon such application to the opposite parties concerned.

I respectfully agree. "Admission" to my mind conveys that point of time when an application or suit, as the case may be, is received into Court and accepted for decision, and that stage is when notice is given to the opposite side. A common example of that is the process known as admitting a civil revision petition or a second appeal. I have before me the original petition placed before the District Munsif and it will be seen that he issued notice on 20th April 1937 and proceeded to hear the application on 1st May, with affidavits completed, which obviously must be a stage long after admission. I think this proviso means exactly what it says. The Court, after all, is responsible for executing its decrees and I think the framers of the proviso had in mind the discretion in the Court to pass such orders as it thinks fit for the protection of the decree-holder, but the wording of the proviso specifically excludes the right of a decree-holder to apply to the Court for such orders. Whether this is satisfactory or whether it might not be usefully provided that an opportunity might be given to the decree-holder to be heard may possibly be matters for consideration: but as framed at the present moment, the wording seems to me to admit of no doubt whatever. The lower Appellate Court therefore decided this matter rightly and this petition must be dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

---

[1] Brij Behari Lal v. Firm Srinivas Ramkumar, (1939) 26 A I R Pat 248=181 I C 579=18 Pat 327=20 P L T 275 (F B).

A. I. R. 1940 Madras 625

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Kona Adinarayana — Appellant.

v.

Dronavalli Venkatasubbayya and others — Respondents.

Letters Patent Appeal No. 75 of 1937, Decided on 4th December 1939, against decree of Venkataramana Rao J., *Reported in A I R 1937 Mad 869.*

Contract—Specific performance — Contract for sale of land to *A* entered into by brothers who were members of undivided Hindu family —Contract signed by major brothers and by eldest of them as manager of family and guardian of minor brother—*A* entering into possession and not disputing title of vendors—Suit for specific performance held maintainable by brothers including minor who had become major.

Brothers who were members of an undivided Hindu family entered into a contract for sale of land to *A*, the contract of sale having been signed by the major brothers and by the eldest of them as manager of family and guardian of the minor brother. The vendee *A* entered into possession and never disputed the title of the vendors. In the suit for specific performance of the contract and to recover the price of the land by the brothers including the minor who had attained majority since:

Held that as the vendee remained in possession of the land and did not repudiate the contract, the right to repudiate must be deemed to have been waived. Moreover, the minor having perfected his title by attaining majority at the date of the institution of the suit, the brothers were entitled to a decree for specific performance: *(1830) 39 E R 113 and (1842) 60 R R 26, Rel. on.* [P 626 C 1]

P. Somasundaram — *for Appellant.*

P. Satyanarayana Rao — *for Respondents.*

Leach C. J.—The appeal arises out of a suit for specific performance of a contract for sale of land tried in the Court of the District Munsif of Gudivada. The respondents were the plaintiffs. On 4th August 1930, by a contract in writing the respondents agreed to sell three-quarters of an acre of land in the Kistna District at the price of Rs. 1095. The respondents are brothers and are members of an undivided family. Respondent 3 was a minor at the time the contract was entered into. The contract was signed by the major brothers and by respondent 1 as the manager of the family and as the guardian of the minor. The appellant went into possession immediately after the execution of the contract and admittedly he has remained in possession and has enjoyed the rents and profits ever since. The suit for specific performance was filed on 4th August 1933. The appellant, although he was in possession and was treating the land as his own, set up the defence that the suit for specific performance would not lie as one of the vendors was a minor. His attitude in the circumstances can only be described as that of a very dishonest person. At the time of the institution of the suit the minor member of the vendor family had reached majority. The District Munsif granted the respondents a decree, but on appeal the Subordinate Judge of Masulipatam held that the major brothers alone were entitled to sue for specific performance. Accordingly, he limited the decree to two-thirds of the land on payment of two-thirds of the purchase consideration. The appellant then appealed to this Court and respondents 1 and 2 filed a memorandum of cross-objections. The appeal was heard by Venkataramana Rao J. who restored the decree of the District Munsif, but gave a certificate permitting of this Letters Patent Appeal.

In holding that the respondents were entitled to maintain a suit for specific performance, the learned Judge relied on the decisions in (1830) 1 Russ & My 293=39 E R 113[1] and (1842) 2 Y & C C C 54=60 R R 26.[2] In the first of these cases it was held that a plaintiff in a bill for the specific performance of a contract was entitled to a decree if, at the time of the hearing, he would shew a good title, although he had not a good title at the time of the contract. Leach M. R. observed:

> The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiff had no title; and he was not bound to wait until they had acquired a title; but, he not having taken that course, it is enough that at the hearing a good title can be made.

In (1842) 2 Y & C C C 54,[2] Knight Bruce V. C. said:

> In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion.

In that case the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor and the vendor later having acquired a perfect title a decree for specific performance was passed. As Venkataramana Rao J. has pointed out from the fact that the appellant remained in possession of the land and did not repudiate the contract, the right to repudiate must be deemed to have been waived. There is nothing in the law of India which prevents the application of the principle applied in (1830) 1 Russ & My 293[1] and (1842) 2 Y & C C C 54[2] and I consider that those principles have direct application here. It would indeed be regrettable if the Court could not give to the respondents the relief they ask against the injustice which they have suffered at the hands of the appellant. At no stage has he repudiated the contract but he has refused to pay the price of the land which he has enjoyed for over nine years. The appeal will be dismissed with costs throughout.

C.R.K./G.N. *Appeal dismissed.*

---

[1] Hoggart v. Scott, (1830) 1 Russ & My 293=9 L J Ch 54=31 R R 112=39 E R 113.

[2] Salisbury v. Hatcher, (1842) 2 Y & C C C 54 =12 L J Ch 68=6 Jur 1051=60 R R 26.

A. I. R. 1940 Madras 626

WADSWORTH J.

Malladi Venkata Sastry and others — Appellants.

v.

Malladi Venkataramanayya and another — Respondents.

Second Appeal No. 779 of 1935, Decided on 28th February 1939, against decree of Sub-Judge, Coconada, in A. S. No. 14 of 1935.

Hindu Law—Construction of upper storey on ancestral house by member with his separate money is made with aid of family properties.

When a man builds an upper storey on to an ancestral house, even when he uses his separate money for the building, the construction is made with the aid of the family properties which supply to the new structure both its foundation and its site and will be liable for partition. [P 626 C 2]

N. Vasudeva Rao — *for Appellants.*

C. Rama Rao — *for Respondents.*

Judgment. — It seems to me apparent that when a man builds an upper storey on to an ancestral house, even when he uses his separate money for the building, the construction is made with the aid of the family properties which supply to the new structure both its foundation and its site. The appeal will be allowed to this extent and the plaintiff will be given a decree for partition of the upper storey, subject to any rights which may have accrued by reason of the mortgage suits to which the plaintiffs were parties. Parties to pay their own costs, the appeal being dismissed in other respects.

C.R.K./D.S. *Appeal partly allowed.*

A. I. R. 1940 Madras 627

KING J.

M. R. Ranganatha Aiyar — Appellant.

v.

Jayavelu Mudaliar and another — Respondents.

Appeal No. 123 of 1939, Decided on 15th February 1940, against appellate order of Dist. Court, North Arcot, D/- 12th January 1939.

Oaths Act (1873), S. 11 — S. 11 relates to proceedings in which evidence was given and not to all possible proceedings—Evidence on special oath given in proceeding under O. 21, R. 100, Civil P. C., is not conclusive proof in suit under O. 21, R. 103, Civil P. C.

The primary meaning of S. 11 must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil Procedure Code itself shows that there is an essential difference between the two. The claim proceeding is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider, and therefore any evidence given under the special provisions of the Oaths Act in a proceeding under R. 100 cannot be conclusive proof in any suit under R. 103. [P 627 C 2; P 628 C 1]

K. V. Ramachandra Aiyer — *for Appellant.*

K. Bhashyam Ayyangar and T. R. Srinivasan — *for Respondents.*

Judgment.—The appellant in this appeal claims title to the western half of a certain house. The respondent was a decree-holder against a cousin of the appellant, who, according to the appellant, owned the eastern half. In execution of the decree, the respondent took delivery of the entire house. There was then an application under O. 21, R. 100 by the appellant asking the Court to re-deliver to him the western half of this house. During the progress of the inquiry into that application, the respondent challenged the appellants in the following words:

> If the petitioner swears on oath that the western half of the suit house belongs to him solely and that he himself built it and at the time when the plaintiff went for taking delivery it was in his possession, then to the extent of the western half, the petition may be allowed.

The appellant accepted the challenge and gave evidence on special oath in the affirmative on all the three points put to him by the respondent. This oath was of course followed by the allowing of the appellant's petition. The respondent then filed a suit under R. 103 against the appellant and his brother and they took the objection that no suit would lie because of the evidence which the appellant had given on oath. This preliminary objection was upheld by the District Munsif. On appeal, the learned District Judge of Vellore found that the oath was no bar to the suit and accordingly remanded the suit for disposal after trial on the other issues. Against that order of remand, the present appeal has been filed. The main question to be decided in this appeal is the interpretation of S. 11, Oaths Act. S. 11 which refers to evidence given on special oath runs as follows :

> The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

And the question which I have now to decide is whether this Section relates to the proceeding in which the evidence was given alone or whether it relates to all possible proceedings in which the subject-matter of the evidence given on oath may be involved. In favour of the latter view is no doubt the fact that in S. 11 no specific statement is made restricting the particular proceedings in which the evidence shall be conclusive proof. On the other hand, Ss. 8 and 9 obviously refer to some judicial proceeding, and it seems to me the only proper method of interpreting S. 11 is to interpret it in conjunction with Ss. 8 and 9, and that its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. This seems to me clear from the expression "the evidence so given." It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered.

It is however argued on behalf of the appellant that although the suit under O. 21, R. 103 may not in one sense be the same proceeding as a petition under R. 100 it is, nevertheless, a continuation of, or in the nature of an appeal from that form of proceeding and therefore any evidence given under the special provisions of the Oaths Act in a proceeding under R. 100 must be conclusive proof in any suit under R. 103. In support of this argument, I have been referred to a decision in 38 Mad 535[1] in which it has been held that a suit of this kind is a continuance of a claim petition with regard to the doctrine of lis pendens. In 38 Mad 535[1] an alienation which took place between the disposal of a claim petition and the institution of a suit was held to be affected by the doctrine of lis pendens. Again in 35 Cal 202[2] the Privy Council dealing with a question of court-fee, has pointed out how a suit of this nature to set aside an order in a claim petition is in the nature of an appeal or a review and therefore comes within a particular provision of the Court-fees Act and is chargeable with a particular sum as court-fees. It does not seem to me that these rulings afford much guidance in the decision of the present appeal. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil Procedure Code itself shows that there is an essential difference between the two. The claim proceeding is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider. It seems to me impossible to hold that unless it is clearly present to the minds of the parties that the evidence which is going to be given in the claim petition is in no manner to be challenged in or by a subsequent suit, an oath in those claim proceedings must relate to the claim proceedings themselves and to them alone.

If we go back to the terms of the challenge in the present case, we find no doubt that the appellant was called upon to repeat on oath his contention that he was the owner of the western half of the suit house. It does not seem to me reasonable to argue that because the appellant was called upon to make that statement, the respondent was setting the whole question of title in issue between himself and the appellant or that the respondent had in mind a complete promise never to proceed against the appellant in the Civil Courts under R. 103. The limitation within which the challenge was made is clearly to be seen in his own words "that if the appellant makes the statement on oath then the petition may be allowed." All that that means, it seems to me, is that the respondent has no objection to the appellants being put in immediate possession of the western half of the house, if he be resolute enough to restate his contentions by taking a special oath. This is in itself a very real concession and, it seems to me, that on the language of the challenge itself, all that the respondent meant was that the particular petition in which he was engaged might be decided unfavourably to himself. Of course, he has not in so many words reserved in the challenge any right to file a suit. But, it seems to me, that the burden lies upon the other side to establish that the challenge was intended to have any effect upon any possible civil suit which might be filed under Rule 103. The only way in which the evidence given in the claim petition could be used to defeat the respondent seems to me to be, if the doctrine of res judicata were to apply to the subsequent proceeding. Obviously, in the present case, the doctrine of res judicata cannot apply because the order on a claim petition is specifically made subject by the provisions of the Civil Procedure Code itself to the result of a suit under S. 103 and the appellant's learned advocate did not attempt to rely upon the doctrine of res judicata. I am accordingly of opinion that the order of the learned District Judge remanding this suit was correct and that this appeal must fail. It is accordingly dismissed with costs. Leave granted.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 628

WADSWORTH J.

A. Ramu Mudali — Appellant.

v.

Shobagmul Sowcar and another — Respondents.

Appeal No. 124 of 1937, Decided on 18th September 1939, against appellate order of Dist. Court, North Arcot, D/- 11th January 1937.

(a) Execution — Decree binding—Decree on its face showing that Court passing it had no jurisdiction to pass it—Executing Court can go into question whether that decree is nullity.

Where on the face of the decree, it can be seen that the Court which passed the decree had no jurisdiction, or if there are apparent reasons for doubting its jurisdiction to pass that decree, the executing Court can go into the question whether or not the decree is a nullity. The extent to which the executing Court can go into the validity of a decree, which is not on its face one passed without jurisdiction, is very limited. [P 629 C 2]

(b) Partnership Act (1932), S. 69 — It is doubtful whether Court has no jurisdiction to

---

1. Krishnappa Chetty v. Abdul Khader Sahib, (1915) 2 A I R Mad 495= 25 I C 11=38 Mad 535=26 M L J 449.
2. Phulkumari v. Ghanshyam Misra, (1908) 35 Cal 202=35 I A 22=7 C L J 36 = 12 C W N 169 (P C).

pass decree in favour of unregistered partnership—Even assuming that it has no jurisdiction to pass such decree, executing Court is not entitled to go into elaborate enquiry as to its legality.

It is doubtful whether it can be said that a Court has no jurisdiction to pass a decree in favour of an unregistered partnership. The most that can be said is that, in certain circumstances a suit by an unregistered partnership is liable to be rejected in limine. Even if there is any lack of jurisdiction which may have existed in the Court which passed such decree the lack of jurisdiction could only be ascertained with an amount of research and investigation which would be beyond the functions of an executing Court. [P 630 C 2; P 631 C 1]

(c) Partnership Act (1932), S. 69 — Suit instituted after 1st October 1933 by unregistered firm in respect of debt arising before commencement of Act—S. 69 does not apply.

The Partnership Act is peculiar in that the commencement of the Act for the purposes of S. 69 is a year later than the commencement for the purpose of the rest of the Act. So far as Madras is concerned, and also in Rangoon, a suit instituted after 1st October 1933 by an unregistered firm in respect of a debt arising before the commencement of the Act is one to which S. 69 does not apply. [P 630 C 2; P 631 C 1]

Ch. Raghava Rao — *for Appellant.*

E. Vinayaka Rao — *for Respondents.*

Judgment. — The appellant was defendant 2 in a suit on a promissory note which was decreed without contest. In bar of execution of that decree, he raised the objection that the suit was bad and the decree a nullity because the plaintiffs at the time of the filing of the suit constituted an unregistered partnership. The plaint filed on 27th June 1935 describes the plaintiffs by their names only and contains no allegation that the claim is made on behalf of the firm or that the promissory note was executed to the firm, nor does it pray for a decree in favour of the firm. But cl. 2-a, of the plaint avers that the two plaintiffs are "joint partners," that plaintiff 1 is the managing partner of the firm and that therefore he is signing the plaint on behalf of plaintiff 2 also. Thus, the fact that the plaintiffs constitute a firm is pleaded merely to show that plaintiff 1 has authority to represent plaintiff 2. The plaint is not in other respects drafted as a plaint in a suit filed by a firm. The decree however has altered the cause title and describes the plaintiffs as "Shobhagmul Sowcar and Ramlal Sowcar by managing partner plaintiff 1" and the same cause title is repeated in the execution petition. The promissory note upon which the suit is brought is dated 15th March 1933, a date of some importance with reference to the date of the commencement of the Partnership Act.

The objection raised by the appellant is briefly that under S. 69, Partnership Act, no suit could lie by an unregistered firm in respect of a contract and therefore the Court had no jurisdiction to entertain this suit, the decree is a nullity and the executing Court should have refused to execute it. Two questions obviously arise. One is whether this decree is one passed without jurisdiction and the other is whether this is a question which the executing Court is entitled to go into. I will deal with the second question first. Undoubtedly, the general rule is that the Court which executes a decree must take it as it stands and cannot entertain an objection as to its legality or propriety: 44 Cal 627.[1] This general rule is subject to exceptions; but it has been generally recognized by the Courts that exceptions to the rule should be restricted to certain categories which have been recognized by the Courts and that the Courts should be very chary of recognizing fresh exceptions. Certain exceptions are widely recognized. It has always been recognized by this High Court that an executing Court can refuse to execute a decree if it is one apparently passed without jurisdiction. Even this exception has not been recognized everywhere, (*vide* 9 Rang 480[2]) but it certainly holds force so far as Madras is concerned. If therefore on the face of the decree, it can be seen that the Court which passed the decree had no jurisdiction, or if there are apparent reasons for doubting its jurisdiction to pass that decree, the executing Court can go into the question whether or not the decree is a nullity. The extent to which the executing Court can go into the validity of a decree, which is not on its face one passed without jurisdiction, is very limited.

One class of cases has been recognized by this High Court, viz., cases in which the executing Court contemplates a sale of property which, by a provision in law enacted for the benefit of the public generally, is inalienable. Cases under this class relate, generally, to sales in violation of the provisions of the Madras Impartible Estates Act or sales in violation of Act 3 of 1895 governing service inams. It may however be doubted, whether this class of cases is really an exception to the general rule; for the grounds of the executing Court's enquiry into the executability of the decree are not really grounds relating merely to the decree itself, but rather to the power of the Court to effect the alienation which the execution completes. That is to say, the basis of the executing Court's right to go into the nature of the decree is really not the illegality of the decree but the Court's own legal duty not to carry out an alienation which offends against a prohibition laid down for public reasons by statute. In other words, it is not really a power to question the decree, but a power residing in the executing Court to make sure that its own act is not illegal. I therefore venture to doubt whether this class of cases is really an exception to the general rule that Courts should not go behind the decree except on grounds of apparent lack of jurisdiction.

---

[1] Kalipada Sirkar v. Hari Mohan Dalal, (1917) 4 A I R Cal 844=35 I C 856=44 Cal 627=24 C L J 375=21 C W N 1104.

[2] Nathan v. Samson, (1931) 18 A I R Rang 252 =135 I C 65=9 Rang 480 (F B).

A further class of cases relates to decrees against persons under a disability who are alleged not to have been properly represented. There is a difference of opinion in the various Courts on the question whether an executing Court can go into the validity of the decree on these grounds. It is not necessary for me to go into the question for the purpose of the present case. A further possible exception relates to decrees against dead men. Here again, it is by no means universally acknowledged that an executing Court can go into the question whether the decree was passed against a person already dead. But even if the power of the executing Court to make such an enquiry be recognized, it is again perhaps not so much an enquiry into the validity of the decree, as an enquiry into the existence of any properties against which a decree can be executed. For, if the defendant was dead at the time when the decree was passed, his properties would have already passed to his heirs and all that would remain against which the decree could be executed would be the person of a man already defunct. Looked at from that angle, it is not really an exception to the rule that the executing Court cannot go into the validity of the decree apparently passed with jurisdiction.

An attempt has been made to argue in the present case that there is a prohibition against the passing of decrees in favour of unregistered partnership—a matter which seems to me rather doubtful, for all we find in S. 69 is a prohibition against the filing of suits by unregistered partnerships. It has however been argued that from the terms of sub-cl. 4 (b) of S. 69, one might infer a general prohibition against the entertainment of execution proceedings by unregistered partnerships. This seems to me to be to deduce far too much out of the special provision relating to Small Cause Court proceedings. Now this decree on its face is not one apparently passed without jurisdiction. Certainly on its face, it appears to be a decree in favour of the partnership, though, as I have already indicated, no such decree was expressly prayed for. But there is nothing on the face of the decree to show that the partnership was unregistered. True that in the counter affidavit to the execution petition, it was contended that the partnership was unregistered and, no reply having been given and there being no evidence to the contrary, one may infer that this contention was correct. But the fact remains that the decree was not one apparently passed without jurisdiction. I doubt also whether it can be said that a Court has no jurisdiction to pass a decree in favour of an unregistered partnership. The most that can be said is that, in certain circumstances, a suit by an unregistered partnership is liable to be rejected in limine. The circumstances are (a) that the partnership in question is not a partnership of the non-contractual kind constituted by a Hindu joint family (*vide* S. 5 of the Act); (b) that the proceeding in question is not one saved by the special provisions of S. 74 of the Act.

Now, in the present case, it appears that the two plaintiffs are Hindus closely related to one another. The learned District Judge has inferred that in all probability they do not constitute a joint family firm. But the matter not having been put into issue in the suit, it cannot, in my opinion, be said that the contention based on S. 5 would not have been open to the plaintiffs had the objection been taken, as it should have been taken, at the time of the trial. Further, the debt with which we are concerned is a promissory note dated 15th March 1933 said to be in respect of a family debt, the origin of which we do not know. The Partnership Act is peculiar in that the commencement of the Act for the purposes of S. 69 is a year later than the commencement for the purpose of the rest of the Act. The Act generally came into force on 1st October 1932. S. 69 came into force on 1st October 1933. It is, I think, settled so far as Madras is concerned, and also in Rangoon, that a suit instituted after 1st

October 1933 by an unregistered firm in respect of a debt arising before the commencement of the Act is one to which S. 69 does not apply. The terms of S. 74 (b) exclude from the operation of the Act any legal proceeding or remedy accruing before the commencement of the Act in respect of any right, obligation or liability which, with reference to sub-cl. (a), was "acquired, accrued or incurred before the commencement of the Act." Now it has been held that the remedy which accrues before the commencement of the Act is one which accrues before the date on which S. 69 comes into force: A I R 1938 Rang 273;[3] (1938) 2 M L J 44.[4] It is to my mind difficult to postulate a different date for the commencement of the Act when dealing with the liability in respect of which the remedy arises, for, if a man had a right on 30th September 1933 to bring a suit in respect of a debt incurred after the 1st October 1932, one would naturally infer that that remedy would be protected by the terms of S. 74, cl. (b), the object of which apparently, is to give the Government time to frame the necessary rules and to give the parties time to carry out the necessary formalities.

I am therefore inclined to the view that the suit out of which this decree arose is not one barred under S. 69, Partnership Act. Whether that view be correct or not, it seems to me clear that any lack of jurisdiction, if lack of jurisdiction be the proper term—which may have existed in the Court which passed this decree could only be ascertained with an amount of research and investigation which would be beyond the functions of an executing Court. The executing Court had an apparently good decree to execute and it is not, in my opinion, entitled to go into an elaborate enquiry into the legality of that decree, an enquiry which demands the adducing of evidence which was not put before the trial Court before which the objection should have been raised. In the result therefore I hold that the decision of the District Judge is correct and I dismiss the appeal with costs. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

---

[3] Soonoiram Ramniranjandas v. Junjilal, (1938) 25 A I R Rang 273=176 I C 691=1938 R L R 371 (F B).

[4] Girdhari Lal Son & Co. v. Kappini Gowder, (1938) 25 A I R Mad 688=179 I C 16=(1938) 2 M L J 44.

---

* A. I. R. 1940 Madras 631

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Nunna Gopalan — Petitioner.

v.

Vuppuluri Lakshminarasamma — Respondent.

Civil Revn. Petn. No. 873 of 1939, Decided on 25th October 1939, to revise decree of Sub-Judge, Ellore, in A. S. No. 110 of 1935.

(a) Promissory Note—Promissory note payable on demand becomes payable immediately demand is made.

In the case of a promissory note which is payable on demand, it does not become payable until demand is made. On the demand being made it falls due immediately: *(1890) 24 Q B D 13; 5 Mad 108 and A I R 1921 Cal 302, Rel. on.* [P 632 C 1]

(b) Promissory Note—Promissory note payable on demand — Amount paid by maker before demand but note left with payee—Payee endorsing it to third person without latter's knowledge of fact of payment—Endorsee can sue maker on promissory note : *64 M L J 241=A I R 1933 Mad 300=141 I C 136, Overruled.

Where a maker of promissory note payable on demand has before there being any demand made by the payee paid the amount without asking for the return of the promissory note and the note is endorsed by the payee to a third person without latter's knowledge of the fact of payment, the endorsee is entitled as holder in due course, to sue the maker on the promissory note : *64 M L J 241 =A I R 1933 Mad 300=141 I C 136,* **Overruled** ; *A I R 1917 Mad 886 and A I R 1936 Mad 879, Rel. on.* [P 632 C 2 ; P 633 C 1]

V. Parthasarathi for J. Krishnamurthi — *for Petitioner.*

K. Venkataramaraju — *for Respondent.*

Leach C. J. — On 10th December 1933 the respondent executed a promissory note in favour of one Maddipati Tattabayi, alias Tata, defendant 2 in the suit out of which this petition arises. The respondent says that she paid the amount due on the promissory note two days later, but the instrument was left in the hands of the payee, who the next day endorsed it to the petitioner. The petitioner instituted a suit on the promissory note in the Court of the District Munsif of Kovvur. The District Munsif passed a decree against the respondent and the payee. The respondent then appealed to the Subordinate Judge of Ellore, who confirmed the decree so far as it affected the payee, but dismissed the suit so far as it concerned the respondent. The Subordinate Judge held that the petitioner was a holder in due course, but inasmuch as the respondent had paid the amount due on the promissory note to the payee he was not entitled to recover from the respondent. The petitioner filed a second appeal, but as the amount involved was less than Rs. 500 the appeal did not lie. My learned brother Krishnaswami Ayyangar, however, allowed the appeal to be treated as an application for revision under S. 115, Civil P. C., and the case has been placed before this Bench for decision.

The opinion of the Subordinate Judge that the petitioner was not entitled to recover is contrary to the provisions of the Negotiable Instruments Act. S. 9 of the Act states that the term "holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. S. 22 says that the maturity of a promissory note or bill of exchange is the date at which it falls due. It is to be observed that in the case of a promissory note which is payable on demand, (as in this case) it does not become payable until demand is made. On demand being made it falls due immediately : *see* (1890) 24 Q B D 13,[1] 5 Mad 108,[2] 47 Cal 861.[3] S. 60 provides that a negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction by the maker, drawee or acceptor at or after maturity, but not "after such payment or satisfaction." "Such payment" means at or after maturity. S. 118 says that until the contrary is proved it shall be presumed that every transfer of a negotiable instrument was made before its maturity, and that the holder of a negotiable instrument is a holder in due course. In this case, there is no evidence of any demand having been made on the respondent before she paid the amount to the payee of the instrument and it must therefore be taken that the indorsement to the petitioner took place before maturity. According to the sections of the Act to which reference has been made the petitioner is clearly entitled to recover from the maker.

In (1890) 24 Q B D 13,[1] the Court of appeal had to consider the position of a person who was a holder of a promissory note in these circumstances. The payee of the instrument had taken from the maker a further security for the same amount in the shape of a mortgage. The payee transferred the mortgage to another person, receiving on the transfer the amount of the debt. Subsequently the payee indorsed the promissory note which remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances. It was held that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and the plaintiff as a bona fide indorsee for value was entitled to recover upon it. Lord Esher said :

> In this case the plaintiff sues the maker of a promissory note payable on demand as indorsee. It was admitted that the plaintiff was indorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases shew that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back . . . . . . If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing.

That is the position here. The principle laid down in (1787) 2 T R 63=1 R R 425,[4] that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it, has also direct application. The respondent had discharged the promissory note on 12th December 1933, but it was indorsed to the petitioner without knowledge of this fact the next day and the respondent as the maker of the note should have insisted on its return to her when she paid the amount. She did not do so and as she left the instrument in the hands of the payee and thus gave him an opportunity to commit a fraud she must suffer in preference to the petitioner. In this connexion I may point out that S. 81, Negotiable Instruments Act, provides that any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, is before payment entitled to have it shown, and is on payment entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. The respondent, having paid the promissory note without insisting on its return to her or without obtaining from the payee a guarantee, acted at her own risk.

---

[1] Glasscock v. Balls, (1890) 24 Q B D 13=59 L J Q B 51=62 L T 163=38 W R 155.

[2] Harry Van Ingen v. Dhunna Lall Lallah, (1882) 5 Mad 108.

[3] Shaha & Co. v. Bengal National Bank Ltd., (1921) 8 A I R Cal 302=60 I C 940=47 Cal 861=33 C L J 541.

[4] Lickbarrow v. Mason, (1787) 2 T R 63=1 R R 425.

In 4 M L W 34,[5] Seshagiri Ayyar J., held that the maker of a promissory note could not plead against a holder in due course that he had paid the money to the payee before the indorsement, and relied on the decision in (1900) 2 Q B 72[6] in which reference to (1787) 2 T R 63[4] was made. The same conclusion was arrived at by Pandrang Row J., in 71 M L J 473.[7] The only dissentient note is that struck by Pandalai J., in 64 M L J 241,[8] on which the respondent relies. There the facts were these. A promissory note was executed by *A* in favour of *B*, but the note came into the possession of his wife and her nephew who refused to give it up to *B*. As the result *B* asked *A* to give him a fresh promissory note, which *A* did. The new promissory note was subsequently negotiated by *B*. Eventually *A* paid the amount due on the promissory note to the indorsee. After *B's* death his wife negotiated the original promissory note and the indorsee called upon *A* for payment. Liability was denied by *A* and Pandalai J. accepted his defence. This decision is clearly wrong. Apart from the provisions of the Negotiable Instruments Act the principle in (1787) 2 T R 63[4] applied. The maker of the promissory note gave of his own free will a new promissory note without insisting on the return of the original instrument or obtaining an indemnity. Had he obtained an indemnity it would not of course have precluded the plaintiff from recovering from him, but if he had taken a proper indemnity he would have safeguarded his position. 64 M L J 241[8] was wrongly decided and cannot be allowed to stand.

It follows that the petition must be allowed and the decision of the Subordinate Judge so far as it exonerated the respondent must be set aside. The decree of the District Munsif will therefore be restored in its entirety. The petitioner is entitled to his costs in this Court and in the lower Appellate Court. The respondent claims to be an agriculturist and to be entitled to the benefit of the Madras Agriculturists' Relief Act, 1938. She must make her application to the trial Court which will hear and decide it.

C.R.K./D.S. *Petition allowed.*

---

[5] Muthureddi v. Velu Asari, (1917) 4 A I R Mad 886=35 I C 591=4 M L W 34=(1916) 2 M W N 107.

[6] Nash v. De Freville, (1900) 2 Q B 72 = 69 L J Q B 484=82 L T 642=48 W R 434=16 T L R 268.

[7] Venkataratnam v. Kanakasundara Rao, (1936) =23 AIR Mad 879=165 I C 432=71 M L J 473.

[8] Venkanna v. Subbayya, (1933) 20 A I R Mad 300=141 I C 136=64 M L J 241.

A. I. R. 1940 Madras 633

SOMAYYA J.

Nallasivan Pillai and others — Appellants.

v.

Ganapathi Mudaliar and another — Respondents.

Second Appeal No. 409 of 1935, Decided on 13th February 1939, against decree of Sub-Judge, Tinnevelly, D/- 27th February 1935.

Religious Endowment — Founder prescribing line of devolution regarding trusteeship — He has no right to alter it unless he had reserved such power.

Once a founder prescribes a line of devolution as regards the trusteeship in the document creating a trust, the founder has no right to alter the line of devolution of the trusteeship unless he had reserved such a power in the original document itself : *A I R 1923 Cal 30; A I R 1934 Cal 244 and A I R 1931 Cal 329, Rel. on.* [P 634 C 1]

K. Balasubramania Iyer—*for Appellants.*

K. V. Krishnaswami Iyer — *for Respondents.*

Judgment.—Defendants 2 and 3 are the appellants in this second appeal. The suit was filed by the plaintiff for establishing that he is the lawfully appointed dharmakartha and entitled to manage and to be in possession of the property dedicated for certain charities. By two documents, Exs. A and B dated 27th November 1910 and 10th August 1911 respectively, the founder dedicated certain properties for the charities mentioned in the two documents and directed that after her lifetime "Ammaiyappa Mudaliar Avergal and after his lifetime his heirs should be the hereditary hukdars." The documents also stated that the founder had no right whatever to cancel or alter this deed of settlement during the lifetime of the settlor. The present suit was filed after the settlor's death which took place on 10th August 1931. The plaintiff states that he is an heir of Ammaiyappa Mudaliar and therefore a hereditary dharmakartha according to the express terms of Exs. A and B. This claim is defended on the ground that after Ammaiyappa Mudaliar's death in 1918, it was competent to the founder to make a new provision for the devolution of the trusteeship and that Ex. II in the case was executed in exercise of such a power by the founder in the year 1925. If Ex. II is to prevail, then the defendants are entitled to succeed.

The main question therefore is whether the settlor had any right after Ammaiyappa Mudaliar's death to make a new provision as regards devolution of the trusteeship. Another contention is also raised that the provision in favour of Ammaiyappa Mudaliar and his heirs became inoperative by reason of the death of Ammaiyappa Mudaliar taking place during the lifetime of the founder. The latter contention might first be disposed of. On the language of the two documents, namely Exs. A and B, I do not think that the provision in favour of Ammaiyappa Mudaliar and his heirs as hereditary hukdars is a contingent one and that it will lapse if Ammaiyappa Mudaliar predeceased the founder. The language leaves no room for doubt that it was a hereditary trusteeship that was conferred upon Ammaiyappa Mudaliar subject to a life estate in favour of the settlor herself. The provision in favour of Ammaiyappa Mudaliar was a vested one though it came into operation only after the death of the life tenant, namely the settlor herself. This contention therefore fails. The other contention that even if the provision in favour of Ammaiyappa Mudaliar was a vested one and therefore did not lapse on the death of Ammaiyappa Mudaliar, the settlor had a right to make a fresh provision regarding the devolution of the trusteeship is, in my opinion, devoid of any authority. On the other hand, the authorities are all clear that once a founder prescribes a line of devolution as regards the trusteeship in the document creating the trust, the founder has no right to alter the line of devolution of the trusteeship unless he had reserved such a power in the original document itself. The decisions in 50 Cal 197,[1] A I R 1934 Cal 244[2] and 34 C W N 1087[3] lay down this proposition. See also the passage in Mr. P. R. Ganapathi Aiyar's Book on Religious Endowments at page 715.

The learned counsel for the appellants has drawn my attention to the decision in 41 C L J 22,[4] where there are certain remarks which are in favour of the appellants. But as pointed out in the later decisions of the Calcutta High Court, there was in that case an express provision against the settlor changing the devolution of the trusteeship, and the actual decision in the case was that the settlor had no right to change the devolution as there was such an express prohibition. The remarks of the learned Judges on the general question must therefore be taken to be mere obiter. I am not able to see what the peculiar circumstances of the facts before those Judges were from the report in 41 C L J 22[4] and if the decision proceeded upon the peculiar circumstances which the learned Judges referred to on page 29 of the report, then it is a decision on the facts of that case and would be of no assistance to us in this case. But if the remarks go further and are of general application, then I respectfully disagree and I hold following the other decisions, which seem to me to be in conformity with the reason of the rule, that the settlor has no right to alter the devolution of the trusteeship unless such a right had been expressly reserved in the document creating the trust. Another question raised by Mr. Balasubramania Aiyer is that the dedication in this case was not of the properties themselves and that there was only a trust created in favour of the charities. What is contended is that the properties mentioned in Exs. A and B were subjected to a trust in favour of the charities and that therefore the properties themselves are not the trust properties. This argument is evidently advanced because it was expected that there might be a surplus after performing the charities mentioned in the two documents.

In the first place, there is an express finding of the lower Appellate Court that the income of the properties does not exhaust the charities mentioned in the two trust deeds. That is a finding of fact which is binding upon me. Next, I do not find any warrant for the Subordinate Judge's treatment of the provisions in Exs. A and B in para. 7 of his judgment. He apparently takes it that for each of the charities only the amounts mentioned as against each should be spent. On reading the two documents carefully, I do not think that that is

---

1. Gauri Kumari Dasee v. Ramanimoyi Dasee, (1923) 10 A I R Cal 30=70 I C 175 = 50 Cal 197=26 C W N 920.
2. Narayanachandra Dutt v. Sm. Bhuban Mohini Basu, (1934) 21 A I R Cal 244=151 I C 954= 38 C W N 15.
3. Sm. Manorama Dasi v. Dhirendra Nath Basu, (1931) 18 A I R Cal 329 = 131 I C 392 = 34 C W N 1087.
4. Sreepathi Chatterjee v. Krishnachandra Banerjee, (1925) 12 A I R Cal 442=82 I C 840=41 C L J 22.

the intendment of the two documents. The charities themselves are mentioned and the amount mentioned as against each was only a rough estimate made by the settlor at that time. It is the performance of the charities that is directed and if the performance of the charities directed in the two documents requires more than the amounts mentioned as against each, I do not see any reason why the trustee should not spend the amount required. Anyway, there being a finding that the income of the properties is not proved to be exhausted by the charities, the question argued by Mr. Balasubramania Aiyer does not arise. Further, the express language of the two documents Exs. A and B leaves no room for doubt that it is the properties themselves that are dedicated and it is not a case of the properties being burdened with the performance of the charities mentioned in the two documents. The appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1940 Madras 635

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

S. V. Subba Rao—Appellant.

v.

Calicut Co-operative Urban Bank Ltd., Calicut — Respondent.

Letters Patent Appeal No. 74 of 1938, Decided on 23rd November 1939, against judgment of Venkataramana Rao J., *Reported in A I R 1939 Mad 304.*

*** Co-operative Societies Act (1912), Rules under R. 15 (7) (Madras)—Execution—Award filed in Civil Court under R. 15 (7) (c)— Limitation Act, Art. 182 applies and not Art. 181.** *I L R 1937 Mad 495=A I R 1937 Mad 31 = 167 I C 223, Overruled.*

An award under the Co-operative Societies Act when it is filed in a Civil Court under R. 15 (7) (c) has to be executed as a decree of the Court and in effect it becomes a decree of the Court. As the provisions of the Civil Procedure Code admittedly apply, the provisions of S. 48 of the Code must apply. S. 48 provides that a decree shall run for a period of twelve years, provided of course that steps in execution are taken at intervals of not more than three years as required by Art. 182, Limitation Act. If S. 48 applies it follows that the appropriate Article is 182 and not Art. 181. If Art. 182 did not apply but Art. 181 did, there would be conflict as Art. 181 fixes a period of three years and S. 48 a period of twelve years : *A I R 1927 Cal 853 and A I R 1935 Mad 217, Rel. on; 31 Mad 24, Disting.; I L R 1937 Mad 495=AIR 1937 Mad 31=167 I C 223*, **Overruled.** [P 635 C 2]

N. R. Sesha Ayyar — *for Appellant.*

K. Kutti Krishna Menon — *for Respondent.*

Leach C. J. — This appeal raises the question whether Art. 181 or Art. 182, Limitation Act, applies to the execution of an award passed under S. 51, Co-operative Societies Act, 1912. If the Article which applies is Art. 181 an award which was filed in the Court of the District Munsif of Calicut for execution will be time-barred. If Art. 182 applies it still may be executed. The District Munsif and the District Judge of South Malabar on appeal held that Art. 182 applies and their decision was confirmed in a second appeal which was decided by Venkataramana Rao J. The learned Judge has dealt with the argument in full and we are in complete agreement with his observations. R. 15 (7) (c) of the rules framed under the Act states that on application to the Civil Court having jurisdiction over the subject-matter of the decision or award, the Court shall enforce the decision of award as if it were a final decree of the Court, and were it not for the judgment of Cornish J. in I L R (1937) Mad 495=71 M L J 759,[1] we should not have thought that there would have been any doubt about the applicability of Art. 182. It is conceded by the learned advocate for the appellant, as it must be, that an award under the Co-operative Societies Act attracts all the provisions of the Code of Civil Procedure in the matter of execution. If it attracts all the provisions of the Code with regard to execution it must, in our opinion, of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. As the provisions of the Code of Civil Procedure admittedly apply, the provisions of S. 48 of the Code must apply. Section 48 provides that a decree shall run for a period of twelve years, provided, of course, that steps in execution are taken at intervals of not more than three years as required by Article 182, Limitation Act. If S. 48 applies, it follows that the appropriate Article is 182 and not Art. 181. If Art. 182 did not apply but Art. 181 did, there would be a conflict as Art. 181 fixes a period of three years and S. 48 a period of twelve years.

Cornish J. considered that the question was really decided in 31 Mad 24[2] but we do not accept that opinion. 31 Mad 24[2] related to the provisions of S. 40, Revenue Recovery Act, the wording of which is very different from the wording of R. 15 (7) (c), Co-operative Societies Act. We can see no reason for applying the decision in 31 Mad 24[2] to a case like the present one, and we consider that I L R (1937) Mad 495[1] was wrongly decided. As indicated by Venkataramana Rao J. in his judgment the decision of the Calcutta High Court in 55 Cal 499,[3] which was followed by this Court in 58 Mad 760,[4] has direct bearing on the question under discussion. The Calcutta case had reference to the execution of award under S. 15, Arbitration Act, which says that where an award has been filed in Court, it shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court. It was held that Art. 182 and not Art. 181 applied. Rankin C. J. remarked:

---

[1] Co-operative Credit Society v. Chinnaswami Udayan, (1937) 24 A I R Mad 31 = 167 I C 223=71 M L J 759=I L R 1937 Mad 495.

[2] Sambasiva Mudaliar v. Panchanadha Pillai, (1908) 31 Mad 24=17 M L J 441.

> If one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the Legislature in sub-s. 1 of S. 15, Arbitration Act, were intended to go to the question of limitation as well as to the question of procedure.

There is no difference here between Section 15, Arbitration Act, and R. 15 (7) (c), Co-operative Societies Act, and as 55 Cal 499[3] has been accepted by a Bench of this Court as embodying the correct statement of the law it decides the matter. The appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[3] Re Belvedere Jute Mills Ltd. v. Hardwarimull & Co., (1927) 14 A I R Cal 853 = 104 I C 808 =55 Cal 499=31 C W N 1097.

[4] Hindu Religious Endowments Board, Madras v. Shirur Mutt, (1935) 22 A I R Mad 217=156 I C 747=58 Mad 760=68 M L J 200.

A. I. R. 1940 Madras 636

WADSWORTH J.

N. Paramasivan Pillai — Appellant.

v.

Thiruvudaya Mudaliar and others — Respondents.

Second Appeal No. 308 of 1935, Decided on 27th January 1939, against decree of Sub-Judge, Tuticorin, in A. S. No. 95 of 1933.

(a) Hindu Law—Manager—Managing member litigating in respect of joint family property —Presumption is that he represents his family.

When a person is a member of a joint family and is in management of the joint family property, he would ordinarily, in the natural course of affairs, be deemed to be acting on behalf of the family when he deals with the family property. The presumption that the manager suing in respect of joint family property is acting on behalf of the other members of the family, is really a presumption of the same class as those dealt with in S. 114, Evidence Act. Normally, the conduct of the manager of Hindu family bringing a suit with reference to joint family property is not to sue in respect only of his own personal interest but to sue as representing the family as a whole. [P 638 C 2]

(b) Hindu Law — Manager — Right in joint property litigated by managing member — Subsequent litigation by junior coparceners not getting impleaded in manager's suit cannot be permitted.

It is not in accordance with the policy of the law when a right in joint property has been litigated by the managing member of the family to permit subsequent litigation by a succession of junior coparceners who have not chosen to get themselves impleaded in the action brought by the managing member. [P 639 C 1]

A. Swaminatha Aiyar and S. Thyagaraja Aiyar — *for Appellant.*

T. M. Ramaswamy Aiyar — *for Respondents.*

Judgment.—This appeal arises out of a suit by defeated claimants in execution of a decree on a mortgage. The property in question originally belonged to a family consisting of two branches, Karuppaya's branch and Arunagiri's branch. The mortgagors against whom the decree was passed under which the defendant purchased, represented Arunagiri's branch. The plaintiffs claim title under Karuppaya's branch by a series of sale deeds and by the devolution of title to themselves on the death of their father which occurred about five years before these proceedings began. The plaintiffs are brothers. The eldest brother, P. W. 1 is not a party to the suit. After the defendant had purchased the property under the mortgage decree, he applied for delivery and was obstructed by the eldest brother of the plaintiffs, P. W. 1. He then applied to the Court for the removal of their obstruction and the result was an order, Ex. II dated 24th November 1930, whereby it was held that the plaintiffs' brother and his tenant were not in possession and the removal of their obstruction was directed. No suit was filed to contest this decision. But shortly afterwards there was a further obstruction, this time by the second brother (plaintiff 1 here) and again there was an application by the present defendant for the removal of the obstruction, resulting in an order dated 11th April 1931, which is Ex. A. This order merely says that the counter-petitioner relied upon the same documents which had been found to be inconclusive in the former claim petition and that a prima facie case for possession was therefore made out in favour of the present defendant. The present suit was filed on 11th April 1932, that is to say, exactly one year after the order in Ex. A, for a declaration that this order was not operative upon the plaintiffs' 5/12ths share of the property, for partition and profits. The 5/12ths share is arrived at by excluding the eldest brother and assuming that Karuppaya's branch was entitled to a half of the whole property. The plaint in the present suit ignores altogether the proceedings in the claim petition which ended with the order Ex. II.

The only contention which has been argued in Second Appeal is that the present suit is barred by limitation, having been preferred more than a year after the adverse order on the eldest brother's claim petition Ex. II, the eldest brother being the managing member of the family litigating with reference to joint family properties and therefore assumed to represent the joint family in that litigation. I must however observe that there were other contentions taken by the appellant, but as I am deciding in his favour on this main contention, it has been unnecessary to go into these other contentions.

Now, the actual affidavit filed by the eldest brother in the earlier claim proceedings has not been put into evidence and the appellant can only succeed on the basis that it has been established that the eldest brother was the managing member of the family litigating in respect of joint family properties and that from these facts a presumption must be drawn that he represented the family, the presumption being one which the plaintiffs should have rebutted by adducing actual evidence that the eldest brother was litigating only in his personal capacity. Now the eldest brother, P. W. 1, in his evidence admits that he was managing the family property for some time after his father's death. He goes on to qualify this admission by stating that he and his brothers "join together and manage the family affairs jointly," and that he alone does not manage. If however P. W. 1 was the manager of the joint family property after his father's death, that event having preceded his claim petition by about four years only and there being no evidence that he ever ceased to be the manager, to my mind it may be taken that he was in fact the managing member of the family at the time of the first obstruction. There is no question that the property with which we are concerned was joint family property and admittedly there was no partition between the brothers. We are therefore concerned only with the presumption which is to be drawn from these simple facts. The judgments of the Courts below give no assistance, for, although this plea of limitation based on the earlier claim order was expressly taken in the written statement and also in the appeal petition to the lower Court, neither Court has really dealt with it as raised. The law on the subject is summarized as follows in the latest edition of Mayne's Hindu Law, page 387:

> Where the suit relates to joint family property and the person sued or suing is the manager, he need not be described as such in the plaint, though it is advisable to do so. If it appears that in fact he was the manager and the suit related to the joint family property or its rights or liabilities, it must be presumed that he was suing or being sued in his representative capacity.

Sir Dinshaw Mulla in his principles of Hindu Law, Edn. 8, p. 286, observes:

> It seems that the manager of a joint Hindu family may sue or be sued as representing the family in respect of the transaction entered into by him as manager of the family or in respect of the joint family property and that a decree passed against him in such a suit would bind all other members of the family, if, as regards minors, he acted in the litigation in their interest and as regards adults, with their consent. The consent need not be express; it will be implied if they do not come and apply to be joined as parties to the suit.

I have been referred to no case on this subject actually arising out of proceedings by way of a claim in execution. There is a decision of a Bench in 52 Mad 787[1] wherein it was held that an adverse order passed under S. 145, Civil P. C., against the father of a family with reference to family property binds the sons who were not nominally parties but had notice of the proceedings. The true basis of the decision appears to have been that stated by Wallace J., namely that the father was in possession as the manager of the family and that the real question in issue was the right of the family to possession, for which purpose the father as manager represents the family. In 51 Bom 450,[2] where it was held that the manager in a previous suit had in fact been clearly acting on behalf of himself and his children in protecting the family property and the decree against him would bind the minor members of the family, it was pointed out that, had the father succeeded in the former case, his sons would have got the benefit of the litigation. In (1937) 1 M L J 16,[3] the Court had to deal with a mortgage over the entire family property by the manager who alone was sued and was not expressly sued as the manager of the family. It was held that the decree bound the entire interest covered by the mortgage, the basis of the decision being that the mortgagor represented the family.

---

[1] Venkatasomaraju v. Varahalaraju, (1930) 17 A I R Mad 48=122 I C 171=52 Mad 787=57 M L J 228.

[2] Lingangowda v. Basangowda, (1927) 14 A I R P C 56=101 I C 44=54 I A 122=51 Bom 450 (P C).

In (1937) 2 M L J 251,[4] which was a case of a suit on a mortgage executed anterior to the purchase of property by the manager on behalf of the family the manager alone was impleaded in the suit and he was not expressly impleaded in that capacity. The learned Judges held that there was a presumption from the circumstances that the defendant was in fact the manager of the property and that the property concerned was family property and that he was impleaded in his capacity as the family manager, though not expressly so described, so that the decree would bind the interests of the junior coparceners in the subject-matter of the suit. The decision in (1938) 1 M L J 526[5] was a case of a manager both of a joint family and of a joint family business who sued in his own name to recover money due to the business without stating in the plaint that he was suing on behalf of the family. It was held that the suit was not bad by reason of the omission from the plaint either of the names of the junior coparceners as parties or of any express plea that the suit was brought on behalf of the family. In 36 All 383,[6] there is a decision of the Privy Council in a mortgage suit brought with reference to joint family property against persons who were managers of the family, the junior coparceners not being impleaded. It was held that the latter were effectively represented and bound by the decree, even though they had no notice of the suit and the plaintiff did not know of their existence. Another decision to the same effect to which I have been referred is found in 6 I A 233.[7]

It is argued for the respondent that in all these cases, there were facts to justify an inference that the manager had actually brought the suit in his capacity as representative of the family even though he did not expressly claim such capacity. When one comes to study the decisions, it appears that what is described as an inference of fact is really the same thing as a presumption drawn from certain facts. No case has been cited before me either showing that when the manager sues or is sued with reference to joint family property, there is no presumption as to the capacity in which he sues, or to the effect that there is a presumption that he sues in his individual capacity. The essential point to remember seems to be this. When a person is a member of a joint family and is in management of the joint family property, he would ordinarily in the natural course of affairs be deemed to be acting on behalf of the family when he deals with the family property. It is not the usual thing for a manager of joint family property to alienate or mortgage family property without indicating in any way that he is concerning himself only with his own individual share and that he is not acting in that capacity which he usually enjoys. Similarly he would not ordinarily enter upon a litigation in respect of joint family property in any capacity other than the full capacity which he has as the manager in charge of the affairs of the family. The presumption that the manager suing in respect of joint family property is acting on behalf of the other members of the family, is really a presumption of the same class as those dealt with in S. 114, Evidence Act. That is to say, it is a presumption of a fact likely to have happened having regard to the common course of human conduct and public and private business. Normally the conduct of the manager of a Hindu family bringing a suit with reference to joint family property is not to sue in respect only of his own personal interest, but to sue as representing the family as a whole.

In the present case when the eldest brother of the plaintiffs filed his claim petition it would appear that one or more of the plaintiffs were minors. I am of opinion that the action of the manager in contesting the right of the court auction-purchaser claiming under the rival branch was intended to be and was in fact for the benefit of the minors. So far as the adult coparceners are concerned, they took no action either to support or dissent from the manager's litigation. It is therefore to be inferred that they were represented by the manager and I have no doubt whatever that, had the eldest brother succeeded in his claim they would have strenuously contended that the victory enured for their benefit. It is moreover not in accordance with the policy of the law when a right in joint property has been litigated by the managing member of the family, to permit subsequent litigation by a succession of junior coparceners who have not chosen to get themselves impleaded in the action brought by the managing member. I hold therefore that the order in Ex. II was an order passed against the managing member of the plaintiffs' family agitating a title claimed in common by the family as a whole and that he represented the junior coparceners and that, a suit not having been brought by these junior coparceners within one year from the date of the order, the order is conclusive as against them. The appeal is therefore allowed and the plaintiffs' suit is dismissed with costs throughout. Leave to appeal is refused.

---

[3] Ramanathan Chettiar v. S. R. M. M. C. T. M. Firm, (1937) 24 A I R Mad 345=168 I C 731 =I L R (1937) Mad 376=(1937) 1 M L J 16.

[4] Venkatanarayana Rao v. Venkatasomaraju, (1937) 24 A I R Mad 610=171 I C 101=I L R (1937) Mad 880=(1937) 2 M L J 251 (F B).

[5] Mallikarjuna Varaprasada Rao v. Venkatarathnam, (1938) 25 A I R Mad 739=177 I C 411=(1938) 1 M L J 526.

[6] Sheo Shankar Ram v. Jaddo Kunwar, (1914) 1 A I R P C 136=24 I C 504=41 I A 216=36 All 383 (P C).

[7] Bissesur Lall Sahoo v. Maharajah Luchmessur Singh, (1881) 6 I A 233=5 C L R 477=4 Sar 76=3 Suther 686 (P C).

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 639

WADSWORTH J.

Patayath Parumpayil Sankara Menon — Appellant.

v.

Karumathil Puthumanae Sanku's son Kuttani and others — Respondents.

Second Appeal No. 926 of 1935, Decided on 21st March 1939, against decree of Sub-Judge, Ottapalam, in A. S. No. 67 of 1933.

(a) Limitation—Onus—Objection that suit is barred— Onus is on plaintiff to prove that suit is within time.

When an objection is taken that a suit is barred by limitation, the burden lies upon the plaintiff to prove that it is within time. [P 640 C 1]

(b) Mortgage—Limitation — Presumption — Mortgage proved to have been executed in certain month — There is no presumption that it was executed on any particular day of that month—There must be proof positive of actual starting point when suit is challenged as barred.

There is no legal presumption that a mortgage was executed on any particular day within the month in which it is proved to have been executed. There must be positive proof of the actual starting point when a suit is challenged as barred by limitation. Especially when the plaintiff seeks to dispossess persons who have been in possession for approximately 72 years, he should be required to prove positively that there is a subsisting mortgage which he is entitled to redeem and this should be done not by showing a mere arithmetical probability that the mortgage subsists but by actual proof that the mortgage was executed within the period of limitation, or by proof of a valid acknowledgment which would save limitation: *26 Mad 34, Ref.* [P 640 C 1, 2]

(c) Limitation Act (1908), S. 22 — Redemption suit against member of unincorporated association in his personal capacity as mortgagee —Amendment seeking to sue member as representing association held could not be allowed as large number of fresh parties were being added—Fact that amendment was not opposed did not deprive association of its right to plead limitation.

A suit to redeem a mortgage was instituted against a member of an unincorporated association in his personal capacity as mortgagee. The member having contended that possession pertained not to him personally but to the aforesaid association of which he was a member, an application to amend the plaint was allowed and the plaintiff was allowed to sue the defendant as representing the association. No objection was taken to the amendment:

Held that it was not a case of a person already on the record being by means of an amendment impleaded in another capacity or on other grounds, but was a case in which by means of an amendment a very large number of fresh parties were added though by a special procedure one of their number who happened already to be on the record in his personal capacity was treated as the representative of the whole association and was essentially a case of adding fresh parties after the period of limitation had expired. The fact that the amendment was not opposed did not take away the right of the association to raise a question of limitation: *15 Mad 417; A I R 1917 Mad 471 and A I R 1935 Mad 160, Disting.; 25 M L J 259, Expl. and Disting.* [P 641 C 1, 2]

K. Kuttikrishna Menon—*for Appellant.*

D. H. Nambudiripad and K. P. Ramakrishna Iyer — *for Respondents.*

Judgment. — This appeal raises a question of limitation. The plaintiff who is the appellant sued to redeem a Malabar kanom mortgage executed in the month Dhanu of the Malabar year 1034, impleading defendant 1 in his personal capacity as the mortgagee. Some time after the filing of the suit, defendant 1 having contended that possession pertained not to him personally but to an unincorporated association of which he was a member, an application to amend the plaint was allowed and the plaintiff was permitted to sue defendant 1 as representing the association of which he was a member. No objection was taken to this amendment and nothing was said by the learned Judge at the time about the effect which the amendment would have on any plea of limitation.

Two questions have been raised. The first relates to the position without regard to the complication caused by impleading defendant 1 in his representative capacity. The suit was filed on 16th December 1930 and, if the suit mortgage was executed on or after 16th December 1858, the suit would be in time since a kanom mortgage ordinarily cannot be redeemed until twelve years after its execution. The first of Dhanu 1034 corresponds to 14th December 1858. There is no evidence to show on which particular day of the month Dhanu this mortgage was executed. The question therefore is whether there is any presumption in favour of the plaintiff by virtue of which it can be said that the suit is within time. Ordinarily speaking, when an objection is taken that a suit is barred by limitation, the burden lies upon the plaintiff to prove that it is within time. All that the plaintiff has proved positively in this case is that the mortgage was executed in a month of which the last 28 days would be within the period of limitation and the first two days outside that period.

I am not aware of any authority for the view that there is a legal presumption that an event took place on any particular day within the month in which it is known to have taken place. It has been suggested that the odds in favour of the plaintiff's suit being within time are 14 to 1 and that, from this fact, in the ordinary course of events the Court would be entitled to presume that that happened which most probably would have happened. But I feel great doubt on the question whether any such presumption can take the place of positive proof of the actual starting point when a suit is challenged as barred by limitation. There is a decision of this Court in 26 Mad 34,[1] which arose out of a Malabar mortgage of an unknown date though the year of its execution was found in the document itself. On the facts of that case, if the mortgage was actually executed in any part of this year except during the last 26 days, the suit would have been out of time. It was held that the suit was barred, but there is no consideration of the question whether there was any presumption against the plaintiff in that case owing to the fact that the mathematical probabilities were strongly against the plaintiff. In the absence of authority I am inclined to the view that, when the plaintiff seeks to dispossess persons who have been in possession for approximately 72 years, he should be required to prove positively that there is a subsisting mortgage which he is entitled to redeem and that this should be done not by showing a mere arithmetical probability that the mortgage subsists but by actual proof that the mortgage was executed within the period of limitation, or by proof of a valid acknowledgment which would save limitation.

A further question of limitation relates to the effect of the amendment of the plaint treating defendant 1 as the representative of an association alleged to be in possession of the suit property. There is a good deal of authority for the position that when there is an amendment whereby either the plaintiff or the defendant on record is impleaded in a capacity other than that which he originally had, S. 22, Limitation Act, has no application. The case in 15 Mad 417[2] was one in which defendant 1 was impleaded as trustee of a temple in a suit based on an allegation that the debt was one due from the temple. By an amendment of the plaint the suit was altered into one claiming the debt as due personally from defendant 1. It was held that S. 22, Limitation Act, did not apply, defendant 1 having been already on the record, the change being merely a change in the nature of a claim made against him. There is a decision of another Bench of this Court which goes a good deal further. The case reported in 33 I C 357[3] arises out of a suit which was filed by the plaintiff in his personal capacity, but an amendment of the plaint was allowed whereby he was permitted to sue as the representative of a company claiming on behalf of the company. Although the effect of this amendment was to bring the company itself which was not a party on to the record, it was held that S. 22, Limitation Act, did not bar the suit. In A I R 1935 Mad 160[4] a suit was filed against the defendant-guardian of a minor to recover a debt. After the period of limitation had expired an amendment of the plaint was allowed whereby the debt was claimed from the defendant personally.

---

[1] **Ittappan Kuttiravattat Nayar v. Nanu Sastri, (1903) 26 Mad 34=12 M L J 101.**

[2] **Saminatha v. Muthayya, (1892) 15 Mad 417=2 M L J 119.**

[3] **Muthukrishna Pillai v. Rajam Iyengar, (1917) 4 A I R Mad 471=33 I C 357=30 M L J 57.**

[4] **Seshagiri Rao v. Seshagiri Rao, (1935) 22 A I R Mad 160=154 I C 582.**

It was held that S. 22, Limitation Act, did not apply.

In 25 M L J 259[5] certain defendants impleaded only as legal representatives of a deceased partner, were sued for money and an amendment was allowed impleading those defendants in their personal capacity as partners themselves. This amendment was allowed only on terms reserving to these defendants the right to raise defences which would have been available had the plaint as amended been filed in 1912. The learned Judges held that the suit was barred by limitation, but the judgment proceeds almost entirely on the terms of the amendment order and it does not quote any of the authorities regarding the effect of such an amendment on the applicability of S. 22, Limitation Act.

It is not desirable, in my opinion, to quote cases from other High Courts where there has been a good deal of difference of opinion, the general trend of decisions of this Court being fairly consistent. I must however observe that there is no case of this High Court with the possible exception of the case in A I R 1935 Mad 160[4] which goes anything like as far as is necessary for the purpose of the plaintiff in the present case; and even the case just referred to can be distinguished on the ground that the plaintiff, though he filed the suit originally in his personal capacity was in fact at the time of suit the authorized representative of the company in which capacity he was eventually permitted to sue. The effect of the amendment in the present case is really to implead a considerable number of individuals joined together in an unincorporated association, with reference to which it does not appear that defendant 1 has any permanently representative status, he having been treated as its representative at the time of amendment only by the procedure laid down for representative suits. It is not a case, to my mind, of a person already on the record being by means of an amendment impleaded in another capacity or on other grounds. If we look at the essence of the amendment, it is a case in which by means of an amendment a very large number of fresh parties are added, though by a special procedure one of their number who happens already to be on the record in his personal capacity is treated as the representative of the whole association. It seems to me that this is essentially a case of adding fresh parties after the period of limitation has expired.

It is suggested that the fact that the amendment was not opposed should take away the right of the association to raise a question of limitation. I do not see how the absence of any objection to the amendment can take away any legal defence which may be open to the fresh parties brought on the record thereby. I therefore hold that by reason of the amendment the suit as against the association represented by defendant 1 is barred by limitation, even if it was within time as against defendant 1 personally when it was first instituted. In either view therefore, the appeal fails and is dismissed with costs of respondents 3 and 4. Leave granted.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 641

SOMAYYA J.

Rahmat Bi Saheba and others — Appellants.

v.

R. Krishna Doss Lala — Respondent.

City Civil Court Appeal No. 23 of 1937, Decided on 27th March 1939, against decree of Principal City Civil Judge of City Civil Court, Madras, D/- 8th October 1936.

(a) Madras City Tenants Protection Act (3 of 1922), S. 11 — Notice under S. 11 is condition precedent to filing suit — Notice to all joint tenants and their assignees is essential—Defect cannot be cured by their being added as defendants subsequently.

It is clear from S. 11 that the issue of the necessary notice is a condition precedent to the filing of the suit itself. Prima facie, when the Section talks of notice to the tenant it must include all the tenants if there are several tenants in respect of the same land. Therefore notices must be served on all the joint tenants and their assignees and a notice sent only to one joint tenant is not enough to found a suit for ejectment against all the tenants. Particularly in the case of the City Tenants Protection Act there is greater reason to hold that the plaintiff must serve notice upon the persons who are entitled to the leasehold interest at the time when he seeks to eject. The defect of non-service cannot be cured by some of them being added as defendants later on: *A I R 1918 P C 102, Expl., and Disting.*; *A I R 1929 Cal 651*; *A I R 1925 Cal 752 and 24 M L J 228, Rel. on*; *A I R 1930 P C 59 and A I R 1939 P C 14; Disting.*; *A I R 1935 Mad 785, Ref.* [P 643 C 1, 2; P 645 P 1]

(b) Civil P. C. (1908), O. 6, R. 18—Application for adding more defendants allowed — Amendment not embodied in original plaint till date of judgment—After delivery of judgment Judge directing officers of Court to carry out amendment—O. 6, R. 18 held sufficiently complied with.

---

[5] Meera Sahib & Co. v. Sheik Nainar, (1913) 25 M L J 259=21 I C 30.

1940 M/81 & 82

The plaintiff's application for amendment of the plaint by adding some more defendants was allowed but the amendment was not embodied in the original plaint till the date of the judgment. After the delivery of the judgment, the Judge directed the officers of the Court to carry out the amendment:

Held the provisions of O. 6, R. 18 were sufficiently complied with. [P 645 C 2]

(c) Madras City Tenants' Protection Act (3 of 1922), S. 5—Compensation — Lowest value of land within seven years before date of decree should be considered.

What has to be decided in determining compensation under the Act is the lowest value of the land that prevailed within seven years before the date of the decree or of the order in ejectment. [P 645 C 2]

R. Krishna Iyer — *for Appellants.*

S. A. K. Shah — *for Respondent.*

Judgment. — Defendants 1 to 4 are the appellants in this appeal which is directed against the decree of the City Civil Judge in O. S. No. 728 of 1935. The suit was filed by the plaintiff to eject the defendants from the land and superstructure bearing Door No. 46, Fakir Sahib Second Lane, Triplicane. The suit was originally filed against defendant 1 only on the footing that she alone was the tenant of the suit property on a monthly rent of Rs. 2. The plaint averred that the tenancy was terminated by a notice dated 9th March 1935 in which the plaintiff offered compensation for the value of the superstructure under the provisions of the Madras City Tenants Protection Act. Defendant 1 filed a written statement pleading that she was not interested in the property in suit and that three other persons, who were later on added as defendants 2, 3 and 4, were the persons entitled to the suit property as tenants. She stated that under a sale deed dated 10th June 1912, she, her husband, the late Dawood Saheb, and her son Abdul Wahab had purchased the leasehold interest together with the superstructure from the previous tenant, that her husband's one-third share now vested in defendant 4, that the one-third share belonging to herself was sold by her to defendant 3 Zulaika Bi by a deed dated 4th December 1934 and that the tenants who were really interested are defendants 2, 3 and 4. After the statement was filed, an application was made to the City Civil Judge to implead the three persons mentioned by defendant 1 as party defendants to the suit. The lower Court granted this application by its order dated 7th October 1935, but it would appear that the amendment was not incorporated in the plaint until the date of the judgment. Nevertheless, summonses were taken to the newly added defendants and they pleaded among other things that they were not served with the requisite notice under the Madras City Tenants Protection Act, and that therefore the suit was not maintainable against them under S. 11 of the Act. They also stated that the plaint disclosed no cause of action against them and that in any event they were entitled to protection under the Madras City Tenants Protection Act, and that they were prepared to pay the value of the land and to buy the same and requested the Court to fix the value in accordance with the terms of the Act. Three issues were raised, (1) whether the suit was bad for want of proper notice to quit, (2) whether the suit was maintainable as framed and (3) what is the amount of compensation payable to the plaintiff in case the defendants desire to acquire the land.

On issue (1) the lower Court held that the suit was not bad for want of proper notice. On issue 2 it held that the suit was maintainable as framed and on issue 3 it fixed compensation originally at the rate of Rs. 1800 per ground and varied the same on a review application made to it increasing it to Rs. 2050 per ground. Defendants appeal to this Court. It is argued on their behalf that the view of the lower Court on issues 1 and 2 is wrong and that the finding of the Judge on issue 3 is vitiated by a consideration of number of documents which are irrelevant and not really admissible for the purpose of determining the value of the suit land in accordance with the terms of the Act.

On the first question, the view expressed by the learned Judge is that when a tenant dies or assigns his interest, there is no need to give notices to all the heirs in the former case or to the assignee in the latter case. He finds that the plaintiff had no notice of the claim of the other defendants and that therefore he was entitled to proceed with his suit for ejectment after notice only to defendant 1. The question is whether the notice given to defendant 1 alone is enough under the circumstances of this case. The leasehold interest in the land appears to have been originally held by one Mahomed Azeemuddin Sahib. He sold the site and the superstructure (he had only a leasehold interest in so far as the site is concerned) to three persons under Ex. 1 dated 10th June 1912. The vendees were (1) Dawood Saheb, (2) his wife Rahamat Bi Ammal and (3) his minor son Abdul Wahab Sahib. Rahamat Bi is defendant 1 in the suit and Abdul Wahab is defendant 2; he is now said to be a lunatic. By Ex. 2 dated 21st January 1915, Dawood Sahib gifted away his interest in the site and superstructure to Abdul Sukkur Sahib, his son by his senior wife, and to Fatima Bi, his daughter who is defendant 4. It is common ground that the right of Abdul Sukkur Sahib has vested in defendant 4. In 1934, defendant 1 conveyed her one-third share to defendant 3 by a registered deed.

From 1912, the date of Ex. 1, the rent due to the landlord seems to have been paid by the husband and wife, namely Dawood Sahib and Rahamat Bi and receipts were given in their names. Even after the death of Dawood Sahib which occurred in or about 1917 rent receipts were issued in the names of both Dawood Sahib and defendant 1. Ex. 4 series which take us up to 1931 are all in the names of these two. It is said that even afterwards down to 1935 receipts were issued in the names of defendant 1 and Dawood Sahib, her deceased husband. Of defendants 2, 3 and 4, defendant 2 is a lunatic; defendant 3 is a minor and defendant 4 is a major daughter. There is a dispute as to whether defendant 4 is married and is living with her husband or whether she is unmarried and is living with defendant 1. It seems to me to be unnecessary to decide which version is true. In either case she cannot be represented by defendant 1. The question that arises for decision is whether notice was necessary to defendants 2, 3 and 4 under S. 11, City Tenants' Protection Act. It is clear from that Section that the issue of the necessary notice is a condition precedent to the filing of the suit itself. S. 11 runs thus:

> No suits in ejectment or applications under S. 41, Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof.

The prohibition contained in the Section is against the institution itself. Under the analogous provisions of S. 28, cl. 2, Provincial Insolvency Act, it has been held that leave of the Insolvency Court is a condition precedent to the filing of a suit by a creditor and that subsequent sanction cannot cure the initial defect. In this particular case, beyond adding them as parties later, it is not pretended that the requisite three months notice was given to them before they were sought to be impleaded as party defendants. Hence if they are entitled to notice it is clear that the suit must fail for want of requisite notice and the defect cannot be cured by their being added as defendants later on. So we go back to the question whether notice is necessary.

It is argued that the defendants are all joint tenants and that notice to one of them is enough. Prima facie, when the Section talks of notice to the tenant, it must include all the tenants if there are several tenants in respect of the same land. The policy of the Act is to give the tenants a right to acquire the land itself at a proper value. It is obvious that while one joint tenant may not be in a position to acquire the land another might be in a position to do so and obviously the reason of the rule requires that notice should be given to all of them. The appellant relies upon the decision of the Judicial Committee reported in 46 Cal 458.[1] There the Judicial Committee was concerned with the question whether there was proof of service of notice to quit upon all the joint tenants. There the notices were addressed to all the joint tenants and were actually sent to each and every one of the joint tenants. What was wanting was only proof that these notices reached the various addressees who were all joint tenants. Dealing with such a case the Judicial Committee held that proof of service of notice on one joint tenant would be prima facie evidence that the notice reached the other joint tenants. It is not an authority for the proposition contended for that no notice need be sent to all the joint tenants and that if a notice is sent only to one joint tenant it would be enough to found a suit for ejectment against all the tenants. This distinction is pointed out in two decisions of the Calcutta High Court. It is one thing to say that where notices were actually sent proof of service on one may be enough but it is another thing to say that no notice at all need be sent to each and every one of the joint tenants. In 57 Cal 10[2] at p. 15, this distinction is pointed out. Referring to a prior decision of the Calcutta High Court, 29 C W N 620,[3] the learned Judges state:

---

[1] Harihar Banerjee v. Ramshashi Roy, (1918) 5 A I R P C 102=48 I C 277=45 I A 222=46 Cal 458 (P C).

[2] Bodardoja v. Ajijuddin, (1929) 16 A I R Cal 651 =120 I C 455=57 Cal 10=33 C W N 559=49 C L J 555.

[3] Bejoy Chand v. Kali Prasanna, (1925) 12 A I R Cal 752=87 I C 708=29 C W N 620.

On examination of the facts of that case however it appears that all that has been laid down in that case is that the notice, in order to give rise to this presumption, must be addressed to all the joint tenants and that, where the notice was addressed to one of the joint tenants, the mere service of the notice on the other joint tenants is not sufficient notice to quit according to law. In the present case the notices that were issued were addressed to all the joint tenants.

In the decision reported in 29 C W N 620[3] it was laid down, that in order to bind a joint tenant the notice to quit must be addressed to and served on him. They also held that the question whether service of notice on one joint tenant is sufficient service on the other joint tenants is a question of fact to be decided on the facts of each case having regard to the presumption laid down in 46 Cal 458.[1] The decision in 46 Cal 458[1] was referred to in the judgment and it was pointed out that in the case that went up to the Privy Council the notices were addressed to all the joint tenants (*vide* pp. 622 and 623). I therefore hold that as the notice served on defendant 1 was addressed only to her, it is not enough to sustain the present action. In the present case after the assignment under Ex. 1, Dawood Sahib, defendant 1, and defendant 2 were all tenants-in-common. It is not pretended that defendant 2 was given any notices at all. Defendant 1's husband's interest devolved by successive transactions on defendant 4 and defendant 1's right devolved upon the 3rd. The notice was addressed only to defendant 1 and was not addressed to any of the other defendants. Hence, this suit is not maintainable against defendants 2, 3 and 4.

It is then argued that defendants 2, 3 and 4 were all living with defendant 1, that defendant 2 being a lunatic and defendant 3 a minor, notice could only be given to defendant 1 under whose protection they are living, and that even as regards defendant 4 on the footing that she is an unmarried girl living with defendant 1, notice to defendant 1 would be enough. Whatever the position may be as regards defendants 2 and 3, whether the omission to state that the notice is given to defendant 1 as also representing defendants 2 and 3, it is clear that so far as defendant 4 is concerned, since she is a major, notice to defendant 1 is not enough. Merely because she is living with defendant 1 her right to have a proper notice issued to her cannot be gainsaid.

It is then urged that an assignee of a lessee is not entitled to notice to quit under the general law. It is said that an assignment of a lease operates only as a sub-demise under the Indian law and that therefore notice is unnecessary. Reliance was placed on the decisions of the Judicial Committee in A I R 1939 P C 14[4] and 57 Cal 1176.[5] Neither of these decisions lays down any such proposition. What is laid down is that a sub-demise of the whole of the unexpired term does not operate as an assignment of the lease under the Indian law, though under the English law the position would be otherwise. In the decision reported in 57 Cal 1176[5] the facts are these: The suit was brought to enforce forfeiture of a leasehold interest for an alleged breach of a covenant not to assign contained in the lease. The lessee executed a mortgage by way of a sub-lease for the whole of the unexpired term. It was contended that this amounted to a breach of the covenant against assignment and that the lessor was entitled to enforce the forfeiture clause. The suit was to recover possession of the property on the ground of forfeiture. Sir John Wallis delivering the judgment of the Board held that a sub-lease by a lessee for the unexpired residue of the term does not operate as an assignment of the lease. He pointed out that in this respect the Indian law differs from the English law. The prohibition was only against an assignment and so it was held that there was no forfeiture.

In A I R 1939 P C 14[4] the lessee created a mortgage of his leasehold interest by way of sub-lease of the whole of unexpired term of the mortgage. This was done by means of what is known as an English mortgage as defined by S. 58, cl. (c), T. P. Act. The lessor filed a suit for rent impleading the mortgagees as well as the mortgagors and wanted a decree against both. The mortgagees resisted the suit by pleading that they had not taken possession of the property and that they were not liable for the suit claim. The question that had to be decided was whether the document by which the mortgagees claimed their right was an absolute assignment. If it was an absolute assignment the assignee would, by the doctrine of privity of estate, be liable to the lessors for rent even though the original lessee (if he happens to be the person who entered into contract of lease)

---

4. **Ram Kinkar v. Satyacharan, (1939) 26 A I R P C 14=179 I C 328=66 I A 50=I L R (1939) 1 Cal 283=I L R (1939) Kar 78 (P C).**

5. **Hunsraj v. Bejoy Lal Seal, (1930) 17 A I R P C 59=122 I C 20=57 I A 110=57 Cal 1176 (P C).**

may continue to be liable on his contract. The Judicial Committee pointed out that even though an English mortgage is in the form of absolute sale, still it is not an absolute assignment of the lease itself because the mortgagor has still a legal interest in the property mortgaged. They therefore held that the mortgagees were not the absolute legal owners of the leasehold interest and that therefore they were not liable to the lessor for rent. They referred to the earlier decision in 57 Cal 1176[5] and held that the principle of that decision governed the case before them. Neither of these decisions is an authority for the proposition contended for by the appellant that an assignment of a leasehold interest operates only as a sub-demise. A sub-demise of the whole of the unexpired portion may not amount to an assignment and will not be so under the Indian law, but that is not the question with which we are concerned.

It is then urged that the plaintiff had no notice at all of the original assignment by Dawood Sahib and that therefore the lessor was entitled to treat Dawood Sahib as his tenant. If so, the plaintiff is met with the difficulty that Dawood Sahib died in the year 1917 or so, and the landlord seeking to eject, is bound to seek out the heirs and to serve the necessary notice on the person who at the time of the notice is actually entitled to the leasehold interest. If therefore, the plaintiff was not bound to give notice to the assignees of Dawood Sahib and was entitled to treat Dawood Sahib as his tenant in spite of his having assigned away the interest, then after Dawood Sahib's death the plaintiff did not give notice to his heirs who are defendants 1 to 4, defendant 1 being the widow and defendants 2 to 4 the children of Dawood Sahib. The view expressed by the lower Court that if the tenant happens to be a Mahomedan and he died, there would be a number of persons who would be entitled to fractional interests and that therefore the landlord is not bound to serve notices on all is begging the question. If the landlord is bound under the law to serve notices on the heirs it is no answer to say that there might be a number of heirs and that it would be difficult to find out and serve all of them.

Particularly in the case of the City Tenants Protection Act there is greater reason to hold that the plaintiff must serve notice upon the persons who are entitled to the leasehold interest at the time when he seeks to eject. As regards the right of an assignee of a lessee it was laid down in 24 M L J 228,[6] that the landlord was bound to implead the assignee or the heir-at-law in a proceeding which he takes either for recovery of the land or for sale of the holding. It is pointed out that without impleading the assignee or the heir-at-law the proceeding would not bind the assignee or the heir-at-law: *see also* 69 M L J 297.[7] As regards the second issue whether the amendments not having been carried out in the original plaint the suit is bad against defendants 2 to 4, O. 6, R. 18, Civil P. C., has got to be considered. That Rule provides that where an amendment of the plaint is ordered the amendment has to be carried out in the plaint within the time limited by the order or if no time is fixed within 14 days of the order unless the Court extends the time later on. In this case the plaintiff was absolutely indifferent and no amendments were actually embodied in the plaint. But my attention is drawn to an application made on the date of the trial, that is 2nd October 1936, on which date the plaintiff applied by C. M. P. No. 2534 of 1936, for extension of time to carry out the amendment in the plaint. It does not appear whether notice of this application was given to the other side but an order was passed on that date that orders will be passed along with the judgment and when the judgment was delivered on 8th October the Court said "amendment will be made by the Court." The Judge directed the officers of the Court to carry out the amendment and this appears to have been done. It is possible to view this as a sufficient compliance with the provisions of O. 6, R. 18. I am not disposed to interfere with the judgment of the lower Court on this question.

On the third question the decision of the lower Court is very unsatisfactory. What has to be decided under the Act is the lowest value that prevailed within seven years before the date of the decree (in the case of suits) or of the order in ejectment (in the case of applications under Section 41, Presidency Small Cause Courts Act). In this case the point of time is October 1936; hence the standard fixed is the lowest value that prevailed between October 1929 and

---

[6] Kesavaswami Ayyar v. Narayanan Chetti, (1913) 24 M L J 228=18 I C 632.

[7] Muthukaruppa Pillai v. Annamalai Chettiar, (1935) 22 A I R Mad 785 = 157 I C 896 = 69 M L J 297.

October 1936. Various documents have been relied upon by the lower Court which consist of decrees and judgments showing what values were fixed under the Act in 1930 and in other years. The value fixed in those suits would be the lowest value that prevailed between 1923 and 1930 and so on; it is of no use whatever when we have to see what was the lowest value that prevailed between 1929 to 1936. It is well known that prices of lands fell considerably between 1930 and 1934. For this suit the lowest value that prevailed during this period is the standard. Thus, Exs. E, F, J, K and L, would all be irrelevant. Then the Judge refers generally to suits that came before him within the last ten years and refers to the prices fixed in those suits. Great caution has to be observed in referring to the values fixed in other suits in view of the provisions of the Act. In the view I take on the first question, I do not think it necessary to examine fully the relevant documentary and oral evidence that bears on this question. If it were necessary to decide it I would fix the value at Rs. 1750 a ground. On my finding on the first question the appeal is allowed and the suit is dismissed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 646

GENTLE J.

Sengamuthu Gounder — Appellant.

v.

Thayarammal and others—Respondents.

Second Appeal No. 706 of 1935, Decided on 22nd February 1939, against decree of Dist. Court, Trichinopoly, in A. S. No. 239 of 1934.

Mortgage—Prior and subsequent mortgagees — Suit by prior mortgagee without impleading subsequent mortgagee — Prior mortgagee himself purchasing mortgaged property at sale in execution of his decree — Suit by subsequent mortgagee against mortgagor and prior mortgagee for enforcing his mortgage—Prior mortgagee can set up his mortgage in defence though right to enforce it may be time-barred.

Where a prior mortgagee obtains a decree against the mortgagor alone without impleading the subsequent mortgagee in the mortgage suit, and himself purchases the mortgaged property at sale in execution of his decree, he is entitled in a subsequent suit by the puisne mortgagee to enforce his mortgage to resist the latter's claim by relying upon and using the prior mortgage as a defence or shield, although by the date the puisne mortgagee filed his suit the period of limitation of the earlier mortgage may have expired : *A I R 1922 P C 11 ; 27 All 325 (P C) ; A I R 1927 Mad 631 ; 39 Cal 527 (P C); A I R 1935 Mad 390; A I R 1934 Mad 353 and A I R 1922 Pat 499, Disting.; A I R 1929 Mad 465 ; A I R 1937 Mad 826; A I R 1922 Mad 249; A I R 1931 All 466 and A I R 1933 All 412, Rel. on.* [P 649 C 1]

K. V. Sesha Ayyangar — *for Appellant.*

K. P. Ramakrishna Ayyar — *for Respondents.*

Judgment. — The facts which are relevant to this second appeal are as follows : One Chikayi Ammal was the owner of a piece of immovable property. In 1919 she mortgaged it in favour of the deceased husband of defendant 3 in the suit. Chikayi Ammal later sold this property, or the equity of redemption to one Chinnathayi, the deceased father of defendants 1 and 2. In 1920 Chinnathayi executed a second mortgage of the same property in favour of the plaintiff. It is convenient to refer to defendant 3 as the first mortgagee, the plaintiff, as the second mortgagee and defendants 1 and 2 as the mortgagor. In 1926 the first mortgagee filed a mortgage suit upon the mortgage of 1919 and in that suit did not implead the second mortgagee as a party. In 1930 a mortgage decree was passed and in due course the mortgaged property was put up for sale by auction and was purchased at the sale by the first mortgagee, who, since that date has been in possession of the mortgaged property. There is no suggestion that the proceeds of the sale amounted to a sum which exceeded the amount due in respect of the first mortgage. In 1934 the present suit was filed, the plaintiff being the second mortgagee, impleading the first mortgagee as defendant 3.

In the trial Court the learned District Munsif decreed the suit in favour of the second mortgagee holding that the earlier decree had in no way affected his rights and that as the twelve years period of limitation in respect of the first mortgage had expired by the date of the institution of the second suit, the first mortgagee could not avail herself of its provisions and could not seek to have her mortgage redeemed by the second mortgagee and was not entitled to remain in possession of the property against the decree which was passed in favour of the second mortgagee in the suit. The lower Appellate Court reversed the decision of the learned District Munsif. It is against the reversal in the Court below that this appeal has been preferred. O. 34, R. 1, Civil P. C., provides as follows :

> Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be

joined as parties to any suit relating to the mortgage.

As stated above the first mortgagee did not follow the provisions of the above rule and failed to join in the first mortgage suit the second mortgagee. Such a failure to join a subsequent mortgagee does not disturb the rights of the later mortgagee. The decree and the subsequent sale do not affect those rights which a subsequent mortgagee has under his mortgage. What are those rights? The second mortgagee is entitled to sue upon his mortgage and having obtained a decree and the mortgage debt remaining unpaid, the hypotheca can be sold and, subject to the rights of the prior mortgagee, the proceeds utilized to pay off the second mortgage debt. The first mortgagee has a prior right over the second mortgagee in regard to the satisfaction of her mortgage debt out of the mortgaged property. The failure to join the second mortgagee in the suit by the first mortgagee does not give to the former any further rights which he did not possess so as to entitle the second mortgagee to ignore the existence of the first mortgage.

In the present case the first mortgagee, having failed to join the second mortgagee in the suit and having obtained a decree and purchased the property in the subsequent auction sale and now being in possession, sets up her prior mortgage against the claims by the second mortgagee for possession and sale of the mortgaged property. On the other hand, the second mortgagee's contention is that since the period of limitation in respect of the first mortgage expired before the date when the second mortgage suit was filed, the first mortgagee cannot rely upon the first mortgage deed. It must be borne in mind that the first mortgagee is not suing upon or setting up this earlier mortgage by making any claim under it but is attempting to use it only as a shield to the claim put forward by the second mortgagee. The learned counsel for the appellant has conceded that if at the date of the institution of the present suit the period of limitation in respect of the earlier mortgage had not elapsed, then the first mortgagee could resist the claim by the second mortgagee by relying upon the provisions of the first mortgage. It is contended however that since the period of limitation had expired, the first mortgagee is not now entitled to rely upon her mortgage.

I have been referred to a number of authorities which appear to some extent to be conflicting. In 50 Mad 626[1] a puisne mortgagee paid off a decree on a prior mortgage and was thereby subrogated to the prior mortgagee's rights thereunder. When the period of limitation under the earlier mortgage had expired, the mortgagor filed a suit for redemption of the puisne mortgage. The puisne mortgagee contended that he was entitled not only to the amount due to him under the second mortgage but also to the sum due under the prior mortgage which he personally had discharged and he attempted to resist redemption until both those debts had been fully satisfied. It was held that the rights under the prior mortgage could be enforced only within 12 years from the date on which a suit on that mortgage could have been brought. In this case although the puisne mortgagee was a defendant and was resisting the claim for redemption, he was also endeavouring to enforce the prior mortgage in respect of which the statutory period of limitation had expired by claiming the moneys due under the mortgage and was not merely using it as a defence to the claim for redemption, but in addition was making the same claims as would be put forward if a mortgage suit had been filed upon the mortgage. The matter then under consideration was approached by the learned Judges who decided that case from the aspect of the right to enforce a mortgage by suit. Madhavan Nair J. in the course of his judgment at page 635 said:

> A subsequent mortgagee has the right to pay off the prior mortgagee. By making such payment he acquires in respect of the property all the rights and powers of the mortgagee whom he has paid off. One of such rights is his power to enforce his charge against the property subject to the law of limitation. If therefore at the time when the subsequent mortgagee seeks to enforce the security by virtue of subrogation a suit by the first mortgagee is barred by time, the subsequent mortgagee's right is also barred.

Again at p. 638 the learned Judge having referred to 39 Cal 527,[2] held that the decision applied to the matter before him and said that

> defendant 1's right to claim the additional amount, viewed as a claim to enforce the security is consequently barred by limitation.

This decision was followed in 68 M L J 362,[3] by a Judge sitting alone and was approved in 66 M L J 566.[4] A decision to the same effect was given in 1 Pat 780.[5] In all these cases the right of either the first mortgagee or of anyone who stands in his shoes is dealt with from the aspect of the mortgage being enforced by way of a suit or by a proceeding comparable to the enforcement of a mortgage by a suit, such as resisting redemption until all the moneys are paid under the mortgage. In 39 Cal 527[2] a puisne mortgagee had advanced moneys to pay off a prior mortgage and thereby he became subrogated to the prior mortgagee and he failed in the suit for a declaration that the properties were liable in respect of the earlier mortgage which was filed after the limitation period had elapsed. Again, that mortgagee was endeavouring to enforce the provisions of a mortgage deed and was not using it in any way as a defence. In A I R 1929 Mad 465,[6] in the course of the judgment of Odgers J. with which Phillips J., agreed at p. 467 he stated that if the decision in 50 Mad 626[1] meant that a defendant could not set up his paid off mortgage, except within 12 years from the date of the mortgage, the learned Judges did not agree with that decision which apparently was based upon the decision in 27 All 325[7] before the Judicial Committee, a case as to a plaintiff and not as to a defendant. It was held in A I R 1929 Mad 465[6] that the purchaser in a court auction of a mortgage right is entitled to set it up as a shield against the puisne mortgagee who was not made a party to the suit on the mortgage and this right to set up the mortgage as a shield is not defeated by the 12 years rule of limitation. That decision was referred to with approval by Horwill J. in A I R 1937 Mad 826[8] and a decision to a like effect is to be found in 41 M L J 399.[9] In 53 All 1023[10] (heard by five Judges) Sir Shah Sulaiman Ag. C. J. in the course of his judgment at p. 1045 said :

---

[1] Kotappa v. Raghavayya, (1927) 14 AIR Mad 631=102 I C 316=50 Mad 626=52 MLJ 532.

[2] Mohammad Ibrahim Husain Khan v. Ambika Pershad Singh, (1912) 39 Cal 527=14 I C 496 =39 I A 68=15 CLJ 411=16 CWN 505 (PC).

[3] Draviam Chettiar v. Ramayya Chettiar, (1935) 22 AIR Mad 390=159 I C 857=68 MLJ 362.

> The question of allowing a prior mortgagee, whose mortgage had long since become barred by time but who was in possession of the property under a decree obtained without impleading the subsequent mortgagee to set up his prior mortgage as a shield, even though the limitation for the mortgage had run out, was prominently before their Lordships in 43 All 469[11] and their Lordships allowed Ghulam Safdar to recover the amount due on his mortgage of 1883. This, to my mind, is a clear authority for the proposition that a prior mortgagee, if he is in possession, can set up in defence a prior mortgage as a shield, although in his suit he had not impleaded the subsequent mortgagee and even though a fresh suit to enforce it would now be barred by time.

Three of the other learned Judges forming the Court agreed with the judgment, from which I have just quoted. Whilst this passage may not have been in respect of a matter for decision in the case and is merely obiter, in A I R 1933 All 412[12] it was quoted with approval. Bennet J. in the course of his judgment at p. 413 said :

> This ruling of law is in our opinion, applicable to the present case. In the present case the appellant has been in possession, and although a suit on the original mortgages of 1909 and 1913 would now be time-barred, the fact that the appellant is in possession entitles him to set up these mortgages as a shield.

In 43 All 469,[11] to which Sir Shah Sulaiman J. referred, Lord Dunedin in the course of their Lordships' judgment, at page 475 said that :

> An owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield.

In that case it would seem from the facts that the earlier mortgage might have been time-barred at the time of the subsequent suit, but no argument or reference is made in regard to the question of limitation and it is not clear that it is an authority for the matter for decision before me. However, as pointed out earlier, a reference to the case before the Judicial Committee was made in 53 All 1023[10] at page 1045 in which it was stated that a time-barred mortgage deed could be utilized as a defence or shield. The learned counsel for the appellant has gone to the length of saying that if a first mortgagee in a mortgage suit failed to implead a second mortgagee, obtained a decree, had the property put up for sale and it was purchased by an innocent stranger, then in a suit filed subsequently by the second mortgagee the innocent stranger could be ejected from the property if at the date of the second suit the earlier mortgage had become statute barred. This is to my mind a far reaching proposition. No authority was quoted in support of it. In the line of authorities to which I have referred, of which 50 Mad 626[1] is one, it is to be noticed, as I have pointed out, that claims were being made to enforce the mortgage. The other line of cases are authorities in which the first mortgagee, or the persons standing in his shoes, were not asserting or setting up any claim under the mortgage itself but using the provisions of the mortgage deed as a defence and to resist a claim or claims made by a subsequent mortgagee. In my view the latter line of decisions is to be preferred so far as the facts of the present case are concerned. The second mortgagee is not to be in any better position by reason of the failure to join him in the first mortgagee's suit than he was prior to that time, namely what he is entitled to is to have his rights which existed at the date of the institution of the first suit safeguarded.

---

[4] Aravamudha Iyengar v. Abhiramavally Ayah, (1934) 21 A I R Mad 353 = 150 I C 930 = 66 M L J 566.

[5] Sibanand Misra v. Jagmohan Lall, (1922) 9 A I R Pat 499=68 I C 707 = 1 Pat 780 = 3 P L T 533.

[6] Karuppa Chettiar v. Venkataperumal, (1929) 16 A I R Mad 465=116 I C 841.

[7] Gopi Narain v. Bansidhar, (1905) 27 All 325= 32 I A 123=2 A L J 336 (P C).

[8] Madappaya v. Mahabala Rao, (1937) 24 A I R Mad 826=176 I C 939.

[9] Venkatarama Reddi v. Rangiah Chetti, (1922) 9 A I R Mad 249=70 I C 212=41 M L J 399.

[10] Ram Sanehi Lal v. Janki Prasad, (1931) 18 A I R All 466=134 I C 1=53 All 1023=1931 A L J 729 (F B).

[11] Sukhi v. Ghulam Safdar Khan, (1922) 9 A I R P C 11=65 I C 151=48 I A 465 = 43 All 469 (P C).

[12] Sarda Prasad v. Kanhailal, (1933) 20 A I R All 412=145 I C 304=1933 A L J 934.

Coming to the present appeal, defendant 3, as the first mortgagee, exercising her rights under her mortgage, obtained a decree, and in the subsequent court auction became the purchaser and is in possession of the mortgaged property. This was effected within the period when the first mortgage could be enforced. The provisions of the first mortgage deed evidence the right under which the first mortgagee purchased and came into possession of the mortgaged property. Following A I R 1929 Mad 465,[6] and the authorities to a like effect, I am of opinion that defendant 3 is entitled to resist the claim by the plaintiff under his puisne mortgage by relying upon and using the prior mortgage as a defence or a shield although by the date when the plaintiff's mortgage suit was filed the period of limitation of the earlier mortgage had expired and although the plaintiff as second mortgagee was not made a party to defendant 3's mortgage suit upon the prior mortgage. Some of the authorities to which I have referred were considered by Wadsworth J. in S. A. No. 287 of 1935.[13] In the light of the facts then before the learned Judge he preferred to adopt the other line of cases. If my decision today is at variance with his opinion then I must respectfully say that I do not agree with the conclusion at which he arrived. The result is that the appeal is dismissed with costs. Leave to appeal is granted.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 649

LAKSHMANA RAO J.

In re *Natesa Padayachi and others* — Accused.

Criminal Revn. Case No. 998 of 1939 (taken up No. 10 of 1939), Decided on 21st February 1940, calling upon accused to show cause why order of Sub-Divisional Magistrate, Trichinopoly, D/- 23rd October 1939 should not be set aside.

Criminal P. C. (1898), S. 182 — Cheating — Case can be tried at place where complainant was cheated and parted with money.

Where the money was paid to the accused by the complainant in Trichinopoly but the spurious coins were handed over to him by the accused in another district :

Held that the complainant was cheated and parted with the money at Trichinopoly and that the case could be tried by the Sub-Divisional Magistrate of that place. [P 649 C 2]

Public Prosecutor — *for the Crown.*

Facts. — The accused, five in number, stood charged by the Crime Branch Police of T for an offence punishable under S. 420, I. P. C. The allegation was that A-3 and A-4 cheated the complainant by giving spurious gold pieces in return for money. According to the facts disclosed by the first information report the money was paid to A-3 and A-4 and the spurious coins handed over to the complainant at another district. A-2 and A-5 contended that the Sub-Divisional Magistrate of T had no jurisdiction to the case against the accused. The Prosecuting Sub-Inspector admitted the facts. The Sub-Divisional Magistrate made a reference to the District Magistrate who in turn made a reference to the High Court praying for a transfer of the case and the criminal revision arose out of the said reference.

Order. — The complainant was cheated and parted with the money at Trichinopoly and the case can be tried by the Sub-Divisional Magistrate of Trichinopoly—*vide* S. 182, Criminal P. C. The records will therefore be returned and the Sub-Divisional Magistrate will proceed with the case in accordance with law.

C.R.K./G.N. *Order accordingly.*

---

[13] Krishna Aiyar v. Subba Reddiar, *Reported in* (1939) 26 A I R Mad 678 = (1939) 1 M L J 770.

* A. I. R. 1940 Madras 650

ABDUR RAHMAN J.

P. L. S. S. Ramanathan Chettiar and others — Appellants.

v.

K. M. V. V. Kumarappa Chettiar — Respondent.

Appeal Nos. 146 to 148 of 1938, Decided on 3rd February 1939, against orders of Sub-Judge, Sivaganga, D/- 16th October 1937.

*** (a) Civil P. C. (1908), O. 32, R. 7—Guardian agreeing to refer matter in suit to arbitration can question legality of reference and award in suit and in appeal** *(Obiter.)*

The question of legality of reference and that of an award can be raised on behalf of the minors by the same guardian who had agreed to refer the matter to arbitration both in the suit and even in the appeal : *A I R 1931 Cal 211 and A I R 1933 Mad 862, Not approved.* [P 651 C 2]

*** (b) Civil P. C. (1908), O. 32, R. 7 (1)—Agreement or compromise by guardian on behalf of minor without Court's leave is voidable against all parties at minor's option.**

If a guardian in spite of the prohibition, contained in O. 32, R. 7 (1) enters into an agreement or a compromise on behalf of a minor, without obtaining the leave of the Court they would be voidable against all the parties and presumably not at their option but at the option of the minors. It is the minor alone who can be held entitled to resile from the agreement or compromise, if he may choose it fit to do so, either on attaining majority or even before through his next friend or guardian. The sub-cl. (1) of O. 32, R. 7 only contemplates two parties one of which is the minor and the other persons who have entered into a contract with the minor through his guardian. As between these two parties the contract is voidable against them and not at their option : *A I R 1916 P C 2, Rel. on ; 22 Mad 378 ; A I R 1925 All 570 ; A I R 1933 Rang 186 ; A I R 1923 Cal 685 and (1881) 16 Ch D 41, Ref.* [P 652 C 1]

(c) Principal and Agent—Power of attorney—Authority to adjust matter does not include power to refer to arbitration.

A power of attorney authorizing the agent to adjust a matter does not include a power to refer the matter to arbitration on the principle underlying the maxim *delegata potestas non potest delegari.* [P 652 C 2]

B. Sitarama Rao and V. Ramaswami Ayyar — *for Appellants.*

Advocate-General, R. Ramamurthi Iyer and C. Somasundaram Chettiar — *for Respondent.*

Judgment. — These appeals arise out of an order passed by the Subordinate Judge of Sivaganga on two applications, one made on behalf of the plaintiff and the other on behalf of the defendants under O. 23, R. 3, Civil P. C., with the allegations that the parties had referred the matter in suit, which was one for dissolution of partnership and accounts, to two arbitrations which resulted in two awards. The earlier which held the plaintiff to be entitled to recover Rs. 30,000 was pleaded on behalf of the defendants and the later under which the defendants were found to be liable to the extent of Rs. 52,000 was pleaded by the plaintiff. Since it has been settled by a Full Bench of this Court in 51 Mad 800,[1] that where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under O. 23, R. 3, Civil P. C., the only question for decision in this case is whether the subject-matter of the suit had been so adjusted between the parties. It was asserted on behalf of the plaintiff that, although the matter was referred to a private arbitration for the first time in 1935, the award given by the arbitrators was invalid and as the plaintiff was not satisfied with it, the subject-matter of the suit along with the question of the validity of the first award were referred to a second arbitration by the parties on 2nd April 1936 and resulted in the award Ex. A, under which the plaintiff was entitled to get a sum of Rs. 52,000, instead of Rs. 30,000 as ordered in the previous arbitration. It was also alleged that the defendants had accepted the later award, signed it in token of their acceptance, executed four hundis for the amount to which the plaintiff was found to be entitled by the arbitrators and delivered them to the plaintiff. He therefore applied to the Court for the adjustment and satisfaction to be recorded and the suit to be dismissed.

Various objections were raised by the defendants to this award although the factum of reference and the existence of a second award were not denied. No evidence was however let in on their behalf to substantiate their contentions and the learned counsel for the appellants has therefore confined himself to certain legal objections which have to be determined in these appeals. I might state at once that in view of the plaintiff's application, it would be unnecessary to consider the award or adjustment relied upon by the defendants in their application (I. A. No. 414 of 1935) unless I come to the conclusion that in view of the legal objections stressed on behalf of the defendants the second award and satisfaction urged on behalf of the plaintiff could not be sustained. If I arrive, on the other hand, at a finding that the satisfaction unpleaded on behalf of the plaintiff was unassailable, the first award or adjustment must be taken to have been superseded by the later award and satisfaction.

---

[1] Subbaraju v. Venkataramaraju, (1928) 15 A I R Mad 1025=113 I C 632=51 Mad 800=55 M L J 429 (F B).

The first legal objection raised on behalf of the defendants is that inasmuch as there were minors who were also defendants in the suit, the matter in dispute could not have been referred to arbitration or compromise under the provisions of O. 32, R. 7, Civil P. C., without the leave of the Court. There is considerable force in this objection so far as it goes. No application appears to have been made to the Court in which the suit was pending for leave to refer the matter to arbitration on behalf of the minors. Even after the award was made, the guardian ad litem made no application to the Court for granting him leave to compromise the matter in suit. In the absence of any application for leave, the Court was not and could not have been called upon to consider whether the compromise was beneficial to the minors and the compromise could not therefore be forced on the minors even if the Court happened to consider it to be beneficial in their interest: *see* 22 Mad 378,[2] 47 All 782,[3] 146 I C 707,[4] 27 C W N 792[5] and (1881) 16 Ch D 41.[6] The learned Advocate-General who appeared for the respondent did not oppose this contention seriously, although it was argued by him that this objection might not be available to the same guardian who had agreed to refer the suit to arbitration. He relied on certain observations made in 58 Cal 628[7] at p. 643 and 65 M L J 755,[8] in that connexion. The case in 65 M L J 755[8] is by a single Judge of this Court and simply follows the Calcutta case. The learned Judges of the Calcutta High Court had held that if some guardians who had agreed to refer the matter to arbitration subsequently turned round after the award was made and wished to appeal against the decree passed in terms of the award, they would not be entitled to do so as the decree passed on that basis was not void but voidable at the option of the minor and that no other party could call it in question except the minor either on attaining majority or before then through another next friend.

The question before me does not relate to the competency of the appeal. Nor have I been called upon in this case to consider the validity of the reference made by the guardian on behalf of the minors without the leave of the Court, as it appears from the application presented on behalf of the plaintiff that the matter was referred to arbitration only by defendants 2 and 4 for themselves and by defendant 2 on behalf of defendant 3 as his agent, and there is no reference to the minors either in the application or in the award Ex. A which is on the record. If it were not so, I feel with great deference to the learned Judges who decided the Calcutta case that the question of legality of reference and that of an award could be raised on behalf of the minors by the same guardians both in the suit and even in the appeal; but as there is no necessity to decide the point here, it is unnecessary to examine the question in any detail. In the absence of any reference to the minors in the award, the lower Court's finding that they (the minors) would be bound by the award unless they got it set aside must be held to be incorrect and is therefore set aside.

It has however been contended that in view of sub-cl. (2) of O. 32, R. 7, which declares an agreement of reference and even a compromise entered into without the leave of the Court not only void as against minors but also voidable against all the parties to the suit and since the defendants have expressed themselves unequivocably by pleading the defence that they were not bound by the compromise, it should be held to be wholly ineffectual. It is quite true that the words employed in sub-cl. (2) are capable of this construction but the interpretation which I have been asked to put on them is, in my opinion, unreasonable and should not be accepted. The whole object of enacting this rule was that a next friend or a guardian should not enter into any agreement in regard to the subject-matter of the suit or compromise without the leave of the Court. This rule is undoubtedly wholesome.

---

[2] Ranga Rao v. Rajagopala Raju, (1899) 22 Mad 378.

[3] Gulab Dei v. Vaish Motor Co. Etawah, (1925) 12 A I R All 570=88 I C 429=47 All 782=23 A L J 523.

[4] Veerappa Chettiar v. Veluswami Thevar, (1933) 20 A I R Rang 186=146 I C 707.

[5] Hemangini Dasi v. Bhagwati Sundari Dasi, (1923) 10 A I R Cal 685 = 75 I C 682 = 27 C W N 792.

[6] In re Birchall, Wilson v. Birchall, (1881) 16 Ch D 41=44 L T 113=29 W R 27.

[7] Golnur Bibi v. Abdus Samad, (1931) 18 A I R Cal 211=130 I C 209=58 Cal 628=35 C W N 238=52 C L J 298.

[8] Chennakesavulu v. Veerasami, (1933) 20 A I R Mad 862=149 I C 778=65 M L J 755.

Sub-cl. (2) was merely providing the penalty when the next friend or guardian acted in contravention of the provisions of sub-cl. (1). If a guardian did in spite of this prohibition, enter into an agreement or a compromise on behalf of a minor, without obtaining such leave they would be voidable against all the parties and presumably not at their option but at the option of the minors. The use of the word 'against' in this sub-clause is important and must not be overlooked. It could not have been the intention of the Legislature to have given this option to the very persons who may enter into an agreement or a compromise in contravention of the rule with a next friend or a guardian of a minor. They must be presumed to have knowledge that they were dealing with a minor's guardian who has had no leave from the Court and cannot be permitted to take advantage of the situation if they find that an arbitrator has gone against them or that a compromise appeared subsequently to be more detrimental than what they thought it would be in the beginning. It is only the minor who is unable to guard his own interests and has to depend upon the bona fides and vigilance of other persons.

It is therefore the minor alone who can be held entitled to resile from the agreement or compromise, if he may choose it fit to do so, either on attaining majority or even before through his next friend or guardian. The sub-cl. (1) only contemplates two parties one of which is the minor and the other persons who have entered into a contract with the minor through his guardian. As between these two parties the contract is stated to be voidable against them and not at their option. This interpretation can be supported by a decision of their Lordships of the Privy Council in 39 Mad 409,[9] where a bond executed as a part of a compromise of a suit jointly on behalf of a minor and by another was held to be unenforceable against the minor but this fact did not absolve the other executant from her obligations under the bond. The agreement of reference or compromise would have been in this particular case voidable at the option of the minors if they were parties to the agreement but as stated above the reference and the compromise were by adult defendants alone and the minors were no parties to either. There is thus no force in the contention that the compromise should be held to be of no force against the other defendants if it was found to be not binding on the minors.

The second question which has been raised by the learned counsel for the appellant is that defendant 2 was not authorized on behalf of defendant 3 to refer the matter to arbitration. The plaintiff on the other hand placed his reliance on the power of attorney executed by defendant 3 in favour of defendant 2 (Ex. 2). Mr. Sitarama Rao contends however that the power of attorney has to be construed strictly and must be examined with care in order to ascertain whether the act done by the agent was fairly within the scope of his authority. This is correct and bearing this rule of construction in mind I would have to examine the document. A reference to the power of attorney shows that defendant 3 had authorized defendant 2 to settle, liquidate or adjust all accounts existing between the defendants and any other person. There was no power authorizing defendant 2 to refer the matter to arbitration. Moreover, the words used in the power of attorney indicate that authority was being given to defendant 2 to adjust, and the authority could not therefore in the absence of any other words to the contrary in the power of attorney, be delegated on the principle underlying the maxim *delegata potestas non potest delegari*. It is quite legitimate for a principal to expect that if he gives the power to an agent to adjust, the agent would exercise his own judgment in the matter and not agree to be bound by the judgment of someone else whom the principal did not know. The learned Advocate-General however urged that the power to adjust expressly granted should include the power to refer to arbitration as it was necessary for accomplishing the object for which the power was granted expressly. It was also argued that business could not be conducted without the existence of this power and defendant 2 should therefore be held to be bound by the award. I am not satisfied in the present case that the claim could not have been adjusted otherwise than by referring the dispute to arbitration. Nor was I struck by the second reason given by the learned Advocate General. I do not agree that the business could not have been conducted without the existence of this power. I would therefore agree with the contention raised by the learned counsel for the appellant that defendant 3 would not, in the circumstances, be bound by the reference to arbitration entered into by defendant 2 on his behalf.

---

[9] **Jamna Bai v. Vasant Rao, (1916) 3 A I R P C 2=34 I C 213=43 I A 99=39 Mad 409 (P C).**

The objections raised on behalf of the other defendants 2 and 4 however stand on a different footing. They had not only referred the matter to arbitration but also signed the award in token of acceptance and cannot now be permitted to pick holes in it. The plea of coercion or undue influence raised on their behalf was not even substantiated by them. It must be remembered that we are dealing with Nattukottai Chetties in this case. The plaintiff is much younger in age than defendant 2 and it is extremely unlikely that he might have been able to exercise the pressure on defendants 2 and 4 which has been imputed to him. The allegation that the defendants were not capable of understanding the nature of the document they were signing is almost inconceivable. Moreover, after the award was pronounced by the arbitrator, defendant 2 executed four hundis for no less than a sum of Rs. 52,000 in accordance with their decision and delivered them to the plaintiff. They cannot now be heard to say that the reference and the award were invalid and not binding on them or that the dispute between the parties had not been adjusted. The case might have presented some difficulty if the plaintiff had not agreed to be bound by the settlement in case defendant 3 was not found to have authorized defendant 2, as held by me already to refer the matter to arbitration; but since he had accepted the hundis executed by defendant 2 in full satisfaction of his claim it may be taken that he hoped to be able to recover the amount due from defendant 2. The learned Advocate-General also indicated during his arguments that even if I came to an adverse finding in regard to his contention about defendant 3, his client would nevertheless be willing to press his application for adjustment and satisfaction to be recorded and the suit dismissed in consequence.

I have already held that the later award has not been shown to be invalid and is binding on defendants 2 and 4. Moreover, it was not only accepted by them but in pursuance of it four hundis were executed and delivered by defendant 2 to the plaintiff. It has thus passed beyond the domain of an award. The first award which formed the subject of the application presented by the defendants need not therefore be considered and must be found to have been superseded. The suit for dissolution and accounts must for the above reasons be held to have been satisfied. The result is that these appeals must be dismissed. But in view of the fact that the lower Court's finding in regard to the minors and in regard to defendant 3 has not been upheld, the proper order in regard to costs appears to be that the parties should bear their own in this Court.

C.R.K./G.N. *Appeals dismissed.*

A. I. R. 1940 Madras 653

GENTLE J.

Corporation of Madras — Plaintiff.

v.

Secretary of State — Defendant.

Civil Suit No. 1 of 1937, Decided on 8th January 1940.

(a) Madras Motor Vehicles Taxation Act (3 of 1931), S. 2 (iii) —"Motor vehicles" includes steam roller.

Steam rollers are motor vehicles within the meaning of S. 2 : *(1915) 1 K B 226, Rel. on; (1929) 141 L T 94; (1879) 4 Q B D 228 and AIR 1917 Bom 239, Ref.* [P 656 C 1]

(b) Interpretation of Statutes — Same rules apply to all statutes—Taxing statute cannot be construed differently.

Where a statute purports to impose a tax, the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes and a taxing statute cannot be construed differently : *(1899) 2 QB 158, Rel. on.* [P 655 C 2]

A. Suryanarayanan — *for Plaintiff.*

Sir A. Krishnaswami Ayyar (Advocate-General) and R. Ramamurthy — *for Defendant.*

Judgment. — The plaintiff, the Corporation of Madras, was the owner of 21 steam rollers which were used in connexion with the discharge of the duty of making, repairing and maintaining roads within the City. Acting through the Commissioner of Police the defendant (hereinafter called "the Local Government") required the plaintiff to pay the sum of Rs. 16,170 as the amount of tax alleged to be leviable upon these steam rollers under the provisions of the Madras Motor Vehicles Taxation Act, 1931 (hereinafter called "the Local Act") for the period from 1st April 1931 to 30th April 1934. The plaintiff contended that these rollers were not motor vehicles within the meaning of the Local Act and that no tax was leviable upon them. Correspondence took place between the plaintiff and the Local Government eventuating in 1936 by a letter addressed to the Corporation informing it that if payment of the sum of Rs. 16,170 was not made the Local Government would adjust this sum by an equivalent deduction from the grants payable to the plaintiff during that year. Thereupon, on 30th March 1936, the plaintiff paid the above sum under protest : *see* Exs. P-1, P-2. On 14th August 1936 by Ex. P-4 the plaintiff claimed repayment of the above amount and gave notice of the intention to file the present suit. This demand not having met with compliance, this suit was filed on 14th December 1936. The plaintiff claims : (a) a declaration that no tax is leviable upon the steam rollers under the provisions of the Local Act ; (b) a decree for the sum of Rs. 16,170, and (c) interest upon that sum at the rate of 6 per cent. per annum from 30th March 1936, the date when payment was made to the Local Government.

The defendant in his written statement alleges that the tax is leviable on the steam rollers under the provisions of the Local Act and denies that in any event the plaintiff is entitled to recover interest. No tax upon the plaintiff's steam rollers has been demanded or paid for the period following 30th April 1934 as under S. 11 (1) (ii), Local Act, the Local Government may by notification make an exemption in regard to the tax payable in respect of any motor vehicle or class of motor vehicles and pursuant to this provision road rollers belonging to the Government or Local Government bodies were exempted from payment of tax after the above date. No oral evidence was given and the facts to which I refer are agreed between the parties. If a steam roller is a motor vehicle within the meaning of the Local Act, the tax was properly leviable, and the plaintiff cannot succeed. On the other hand if "motor vehicle" under the Act does not include a steam roller the plaintiff was wrongly chargeable with the tax and is entitled to a decree for the amount paid. There is no dispute in regard to the amount of the claim. It is conceded by the plaintiff that if the tax was payable under the Act, the sum of Rs. 16,170 is the correct amount and the learned Advocate-General on behalf of the defendant conceded that if steam rollers were not taxable, then the above sum is a debt due and recoverable by the plaintiff from the defendant. The relevant provisions of the Local Act are :

> Section 2 (iii) "motor vehicle" has the same meaning as in the Motor Vehicles Act, 1914.
>
> Section 4 (1). The Local Government may . . . . direct that a tax shall be levied on every motor vehicle kept or used in the presidency of Madras.

Section 2, Motor Vehicles Act, 1914, (hereinafter called the "the Imperial Act") provides that a

> "motor vehicle" includes a vehicle, carriage or other means of conveyance propelled or which may be propelled on a road by electrical or mechanical power either entirely or partially.

Mr. Vijayaraghavan in the course of his able argument on behalf of the plaintiff, contended that a steam roller is not included in the definition of 'Motor Vehicle' in the Imperial Act and consequently is excluded from the Local Act, and further that even if included in the definition in the Imperial Act, it is excluded from the Local Act which is a taxing or revenue statute, the object of which is different to that of the Imperial Act, and its provisions must be construed differently or at least more strictly than other legislation. Except in the respect mentioned below, no question arises that a steam roller fulfils the requirements of the definition in S. 2, Imperial Act. It is necessary in the first instance to consider whether a steam roller is 'motor vehicle' within the meaning of that statute.

It was contended that the words in the Imperial Act 'vehicle,' 'carriage' and 'other means of conveyance' must be read ejusdem generis and consequently, a vehicle which is not used or constructed for the purpose of conveying passengers or goods, is not a vehicle within the definition, a steam roller being used solely for the purpose of making, repairing and maintaining roads and is not a means of conveyance. In Shortt's Dictionary a vehicle is defined as "a means of conveyance on wheels or runners used for the carriage of persons or goods." A steam roller has three wheels, a wide one in front and two narrower wheels at the rear (which are usually wider than wheels of vehicles). These wheels are of heavy manufacture and when the roller is employed in road making are used as the rollers. When it moves from place to place and in order to progress, these wheels fulfil the ordinary functions as such, and they are no less wheels because another purpose is fulfilled by them. A steam roller is one inseparable implement with a large superstructure containing its machinery and driver's cab and it travels on a road by means of its wheels.

In (1915) 1 K B 326[1] the question was whether a heavy threshing machine and a straw trusser or presser, each travelling on four wheels, were included in S. 17 (1),

---

[1] Smith and Sons v. Pickering, (1915) 1 K B 326=84 L J K B 262=112 L T 452=79 J P 118=13 L G R 175=31 T L R 55.

Locomotives Act, 1898, which defines a 'wagon' as including "any truck, cart, carriage or other vehicle." Scrutton J., as he then was, in his judgment pointed out that the words "any truck, cart, carriage or other vehicle" would seem to imply that a wagon must be constructed to carry something and if not so constructed there was support in some provisions of the Locomotives Act for the contention that it was not a 'wagon,' but if it were not regarded as a wagon, other provisions in the Act for the public safety would be inapplicable, and at p. 331, he said :

> I come to the conclusion that it is not necessary to read into the meaning of the word 'wagon' any condition that the particular structure shall be capable of carrying any load other than itself. I see no reason why a heavy superstructure upon wheels should not be described as a vehicle.

If a steam roller were not included in the definition 'of motor vehicle' in S. 2, Imperial Act, then the provisions of Ss. 3, 4 and 5 in Part 2 and Ss. 16 and 17 in Part 5 of the Statute would not apply to it. These Sections forbid a person under 18 years of age from driving a motor vehicle, require the driver to stop when directed by a police officer and others specified so to do, make it an offence to drive recklessly, specify the tribunal by which offences are triable and the punishment. The Legislature could not have intended, for example, to exempt a driver of a steam roller from any penalty, although he was guilty of driving to the danger of the public or refusing to stop when required in the interests of public safety. In (1929) 141 L T 94,[2] an "Austin" motor tractor was held to be a vehicle. This is an implement upon which the driver rides and is used for the purpose of towing or pulling. Avory J. in his judgment at p. 96 points out that it was available for the purpose of carrying a person upon it. This must of course be the driver. In (1879) 4 Q B D 228,[3] a bicycle was held to be a vehicle or carriage within S. 78, Highway Act, 1835, which prohibits the furious driving of any carriage, and it would seem that in that case the words "carriage" and "vehicle" were considered to be correlative terms. That decision was followed in 41 Bom 464.[4] A steam roller is propelled on a road by mechanical power, it conveys the driver, and if he has one, also his assistant. Without the former, it could not travel.

With respect, I agree with the opinion of Scrutton L. J. in (1915) 1 K B 326,[1] that a heavy superstructure upon wheels is a vehicle, and it must follow that if it propels itself by mechanical power, it is a motor vehicle. Whether a steam roller is kept or used by a private person, firm or company or by a local authority, there can be no difference as to its nature. I cannot think that it was intended by the Legislature that a private person who is the owner of a steam roller used for road making could send it upon a highway to travel in any town or other part of the country and the driver should not be liable for the consequences of infringements of the provisions in the Act enacted for the purpose of public safety. In my view, a steam roller is a motor vehicle within the meaning of the definition in S. 2, Imperial Act. It is to be noticed that under S. 13 of this Act the Governor in Council by order dated 29th November 1916 exempted road rollers from the operation of Part 3 of the Act, which deals with licensing and control of motor vehicles. If a steam roller is not a motor vehicle within the meaning of the Act, then it could not be exempted from its provisions as they would otherwise be inapplicable.

Section 2 (iii), Local Act, expressly provides that a "motor vehicle" has the same meaning as in the Imperial Act. It is contended on behalf of the plaintiff that as the object of the Local Act was, as set out in the Preamble, to abolish the levy of taxes on motor vehicles by local bodies and to provide for the levy of a provincial tax, and by S. 10 (1), from the proceeds of the tax, the Local Government shall pay to each local body such sum as represents the average annual income in tolls or taxes theretofore levied, that the Local Act was revenue legislation and consequently the meaning of "motor vehicle" is different to that in the Imperial Act, and the legislation being of a revenue nature, the same principles of construction do not apply. I do not agree with this contention. Whilst undoubtedly if a statute purports to impose a tax, the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes. In (1899) 2 Q B 158,[5] Lord Russel C. J. at p. 164 said:

---

[2] Dennis v. Leonard, (1929) 141 L T 94 = 28 Cox C C 621.

[3] Taylor v. Goodwing, (1879) 4 Q B D 228 = 48 L J M C 104=40 L T 458=27 W.R 489.

[4] Emperor v. Kikhabhai, (1917) 4 A I R Bom 239=40 I C 289=18 Cr L J 641=19 Bom L R 349=41 Bom 464.

[5] Att-Gen. v. Carlton Bank, (1899) 2 Q B 158 = 68 L J Q B 788=81 L T 115=47 W R 650 = 63 J P 629=15 T L R 380.

I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, viz., to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connexion with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by considerations of hardship or business convenience, or the like.

The wording of S. 2 of the Local Act is clear and expressive and provides that a motor vehicle within that statute shall have the same meaning as in the Imperial Act. It must follow, in my opinion, that a motor vehicle within the meaning of the Imperial Act must also be a motor vehicle within the contemplation of the Local Act. It would seem that the plaintiff Corporation is impressed with the position that prior to the passing of the Local Act, the Corporation was the authority which imposed a tax upon motor vehicles and after it came into force it was unable to accept the new position that its own vehicles were liable to taxation. I hold that the plaintiff's steam rollers are motor vehicles within the meaning of S. 2 of the Local Act and were liable to the taxation imposed upon them by the Local Government. In the light of the conclusion to which I have arrived, it is not necessary to consider at length the arguments which have been addressed to me upon the question of interest upon the amount of the claim. The learned Advocate-General conceded that if the Corporation succeeded in recovering the sum of Rs. 16,170 it would also be entitled to interest upon that amount from 14th August 1934, the date when the demand was made for repayment. I desire merely to express shortly that in my view the plaintiff is not entitled to interest prior to the above date. The sum claimed is not a debt payable by virtue of any written instrument at a certain time and interest would therefore commence to accrue from the date when written notice of demand was given as provided by S. 1, Interest Act, 1839. There will be a decree therefore in favour of the defendant and for the costs. (Certificate for Counsel.)

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 656

VENKATARAMANA RAO AND
ABDUR RAHMAN JJ.

Rajah Tadakamalla Seetharamachandra Rao — Appellant.

v.

Sree Rajah Kotagiri Satyanarayana Rao and others — Respondents.

Appeal No. 21 of 1936, Decided on 16th November 1939, against decree of Sub-Judge, Bezwada, D/- 11th April 1935.

Riparian Rights — Proprietors of estate on partition stipulating to keep watercourses joint and agreeing not to interfere with supply channels — Either party can restrain other from erecting bund interfering with watercourse without showing damage.

Under a partition of an estate it was stipulated that the watercourse should be kept joint and none of them should cause obstruction to the supply channels and water channels flowing as per mamool till that date to the tanks from one part of the estate to another :

Held that the putting up of a bund interfering with the common watercourse by one party amounted to an infraction of the right of the other party and the latter had every right to have it removed without showing damage : *(1865) 1 H L (S C) 47 ; 19 Mad 38 and A I R 1925 P C 236, Rel. on.* [P 659 C 2]

Ch. Raghava Rao, M. S. Ramachandra Rao and D. R. Krishna Rao — *for Appellant.*

B. Sitarama Rao and P. Sivarama Krishnayya — *for Respondents.*

Venkataramana Rao J. — The facts necessary for the disposal of this appeal lie in a narrow compass. The question in dispute is between two neighbouring proprietors in relation to a natural watercourse known as Durgadevi cheruvu which flows between the two estates of North Vinagadapa and the South Vinagadapa. The plaintiff is the owner of the estate of South Vinagadapa and defendants 1 and 2 are the owners of North Vinagadapa. Both these estates formed part of one estate which belonged to two brothers who partitioned it in 1844 by a deed of partition dated 29th August 1844 (Ex. N). Under the said partition, it was stipulated that the mountains, watercourses and certain other properties should be kept joint and none of them should cause obstruction to the supply channels and water channels flowing as per mamool till that date to the tanks from one part of the estate to another. The Durgadevi vagu rises in a forest in the north-east of both the estates and flows in a westerly direction and empties itself into the Durgadevi tank within the limits of Vinagadapa south. It is the case of the plaintiff that no portion of the Durgadevi vagu flows through the estate of North Vinagadapa. But it is the case of the defendants that a portion of the vagu flows through a donka which is common to both parties and that the said donka forms part of the boundary of both the estates. That the donka belongs in common to the proprietors of both the estates cannot be disputed. This was not controverted by the plaintiff or his witnesses. Issue 1 was raised on the basis of the joint ownership of the donka. It is also the defendants' case that the course of the vagu is in the form of a big curve marked as BCA in the plan Ex. C when it traverses the donka and not in a straight course.

It is the case of the plaintiff that the course of the vagu has always been straight falling within the limits of the plaintiff's estate and that no portion of it goes through the common donka. The necessity for the action has according to the plaintiff been occasioned by the demolition of a bund marked AB in Ex. C which is at the southern extremity of the donka by the defendants in July 1929 after it was repaired by the plaintiff. The plaintiff alleges that in 1925 there was a cyclone which caused an erosion in the Durgadevi vagu and diverted the water in a circular course in the vagu preventing the water reaching the Durgadevi tank and a bund was built in order to prevent such a diversion and the said bund existed from 1925 to July 1929 when the defendants demolished it. Certain criminal proceedings were started in consequence and the parties were ultimately referred to a regular suit. The defendants denied that there was any such bund erected in 1925, and alleged that the bund was newly erected in 1929 because the defendants constructed a channel called the Gopavaram vagu to lead water from Gopavaram tank which is in the extreme east of their estate to the Durgadevi vagu to increase the water supply of Durgadevi tank, that by reason of the bund having been erected water which was naturally flowing from the donka into the tank known as Rallacheruvu was interfered with and they suffered damages thereby.

The main question in controversy between the parties is whether Durgadevi vagu was flowing in a straight course or in a bent course through the common donka. The suit is in substance for a declaration that the plaintiff is entitled to put up a bund to the Durgadevi vagu at the portion marked AB and for an injunction restraining the defendants from interfering with the plaintiff when he raises any such bund or when repairs are effected for the same. In fact all the issues relate solely to this question. A larger question as to the water of Durgadevi vagu flowing into the Rallacheruvu vagu was also raised in the pleadings. But no issues were framed in regard to that matter though some evidence was let in on this question also. The main question for decision is only as to the right of the plaintiff to put up a bund in the Durgadevi vagu as alleged by him. This is again dependent upon the question whether the vagu runs in a straight course or in a bent course. The plaintiff can only succeed if it runs only in a straight course. If the finding is that it goes in a bent course the plaintiff's suit fails. The learned Subordinate Judge has found that the Durgadevi vagu was flowing in a bent course and not in a straight course at the disputed locality and that the vagu does not lie exclusively in the estate of the plaintiff. It is this finding which Mr. Raghava Rao attacks on behalf of the plaintiff. The evidence relating thereto has been elaborately discussed by the learned Subordinate Judge and in view of the fact that we are agreeing with his conclusion we think it unnecessary to deal with the evidence at length. We propose to refer only to a few salient features which render the plaintiff's case improbable.

There are five plans filed in this case. Ex. A is a plan prepared by the All India Survey Authorities in 1924-25. Ex. B is a plan prepared by Mr. Rangachari in the early stages of the case in March 1930. Ex. C is a plan prepared by an expert Mr. Varadachariar, a few months thereafter in September 1930. Ex. O is a plan of the suit locality prepared by P. W. 3 during the course of the criminal proceedings in August 1929 just before suit which was filed in November 1929. Ex. R is a plan prepared by P. W. 8 in O. S. No. 271 of 1910, a suit which arose with reference to the extension of the bund of Rallacheruvu in consequence whereof the plaintiff who is the owner of a portion of the Vinagadapa estate complained that his lands were submerged. A careful study of these plans taken in conjunction with the evidence of the witnesses who prepared them supports the defendants' case. The survey plan Ex. A is important. It shows that the Durgadevi vagu takes a bent course towards the west touching

Rallacheruvu vagu almost and then flows downward into the Durgadevi tank. Ex. C is very clear that the donka and Durgadevi vagu are one and the same in one portion of it after the vagu passes the bend and that a portion of the bent course of the vagu lies in the defendants' estate beyond the donka on the north. In Ex. C-1 the commissioner remarks that from the appearance of the course and the physical features, water must have flowed through this course for a number of years as this vagu also is well defined and appears to be old. There is one other fact which is relied upon to show in this connexion that a portion of the water of Durgadevi vagu in certain seasons would flow into the Rallacheruvu vagu over surplus weir which has been constructed, within the limits of the plaintiff's estate when there is surplus water on the Rallacheruvu and this could not be unless the water was flowing over in a bent course. This topographical feature is admitted by the plaintiff's own witnesses P. Ws. 3 and 8 and the Commissioner in Ex. C-1 remarks that if there was water more than 2 feet in the vagu it would flow to Rallacheruvu over the surplus weir between A and the bund of Rallacheruvu.

There is consistent testimony given by the defendants' witnesses that the water used to overflow to the Rallacheruvu vagu from the Durgadevi vagu. Considerable reliance was placed by Mr. Raghava Rao on the plan prepared by P. W. 8 in the former litigation and the statement by P. W. 8 in the deposition in the present case that he would have shown the bent course of the vagu in the plan prepared by him if such was the course of the vagu. But he had to admit that he noted in his plan only the relevant points that were necessary for the suit O. S. No. 271 of 1910 and omitted the points that were not relevant and that the length of the vagu was shown in the plan only to the extent that was necessary then, and that any curve in the vagu was not relevant to the suit. Therefore his evidence is not of much value on the questions in dispute. The oral evidence of the plaintiff has been throughout to show that in 1925 there was an erosion which diverted the straight course of the vagu into a curved one at the disputed locality by reason of the breaches caused therein and that a bund consequently had to be put up by P. W. 1 at the instance of P. W. 4 who agreed to purchase the estate from the then owners of the zemindari. The learned Judge on a consideration of the evidence on this point was very clearly of the opinion that no such erosion took place and no such bund was erected.

It is the case of the plaintiff that P. W. 1 sent information to P. W. 4 about the breach in the vagu and thereupon P. W. 4 directed him to erect a bund. Two letters (Exs. H and J) are sought to be relied upon in support. The learned Judge declined to act on the said letters and rightly so. It is admitted by P. W. 4 and P. W. 1 that accounts were maintained in regard to the repairs and that P. W. 1 submitted the account of the repairs but no such account was produced. At the time when the repairs were executed P. W. 4 was not the owner but long after the repairs were executed the sale deed of the estate was executed in favour of P. W. 4 but no claim for repairs of this bund was made by him and the explanation given by him is unconvincing. That there could be no such erosion is also clear from Ex. T-1, the report sent by the Village Munsif on 18th May 1925, a day after the cyclone. He mentioned breaches in the Rallacheru vagu but did not mention that there was an erosion in the Durgadevi vagu. The evidence of other witnesses who speak with reference to this is unreliable. P. W. 2 was not in a position to say how long after the cyclone he went and saw the damaged portion. He says that after P. W. 1 strengthened the bund he saw it once and that he did not see it ever afterwards at any time, that at the time when the repairs were carried on, he did not see them. P. W. 3 also says that he had no opportunity to inspect when the vagu was flowing along its course. He was the engineer who prepared the plans for the Gopavaram vagu and he clearly says that he did not think of any bund erection at the point AB, when he made the scheme and he carried out the scheme, but it is significant that he was not consulted about the breach and how the bund should be erected and that he only saw it after it was built.

It is hardly likely that on such an important matter as the erection of the bund which is very material in connexion with the Gopavaram scheme he would not have been consulted at all if the fact of erosion were really true. Though P. W. 5 is a karnam for over 25 years he saw the suit vagu only once and he was the person who put the mark of the Village Munsif in Ex. T-1 and he did not see the vagu after erosion. P. Ws. 6 and 7 do not give any useful evidence except merely reiterating that the bund came into existence only in 1925. But all the witnesses clearly admit that if the bund was erected at the point AB water would not overflow into Rallacheruvu. P. W. 5 clearly says that if the bund at AB was in existence no water from the vagu can flow into Rallacheruvu even in high floods. But I think it is very plain even from the plaintiff's witnesses that water from the Durgadevi vagu used to overflow and go into Rallacheruvu vagu. As already stated the evidence of the defendants' witnesses was that to their knowledge there was the bent course for over 40 or 50 years and water was flowing through that bent course and during high floods or when the water reaches a certain height it used to overflow from the Durgadevi vagu to Rallacheruvu vagu. The learned Judge who heard the witnesses has believed them and Mr. Raghava Rao has not been able to point to anything to show that the opinion formed by the learned Judge of these witnesses is wrong. It is admitted by all the witnesses on behalf of the plaintiff that no such bund ever existed before 1925. From a consideration of the entire evidence, we are of the opinion that the finding of the learned Judge that no such bund at AB existed, that the water did not run in a straight course but in a bent course as alleged by the defendants and that the bund was newly erected only in 1929 is correct. The question is whether the plaintiff is entitled to erect a bund. The donka being common property, its bed belongs to both the plaintiff and defendants 1 and 2. Mr. Sitarama Rao has contended that it is not open to the plaintiff to put up the bund and interfere with the enjoyment of the common property and that defendants 1 and 2 have a right to prevent the putting up of the bund even though they are not able to show any damage or the likelihood of any damage. It seems to us that this contention is well founded. In (1865) 1 H L (SC) 47[1] Lord Westbury enunciated the principle at page 62 thus :

> It is wise therefore to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed. In this sense, the maxim has been applied by the law of Scotland that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest.

Applying this principle it was held in 19 Mad 38[2] that one of the two tenants in common of a party wall could not raise the party wall with a view to building a superstructure on his own tenement without the consent of the other tenant though he might suffer no inconvenience therefrom. The principle laid down in (1865) 1 H L (SC) 47[1] has been approved by their Lordships of the Judicial Committee in 3 Rang 494[3]: *vide* the observations of Lord Atkinson at pp. 500 and 501. Therefore the putting up of a bund AB in this case is an infraction of the right of the defendants and the defendants have every right to have it removed without showing any damage. But in this case it is admitted by the plaintiff's witnesses themselves as already stated that the bund would prevent any water from overflowing the vagu and reaching the Rallacheruvu. The defendants have this right even under Ex. N which clearly provides that no obstruction should be caused to the water flowing as per mamool in the channels from one estate to another.

But there remains another question which was raised by Mr. Raghava Rao. He has asked for an injunction restraining the defendants from interfering with the Durgadevi vagu. The defendants asserted a right to take water from the vagu through certain passages which according to Mr. Raghava Rao were newly dug after the institution of the suit as will appear from the several applications made by his client in the lower Court for the appointment of a commissioner to inspect the locality and prepare a plan of the existing topographical features. Unfortunately, an issue was not raised relating thereto but there is no doubt, that the question whether any water would overflow from the Durgadevi vagu in its natural condition having regard to the situation of the vagu and the defendant's lands did arise and the evidence establishes that during the time of high flood or when water reaches a certain height in Durgadevi vagu it would overflow into Rallacheruvu vagu. In fact in the written statement the claim that was put forward by the defendants was that the water of the vagu has been flowing uninterruptedly into the Rallacheruvu vagu from time immemorial and the plaintiff had no legal right to impede the usual flow of the vagu. All that the defendants can claim in this case is that the plaintiff should not do anything which would prevent the overflow of the water in its natural state from the Durgadevi vagu into the Rallacheruvu vagu either during high floods or when the water reaches a particular level which would cause an overflow of the water. Once the water falls on the defendants' land, the defendants can take such steps as they may to conserve it. If the defendants have got any other right, it is open to them to take such appropriate proceedings as they may be advised to have it declared and safeguarded and it cannot be gone into in this suit. In the result the appeal fails and is dismissed with costs.

---

[1] Bickett v. Norris, (1865) 1 H L (SC) 47 = 12 Jur (NS) 803 = 14 L T 835.

[2] Kanakayya v. Naresimhulu, (1896) 19 Mad 38.

[3] Moung Bya v. Maung Kyi Nyo, (1925) 12 A I R P C 236 = 90 I C 198 = 52 I A 385=3 Rang 494 (P C).

C.R.K./G.N. *Appeal dismissed.*

✻ A. I. R. 1940 Madras 660

ABDUR RAHMAN J.

Pentakota Audinarayana Naidu — Petitioner.

v.

Panchayat Board of Mangapaka and another — Respondents.

Civil Revn. Petn. No. 1328 of 1936, Decided on 8th December 1939, to revise decree of Sub-Judge, Vizagapatam, D/- 28th July 1936.

✻ (a) Contract Act (1872), S. 72 — Payment under mistake of fact is not voluntary— Money paid voluntarily under mistake of fact is recoverable under S. 72 — Payment need not arise out of contractual relation— Payer's ignorance or forgetfulness cannot deprive him of his right—Nor is it necessary that non-rectification of mistaken payment should result in payer incurring liability.

A payment under a mistake of fact cannot be regarded as a voluntary payment. If money is paid voluntarily under a mistake of fact, viz., by a taxpayer in regard to the territorial limits of the Panchayat Board's jurisdiction, it is recoverable under S. 72. It is not necessary that the payment should arise out of a contractual relation between the parties. The payer's ignorance and even forgetfulness would not by themselves disentitle him from claiming a refund unless he can be held to have been estopped or guilty of laches. Nor is it necessary that the mistaken payment must be of such a nature that if such payment were not rectified, a liability would be created against the persons paying: *AIR 1928 All 500, Rel. on; AIR 1930 Bom 430 and (1915) 3 K B 106, Expl.; A I R 1934 Mad 420 and A I R 1937 Mad 559, Disting.; AIR 1926 Bom 66, Expl., and Disting.; AIR 1934 Rang 66, Not approved.* [P 661 C 2; P 662 C 1,2]

(b) Contract Act (1872), S. 72— Tax paid to Panchayat Board under mistaken notion that property in respect of which it was payable was within jurisdiction of Board — Payment is under mistake of fact and is recoverable as money had and received for payer's use.

Where taxes are paid by a person to the Panchayat Board under the mistaken notion that the properties in regard to which payments were made were situated within the local jurisdiction of the Board and not beyond it, there can be no doubt that they were made under a mistake of fact and the payer is entitled to recover them as money had and received by the Board for his use: *(1905) 21 T L R 538 and A I R 1928 P C 261, Rel. on.* [P 661 C 1, 2]

K. V. Gopalaswami Rao and G. Balaparameswari Rao — *for Petitioner.*

Kasturi Seshagiri Rao—*for Respondents.*

Order. — This is a revision from the decree of the Subordinate Judge of Vizagapatam acting as a Judge of the Court of Small Causes in a suit instituted by one Pantakota Adi Narayana Naidu against the Panchayat Board of Mangapaka for the refund of money alleged to have been paid by him for profession and house taxes and in regard to the licensing fee for his rice mill and brick kiln under a mistaken belief that the properties or business in respect of which he had paid the license fees or other taxes were situated within the jurisdiction of the Panchayat Board. The levy of the profession tax was also questioned on the ground that the notice issued to the plaintiff by the Panchayat Board did not comply with the requirements of law and the demand was therefore illegal. The Subordinate Judge disallowed the plaintiff's claim in regard to the refund of house tax and license fee as he held the payments made by the plaintiff to have been voluntary and not under a mistake of fact that arose out of contractual relation, although to use the Sub-Judge's words "there was an error in understanding the limits of this jurisdiction owing to ignorance of all parties concerned." In regard to the profession tax however he passed a decree for the refund of the tax paid for the year 1934-35 as he found the notice served by the Board on the plaintiff to be illegal and the levy of the same consequently ultra vires. The claim for refund of the profession tax for prior years was not allowed as it was held that the plaintiff had failed to prove that the notices in regard to them were defective and the demand by the Board unjustified. This has led the plaintiff to file the present revision.

Although conceded by the trial Court, learned counsel on behalf of the respondent contended in this Court that the mistake found to have been committed by the parties was one of law and not that of fact and would not therefore entitle the plaintiff to sue the Board on that basis. Mr. Bala Parameswari Rao (learned counsel for the petitioner) denied this and contended on the other hand that S. 72, Contract Act, made no distinction between mistakes of fact and those of law and alleged that the money paid erroneously was refundable whether it was paid under one kind of mistake or the other. It must be admitted that the words of this Section are very general and capable of bearing the interpretation which was attempted to be put upon them; but in view of S. 21, Contract Act, which provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India, it has been decided in some cases that the mistake, to entitle a party to get the relief, must be one of fact and not of law: *see* A I R 1929 Mad 177,[1] A I R 1929 Mad 179[2] and 44 Bom 631[3] at p. 648. It may be argued that since the term 'coercion' used in S. 72, Contract Act, has been held by their Lordships of the Privy Council in 40 Cal 598[4] to have been used in the ordinary sense and the definition in S. 15 held not to control the meaning of that word in this Section, the word mistake might similarly be construed in the ordinary sense and should not be controlled by S. 21 of the Act. It is unnecessary, however, for me to consider this question in this case as there is no doubt that the payments were made by the plaintiff to the defendant Board under the mistaken notion that the properties in regard to which those were made were situated within the local jurisdiction of the Board and not beyond it. Whether the plaintiff is entitled to recover them on the ground of failure of consideration or on the basis of an express or at least an implied request of the defendant, there can be no doubt that they were made under a mistake of fact and the plaintiff is entitled to recover them as money had and received by the defendant for the plaintiff's use. The observations of their Lordships of the Privy Council in 29 M L W 72[5] are helpful and may be cited. They observed:

> It follows that in the absence of such proof, the payment made to the appellant in respect of his 1000 shares was, on the interpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, viz., that he was a share-holder for 1000 shares, when in truth he was not, and money so paid can be recovered as money had and received to the use of the company and this was the form of the action.

The lower Court's suggestion that even if the mistake under which the money was paid to the Board was one of fact, it was "not one that arose out of any contractual relation" and the money could not therefore be refunded was not justified. It is quite possible to conceive of cases where a payment may have been made by a party under a mistake of fact although there may have been no contractual relation between him and the person to whom the money was paid. The case in 50 All 818[6] may be cited as one of the instances in which money paid by mistake was held to be recoverable although there was no contractual relation between the parties to that suit.

Since the main ground, on which the plaintiff's claim for refund was disallowed by the lower Court, was that the payments made by the plaintiff were voluntary in character, the next question to decide is how far the conclusion arrived at by the lower Court in this connexion is correct. Money paid under a mistake of fact would only be recoverable when it is found that it was not paid by the plaintiff with the intention of making a gift or with an idea that the party receiving the money may have the benefit of the same whether the reason which led to the payment was correct or otherwise. Since the remedy under the Section is of an equitable nature, it may also not be recoverable if the person who paid the money is found to be estopped from recovering it or even when the receiver's rights in relation to third parties have been prejudiced. But where the position is not altered or the plaintiff has not been guilty of any laches, he would be entitled to recover the money paid by him

---

1. A. M. Appavu Chettiar v. S. I. Ry. Co. Ltd., (1929) 16 A I R Mad 177=114 I C 358=56 M L J 269.
2. Sethupati Avergal v. Secretary of State, (1929) 16 A I R Mad 179=114 I C 829=52 Mad 12 =55 M L J 770.
3. Wolf & Sons. v. Dadiba Khimji & Co., (1920) 7 A I R Bom 192=58 I C 465=44 Bom 631= 21 Bom L R 986.
4. Kanhaya Lal v. National Bank of India Ltd., (1913) 40 Cal 598=18 I C 949=40 I A 56= 17 C L J 478=17 C W N 541 (P C).
5. Tom Boevey Barrett v. African Products Ltd., (1928) 15 A I R P C 261=110 I C 299=29 M L W 72 (P C).
6. Anrudh Kumar v. Lachmichand, (1928) 15 A I R All 500=115 I C 114=50 All 818=26 A L J 753.

under a mistake of fact even if he had been careless or negligent and failed to exercise due diligence to enquire into the facts or to remember them. If the money were paid under compulsion of legal process, it might have been a different matter, but when it was paid under the mistaken notion of fact that the defendant was entitled to receive this money from the plaintiff, there is no reason why he should not be entitled to recover it after the mistake was discovered. The following statement of law made by Lord Reading C. J. in (1915) 3 K B 106[7] is if I may say so with great respect to that high authority correct in so far as it goes. It was to the following effect :

> If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received.

But this does not mean that the money not paid under compulsion of urgent and pressing necessity is not recoverable. A payment made under a mistake as provided in S. 72, Contract Act, is a case in point. If money is paid under a mistake of fact, it cannot be said to have been voluntary in the sense in which that term was used in law in connexion with payments although there may have been no actual compulsion of urgent or pressing necessity. To be voluntary it must have been made by a person of one's own free will ; but if it is made under a mistake of fact, how can it be said to have been so? There is no scope here for the application of decisions in cases such as 67 M L J 566[8] and (1937) 1 M L J 496[9] where no question in regard to a mistake of fact was raised or considered. Indeed in the first of the above cases Krishnan Pandalai J. observed :

> It has not been contended and very properly that the right to recover can be put upon any ground of mistake because if mistake there was it was a mistake of law and that is not sufficient.

This would show that the learned Judge was not considering cases where the mistake committed was one of fact. If money is paid voluntarily under a mistake of fact, such as the parties were under in this case, viz., in regard to the territorial limits of the Panchayat Board's jurisdiction, it is recoverable under S. 72, Contract Act. That a mistake like this was purely a mistake of fact cannot be doubted. It was so held by Lord Alverstone C. J. in 21 T L R 538.[10] It must therefore be held that a payment under a mistake of fact cannot be regarded as a voluntary payment and the decision of the case against the plaintiff on that ground was erroneous. The decision in A I R 1930 Bom 430[11] does not decide that a voluntary payment, even if made by mistake, cannot be recovered from the party receiving it. The learned Subordinate Judge has however in refusing the reliefs prayed for by the plaintiff based his decision on certain other circumstances. These were firstly that the plaintiff was the President of the Board at the time when he made these payments and he did not care to read the notification limiting the jurisdiction of the Board to certain areas carefully, and secondly that the condition mentioned in 12 Rang 25[12] which was to the effect that the mistaken payment must be of such a nature that if such payment were not rectified, the liability would be created against the persons paying, was not complied with. Both these grounds are, in my opinion, incorrect and do not disentitle the plaintiff from recovering the money. As to the first one I have already observed that the plaintiff's ignorance and even forgetfulness would not by themselves disentitle him from claiming a refund unless the plaintiffs can be held to have been estopped or guilty of laches. This is borne out by the very case on which the Subordinate Judge relied in support of the second ground. The learned Judge of the Rangoon High Court expressed himself in the following words :

> The rule governing the recovery of money paid under a mistake of fact seems to be this. That the person paying under a mistake of fact however ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered the position by parting with the money.

Learned counsel for the respondent has cited 50 Bom 49[13] in support of his contention that since the plaintiff was negligent in ascertaining the truth, S. 72, Contract Act, would be of no help to him. A reference to the decision would however show that it does not support the proposition for which it has been cited. It was found in that case that the persons who had paid a hundi on presentation were not entitled to recover the money, although they were not the drawees and had paid it under a mistake of fact. In recording his opinion the learned Chief Justice observed as follows :

---

[7] Maskell v. Horner, (1915) 3 K B 106=84 L J K B 1752=113 L T 126=31 T L R 332=79 J P 406=59 S J 429.

[8] Municipal Council Tuticorin v. Ralli Brothers, (1934) 21 A I R Mad 420=150 I C 890=67 M L J 566.

[9] Chairman, Municipal Council, Rajamundry v. Subba Rao, (1937) 24 A I R Mad 559=169 IC 330=(1937) 1 M L J 496.

[10] Meadows v. Grand Junction Water Works Co., (1905) 21 T L R 538=69 JP 255=3 LGR 910.

[11] Manilal Lallubhai v, Chandulal Tribhovandas, (1930) 17 A I R Bom 430=125 I C 907=32 Bom L R 424.

[12] Lloyds Bank Ltd. v. Administrator General of Burma, (1934) 21 A I R Rang 66=151 I C 1018=12 Rang 25.

[13] Raghunath Rithkaran v. Imperial Bank of India Ltd., (1926) 13 A I R Bom 66=91 I C 342=50 Bom 49=27 Bom L R 1229.

> It would seem contrary to principles of common law that in cases of negotiable instruments mistakes of this kind should not be notified within a reasonable time. The fact that the party assumed the liability which was not cast upon him by the document which was presented to him for payment must be taken as a ground for holding that he was bound to notify the mistake within a reasonable time to the holder of the document.

The learned Chief Justice was, it must be remembered, dealing with a negotiable instrument in that case, and it would be wrong to extend its application to cases where considerations special to that type of cases are not to be taken into account. He held that in the circumstances of that case a duty was cast upon the plaintiffs to inform the bank within a reasonable time that they had accepted the position under a mistake of fact. The real reason for disallowing the claim was brought out by the other learned Judge when he observed :

> In this case however the plaintiffs have by their conduct made it impossible to restore the parties to their original position and this fact in my opinion affords a good defence to the suit.

This gives the real clue to the reason why the plaintiffs were held disentitled to recover the money paid by them under a mistake of fact. They were held to have been estopped on account of their silence, and estoppel, even if it is by conduct, is, as already observed, a good defence to a suit of this kind. The mere fact therefore that the plaintiff was himself the President of the Board during the period when he paid this amount and was ignorant of the limits of its jurisdiction could not, without anything else, justify the Court in disallowing his claim. As for the second ground, reliance was placed by the lower Court in its judgment and by the learned counsel for the respondent here on an observation in 12 Rang 25[12] appearing at p. 39. It reads as follows :

> But it has been laid down that the mistaken payment must be of such a nature that if such payment is not rectified a liability will be created against the person paying. This requirement is present here as any Administrator-General who arts with money belonging to an estate of which he has charge is obviously accountable for the loss thus sustained.

It would not be easy to assent to the proposition if the learned Judge was proposing to lay down a general rule applicable to all cases of payments under mistakes of fact. If the learned Judge was on the other hand giving an additional ground which was taken by him into consideration in granting the equitable relief, the observation would be innocuous but perhaps unnecessary. One cannot expect to find a circumstance like this in every case. In a large number of cases moneys paid by persons under mistakes of fact will be found to have belonged to themselves only and no further liability found to have been created if the money is not refunded to them ; while in other cases although a liability may be found to come into existence if the money paid by a person is not refunded to him, yet it may not be possible to pass a decree in his favour ; I am thus constrained to hold that a condition such as stated by the learned Judge in 12 Rang 25[12] cannot be held to be a *sine qua non* for ordering a refund of money paid under a mistake of fact. There is nothing else which was said at the bar or which would point to the conclusion that the plaintiff had either waived his right to claim or was estopped from claiming this amount. Learned counsel for the respondent seemed to suggest at one time that the money, after it was received by the Board, was utilized towards discharging certain liabilities and could not therefore be recovered but the suggestion was not pressed seriously. It is immaterial if the money paid under a mistake is spent by the recipient in works or things for which he would have paid anyhow whether the money paid under a mistake was received by him or not. It cannot be said in a case like this that the defendant has altered his position on account of the receipt of this payment and this could be no ground to disallow the plaintiff from recovering the money paid by him under a mistaken notion.

So far as the profession tax is concerned, the lower Court had disallowed the refund of payment for prior years only because it found that the plaintiff had not produced any notice like Ex. G in respect of those years. In doing so the Subordinate Judge appears to have overlooked para. 4 of the additional written statement filed by the defendant where it was admitted that the form employed in Ex. G was employed by the Board for all the notices sent during the period when the plaintiff was the President of the Board. This would show that the other notices sent to the plaintiff suffered from the same illegality as from which Ex. G was suffering and the same decree should therefore have been passed in regard to the other payments as well. There seems to be no force in the question of limitation so far as the payments other than those relating to profession tax are concerned. The suit was instituted by the plaintiff very shortly after the discovery of the mistake as found by the Court below and since the limitation under Art. 96 started from the date when the mistake became known to the plaintiff, his suit cannot be held to be beyond time. As to the profession tax the plaintiff would be entitled to a decree for such payments as he had made during the three years prior to suit. The revision must therefore be accepted and the plaintiff's suit decreed accordingly. In view however of the fact that the plaintiff's conduct had been negligent, I would leave the parties to bear their own costs throughout.

C.R.K./G.N. *Revision accepted.*

✲ A. I. R. 1940 Madras 664

LEACH C. J. AND
KRISHNASWAMI AYYANGAR J.

Cherutty and another — Appellants.

v.

Nagamparambil Ravu and others — Respondents.

Letters Patent Appeal No. 96 of 1938, Decided on 29th November 1939, against judgment of Wadsworth J., *Reported in A I R 1939 Mad 513.*

✲ (a) Hindu Law—Maintenance—Coparcener — Major and minor coparceners can sue for maintenance without asking for partition: *(1939) 1 M L J 683=A I R 1939 Mad 513=185 I C 26, Reversed.*

Since a major coparcener is entitled to sue for maintenance the right cannot be denied to a minor coparcener and if he does happen to sue for maintenance he need not couple with the prayer for that relief a prayer for partition: *A I R 1918 P C 81 and A I R 1931 P C 294, Foll.; 26 Bom 141, Appr.; 2 Bom 346; 12 Bom H C R 94 and A I R 1922 Bom 292, Not appr.; (1939) 1 M L J 683=A I R 1939 Mad 513=185 I C 26,* **Reversed.** [P 666 C 1]

✲ (b) Hindu Law — Maintenance—Daughter in joint family can sue manager for maintenance : *(1939) 1 M L J 683=A I R 1939 Mad 513 =185 I C 26, Reversed.*

Under the Hindu law a daughter is entitled to maintain a suit for her maintenance and therefore can sue the manager of the family. Her right is not restricted by proceeding against her own father. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole: *(1939) 1 M L J 683=A I R 1939 Mad 513 = 185 I C 26,* **Reversed** ; *A I R 1929 Mad 586 (F B), Rel. on.* [P 666 C 1; P 669 C 1]

K. P. Ramakrishna Ayyar — *for Appellants.*

K. Subramaniam — *for Respondents.*

Leach C. J.—This Letters Patent appeal arises out of a suit filed in the Court of the District Munsif of Vayitri by the appellants and their parents for a decree for maintenance. Appellant 1 is the son and appellant 2 is the daughter of one Nagamparambil Imbichutty and his wife Kalyani. Both the appellants are minors. The parents and their two children constitute one of two branches of an undivided Hindu family of which respondent 1 is the manager. The respondents represent the other branch and were all made defendants. The District Munsif held that the parents of the appellants were not entitled under the Hindu law to maintain a suit for maintenance, but that the appellants were, and granted them a decree. The respondents appealed to the Subordinate Judge of South Malabar, who gave judgment in their favour. The appellants then appealed to this Court. The appeal was heard by Wadsworth J. who concurred in the decision of the Subordinate Judge. The appellants' parents accepted the decision of the District Munsif and therefore are not parties to this appeal. The parties are Tiyyas of South Malabar and it is common ground that the questions arising in the appeal have to be decided according to the ordinary rules of Hindu law. Wadsworth J. was of the opinion that a major coparcener can never sue for maintenance. When maintenance is denied him his only remedy, he said, is to sue for partition. With regard to a minor coparcener the learned Judge was of the opinion that a suit for maintenance might be filed, provided that he asked in the alternative for a decree for partition. It was for the Court to decide whether the appropriate relief was a decree for maintenance or a decree for partition. The learned Judge considered that the daughter of a coparcener, like her father, can never maintain a suit for maintenance against the manager of the family. He said that her only remedy is to bring a suit against her father and claim maintenance out of his properties, joint and separate. Having obtained a decree she would be in a position to sell her father's share in the joint family estate in execution proceedings.

I find myself unable to concur in any of the conclusions of the learned Judge. It is true that there are statements in the latest edition of Mayne's "Hindu Law and Usage," 10th Edn., p. 825, and in Mullah's "Principles of Hindu Law," 8th Edn., p. 582, which support the learned Judge in his opinion that a major coparcener cannot sue for maintenance, but they are based on certain observations of the Bombay High Court which appear to me to run contrary to decisions of the Privy Council. In passing I may mention that Varadachariar and Mockett JJ. in I L R (1937) Mad 42,[1] observed it was doubtful whether an adult son could maintain a suit for maintenance against his father when he could sue for partition, but they gave no reasons for the expression of doubt and presumably it was based on the Bombay cases. Every member of an undivided Hindu family is entitled to be maintained out of the family estate. In 41 Mad 778[2] (known as the *Second Pithapur case*), Lord Dunedin, in delivering the judgment of the Board, dealt with the question of the right of a coparcener to be maintained out of the common property. After pointing out that it was admitted on both sides of the bar,

> that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property, that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is de facto accomplished these same persons have a right to maintenance,

Lord Dunedin went on to say:

> It seems clear that this right is an inherent quality of the right of coparcenary, that is of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide to be maintained out of the property which is common to them who are excluded from the management and to the head of the family who is invested with the management.

The right to maintenance out of joint family property was dealt with again by the Privy Council in 55 Mad 1.[3] The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir Dinshaw Mullah in delivering the judgment of the Board pointed out:

> That the illegitimate son of a sudra by a continuous concubine is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; and that where the father has left no separate property and no legitimate son but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property.

It is here emphasized that the share of inheritance, is not given in substitution of a right to maintenance. As there is a right to maintenance there must be an appropriate remedy when that right is denied. To say that the member of a joint family to whom maintenance has been denied shall cause the family to be divided and the family estate partitioned or go without anything is not providing an appropriate remedy for the injustice done to him. He may not want to have the family divided and it may be against his interest to have the family estate partitioned. In view of the fact that Wadsworth J. relied on the statements in Mayne and Mullah based on the Bombay decisions, it is necessary that I should refer to them. The cases are, 12 Bom H C R 94,[4] 2 Bom 346[5] and 46 Bom 435.[6] In 12 Bom H C R 94[4] Westropp C. J. and Kemball J. held that a suit for maintenance out of the ancestral estate by a Hindu son lies against his father when the estate is impartible. The Court did not decide the question of the right of a son to maintenance when he was in a position to sue for partition. The foot note to the report however shows that in an earlier case Westropp C. J., and Melvill J. had decided that a suit by one coparcener against the other coparceners for maintenance when the estate was impartible was unsustainable,

> unless indeed he were illegitimate, deformed, or idiotic, or suffering from other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to maintenance.

It is quite clear from this observation that the opinion of the Bombay High Court was that the right to maintenance was in lieu of a right to share in the estate, but I am not aware that this opinion has been accepted by any other High Court and it appears to me that it is opposed to the principle which the judgments of the Privy Council in the *Second Pithapur case*, 41 Mad 778,[2] and in 55 Mad 1[3] have established. In 2 Bom 346[5] Pinhey J. regretted that the judgment in 12 Bom H C R 94[4] allowed a member of a family owning an impartible estate to sue for maintenance, but the decision in that case was eventually accepted. The case in 46 Bom 435[6] had reference to a family owning a partible estate. The plaintiff was a minor member of the family, but his father was alive and therefore under the Hindu law as administered in the Bombay Presidency he could not file a suit for partition without the consent of his father. It was held that in such circumstances he was entitled to sue for maintenance because he was in the same position as if the estate were impartible. As the Bombay decisions proceed on the basis that the right to maintenance is given in lieu of a right to share—a position which has never been accepted in this Presidency—they cannot be accepted as correctly stating the law in Madras.

---

[1] Subbayya Thevar v. Sivagnana Marudappa Pandian, (1936) 23 A I R Mad 828 = 167 I C 92=I L R (1937) Mad 42=71 M L J 568.

[2] Venkata Mahipati Gangadara Rama Rao v. Rajah of Pithapur, (1918) 5 A I R P C 81=47 I C 354=41 Mad 778=45 I A 148 (P C).

[3] Vellaiyappa Chetti v. Natarajan, (1931) 18 A I R P C 294=134 I C 1084=55 Mad 1=58 I A 402 (P C).

[4] Himmatsingh Bechar Singh v. Ganapat Singh, (1875) 12 Bom H C R 94.

[5] Ramchandra Sakharam v. Sakharam Gopal Vagh, (1877-78) 2 Bom 346.

[6] Bhupal v. Tavanappa, (1922) 9 A I R Bom 292=64 I C 568=46 Bom 435=23 Bom L R 1236.

If a major coparcener is entitled to sue for maintenance and I hold that he is, the right cannot be denied to a minor coparcener and there appears to me to be no support at all for the view that if he does happen to sue for maintenance he must couple with the prayer for that relief a prayer for partition. The statement that a daughter cannot sue the manager of the family, but must proceed against her own father is also unsupported by authority. On the contrary there is the Full Bench decision of this Court in 53 Mad 84,[7] which shows that she is entitled to maintain a suit for her maintenance. It was there held that the right of a daughter to her marriage expenses and maintenance was based on her right to or interest in the joint family property, and not based on the natural obligation of a father to maintain his children. The contention that the liability of the joint family during the father's lifetime was only based on the father's obligation to maintain and bear the marriage expenses of his daughters, and the obligation fell upon the joint family through him, was rejected. Ramesam J. said :

> So far as the joint family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family.

I agree with the following observations of Chandavarkar J. in 26 Bom 141[8] at page 145 :

> Apart from authority, there is no reason, founded on sound principle, why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparcener's or strangers claiming under them and against his will to break up the joint family and forced to a suit for partition.

That would be the position if the judgment now under appeal were to stand. I have said sufficient to indicate that I consider the judgment to be against principle and authority and the appeal must be allowed. The result is that the case will be remanded to the Court of the Subordinate Judge. His decision was based merely on the issue relating to the maintainability of the suit. There are other issues and these will have to be decided. On the record reaching him the Subordinate Judge will hear and dispose of according to law the appellant's appeal from the judgment of the District Munsif, but as their parents did not appeal from the judgment of the District Munsif the suit will stand dismissed so far as they are concerned. The appellants are entitled to their costs in this appeal and in the second appeal. They will also be entitled to the refund of the court-fees paid in the second appeal and in the Letters Patent Appeal.

Krishnaswami Ayyangar J. — I am of the same opinion but shall add a few words on certain aspects of the question argued before us. The judgment of Wadsworth J. when analyzed seems to be based upon two propositions : (i) that the right of a member to maintenance out of joint family assets is only to be recognized where he has no right to enforce partition, and (ii) that the right of an unmarried minor daughter in a joint family to be maintained till marriage is enforceable only against the father and not against the joint family as a whole. The soundness of these propositions is open to question, as there seems to be nothing either in the texts or in the principles of Hindu law to lend support to either of them. The learned Judge has referred in support of his decision to the statement of law contained in Mayne and in Mullah: *see* Mayne's Hindu law, Edn. 10, p. 825; Mullah's Edn. 8, p. 582. While recognizing that these statements reflect the view taken in Bombay he accepted them as equally applicable to Madras, as the proposition is found stated in general terms and no Madras authority to the contrary was cited before him. He did not notice the decision of the Privy Council in the *Second Pittapur case*, 41 Mad 778,[2] which unambiguously recognized the right of a coparcener to be maintained out of the joint family property, but held, however, that it is the ordinary rule that a coparcener cannot claim maintenance if he is entitled to claim partition.

---

[7] Subbayya v. Anantaramayya, (1929) 16 A I R Mad 586=121 I C 113=53 Mad 84=57 M L J 826 (F B).

[8] Narainbhai Vaghibai v. Ranchod Premchand, (1902) 26 Bom 141=3 Bom L R 598.

Of the three Bombay cases cited in support of the proposition, the first two, 12 Bom H C R 94[4] and 2 Bom 346,[5] related to a claim for maintenance by an adult son against the father. The family possessed property which was however not liable to partition, being by nature impartible. The claim was upheld. The right of a son to be maintained out of impartible joint family estate is beyond question, and does not appear to have ever been doubted. Decisions of the highest tribunal and of this Court in I L R (1939) Mad 622[9] have since authoritatively settled the point. It is plain therefore that no exception can be taken to the correctness of the actual decision of the Bombay High Court so far as it went. The ratio of the decision in the first of these cases 12 Bom H C R 94[4] is to be found in the observation of Westropp C. J. that

> no authority was cited . . . . to show that where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance.

To recognize a right, namely the right of coparcenary, but at the same time to deny a remedy for its infringement, is an impossible position and this is what seems to have weighed with the Court. The learned Chief Justice expressly refrained from expressing any opinion as to the right of a son to sue for maintenance, where he might, if he chose, sue for partition. This he did in spite of the fact that an earlier decision to which he had himself been a party had laid it down that a member of an undivided family could not sue for maintenance, unless by reason of a personal disqualification he was not entitled to sue for partition. The opinion here expressed does seem to support the view which has found favour with Wadsworth J., but, as I shall presently show, is no longer tenable. 2 Bom 346[5] was a case in which the father was found to be in possession of impartible property, but not of any property in which the son could claim a share. Melvill J. observed that as a general rule perhaps, a Hindu is not bound to support a grown up son, but held that the liability existed when the family estate is impartible. Pinhey J. agreed but doubted whether it is good Hindu law to say that an adult son in an undivided Hindu family who is suffering from no disability recognized by that law, can claim a separate maintenance from his father.

In the later decision of the Bombay High Court, 46 Bom 435,[6] the son sued for separate maintenance, as a coparcener in a family consisting of the father, uncle, cousin and step brother, and owning joint family property which was partible. He could not however on the view of the law as accepted in that Presidency, enforce a partition against a father when the father was joint in estate with his own ancestor or his collaterals and against his consent. Right to partition not existing, the son was held, on the principle of the earlier decisions, entitled to sue for maintenance. In all these cases, the right of the son to sue for maintenance was expressly stated to arise on account of the absence of the right to partition. The larger remedy being available, the lesser relief was denied on the footing that the primary and the only true remedy for the excluded parcener was to enforce his right to partition by suit. When this remedy is cut out by reason of a personal disqualification or otherwise, the coparcenary right ordinarily inherent in every member of the family suffers a diminution and it then finds expression in the inferior remedy of maintenance. The right to maintenance is thus to be regarded as a substitute for the lost right to a share and is in the nature of a secondary remedy to be granted in lieu of the primary one, where it is not available. This I think is the rationale which underlies the decisions of the Bombay High Court. With all respect, I regret to say that such a view of a coparcener's right cannot be sustained either in principle or on authority. It is well to remember in this connection that a right to maintenance may arise in one of three ways. First, the existence of certain specified personal relationships, independently of the possession of joint property in the person liable, may give rise to the claim. The right in this class of cases is enforceable personally against the person on whom the law casts the burden, and is based on the well-known text of Manu, that,

---

[9] Maharaja of Venkatagiri v. Raja Rajeewara Rao, (1939) 26 A I R Mad 614=I L R (1939) Mad 622=(1939) 1 M L J 831.

> the aged parents, a virtuous wife, and an infant child must be maintained even by the doing of a hundred prohibited acts.

The right does not extend to remoter relations. The second and the more important ground of claim is that based not on pure relationship but on membership in a joint family possessed of joint family property. The Privy Council has in the *Second Pithapur case*, 41 Mad 778,[2] examined the jural basis of the right in this class of cases, and declared that it is an inherent quality of the coparcenary property that it should afford the means of sustenance to all the members of the coparcenary while the family remained joint. This is clear from the following observations of their Lordships:

> This coparcenary interest carries with it the inchoate right to raise an action for partition, and until partition is de facto accomplished these same persons (junior members) have a right to maintenance.

The meaning of this statement is sufficiently explicit. The junior members are entitled to maintenance until partition out of the common property where that property is ordinary partible property. The right will cease the moment a partition takes place, for thereafter there is no common property. It will continue to subsist so long as partition does not take place, and in the case of impartible property it is incapable of being terminated. The effect of the texts on the subject is correctly stated in Mayne's Hindu Law, p. 821, in the following passage:

> The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies and defray the expenses of their marriages.

Membership in the family, and the existence of joint property are the only conditions to which the right is subject. The third head of claim is based on the text of Yagnavalkya, which imposes a personal disqualification by reason of some defect such as blindness, impotency, etc. (Yagnavalkya, Second, 140-142). The defect operates to exclude the sufferer from a share in the inheritance, but, in lieu of it, he is recognized as being entitled to maintenance. This, in my opinion, is the only class of cases in which the right to maintenance can be said to be recognized as a substitute for the right to partition with some justification, though even here the right springs from the existence of joint property subject to the burden of supporting all the members of the family whether entitled to partition or not. But even if there is no impediment to the exercise of the right to partition, there can be no logical reason for compelling a member to sue for partition, when the head of the family neglects to maintain him. The right of an excluded member to sue for joint possession, without being obliged to sue for partition is recognized by Art. 127, Limitation Act. From this it is to my mind clear, that partition is not to be regarded as the sole remedy. Joint possession which he can seek is in most cases indistinguishable from maintenance out of the family assets, and it is therefore difficult to maintain a distinction in principle between the two. The logic of the observations of Chandavarkar J. in 26 Bom 145[8] referred to in the judgment of my Lord, appears to my mind to be indisputable.

That the true origin of the right in the second and third classes of cases is the existence of joint property, partible or impartible, scarcely admits of doubt at the present day. It seems to me to be absolutely impossible to get away from the principle laid down by the Privy Council which is that the right of a junior member in a joint family where the family possesses property is a right which springs from the joint property itself. When the question came to be examined by the Board in 55 Mad 1,[9] in which the claim to maintenance was advanced by an illegitimate son of a deceased member of a joint family possessing joint family property, their Lordships used language which removes all further doubt on the point. Referring to the view taken in a decision of this Court in 8 Mad 557[10] that the share of inheritance given to the illegitimate son was merely in lieu of maintenance in the case of Sudras, their Lordships made the following observations:

> On the consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of the son and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled *as a member* of the family to maintenance *out of that property*. (The italics are mine.)

In the Full Bench decision of this Court in 53 Mad 84,[7] the basis of the right of a daughter to maintenance out of the family property was examined, and it was again clearly laid down that the obligation was not personal to the father who was along with others a member of the family but that the obligation lay upon the family as a whole, that is to say against the family property. The texts and the decisions were gone into, and the learned Judges expressed the opinion that the right of the daughter was the surviving remnant of a larger right she once enjoyed in the joint family property. These authorities seem to take the question beyond the region of controversy. The right of a coparcener to be maintained out of joint property is merely one of the modes in which the coparcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property. Wadsworth J. has held that the daughter must institute a suit against the father in the first instance and pursue her remedies against his share in the joint family property. This view can be understood only on the theory that the daughter's right to maintenance is based solely on the personal obligation of the father. As I have already indicated, this theory is opposed to the decision in the Full Bench case already referred to. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

---

[10] Ranoji v. Kandoji, (1885) 8 Mad 557.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 669

HORWILL J.

Pandela Pundarikakshudu — Appellant.

v.

Sontineni Kondayya and others — Respondents.

Second Appeal No. 900 of 1936, Decided on 24th November 1939.

(a) Transfer of Property Act (1882), S. 65-A —Mortgage before S. 65-A—S. 65-A would not apply even if lease is after it.

Section 65-A would not apply if the mortgage took place before S. 65-A was introduced into the Transfer of Property Act even if the lease was actually after S. 65-A was introduced. [P 669 C 2]

(b) Transfer of Property Act (1882), S. 65-A — Lease by mortgagor for unusual term to defeat creditors is void—Lessee will have no right to redeem.

A lease is void, unless it is one granted in the ordinary course of management. The lease by the mortgagor for an unusual term to defeat the creditors is void and would not be binding on the mortgagee. The lease being void the lessee will have no right to redeem : *40 C W N 57, Dissent.*; *(1888) 39 Ch D 456, Expl.*; *A I R 1933 Mad 876, Rel. on.* [P 670 C 2; P 671 C 1]

B. V. Ramanarasu — *for Appellant.*

Ch. Raghava Rao — *for Respondents.*

Judgment.—The appellant was a simple money creditor of defendants 2 and 3, who executed a mortgage deed in favour of defendant 1 on 20th June 1923 which contained a covenant against leasing the property. Defendant 1 was also an unsecured creditor of defendants 2 and 3 and obtained a simple money decree against them. Defendant 1 attempted to execute his decree in 1932; but by that time defendants 2 and 3 had filed an insolvency petition, and so the execution petition was struck off. The insolvency petition was subsequently dismissed; and before defendant 1 filed another execution petition against defendants 2 and 3, the plaintiff, in order to satisfy his own decree, had persuaded defendants 2 and 3 to execute a lease of the property for ten years. He then filed E. A. No. 2847 of 1933 in the execution petition of defendant 1, claiming that the equity of redemption could be sold only subject to his lease. That petition was dismissed; and the plaintiff thereupon filed the present suit for a declaration to that effect. The lower Appellate Court dismissed his suit on the ground that under S. 65-A, T. P. Act, such a lease would be void in view of the covenant against leasing the property. It is argued here that S. 65-A would not apply because the mortgage took place before S. 65-A was introduced into the Transfer of Property Act. It is however contended on the other side that although that is true, the lease was actually after S. 65-A was introduced and that S. 65-A therefore applied. On this point I agree with the learned advocate for the appellant. It is not contended that S. 65-A has any retrospective effect. Its effect was that whereas leases in contravention of a covenant were not void before the amendment, they became void afterwards. In effect, therefore, it added an implied term to the contract, which it could not do to a contract already executed on the date of the amendment.

Before S. 65-A was enacted, some Courts were inclined to apply the strict law of

England to mortgages in India also; but the view that finally prevailed was that the mortgagor did have a right to lease and that although it was usual to introduce terms into the mortgage prohibiting the mortgagor from leasing lands, yet that condition was honoured as often in the breach as in the observance. It was accordingly held that a mortgage in breach of a covenant was not void. 6 Cal 317,[1] 4 All 518[2] and A I R 1935 All 511[3] are authorities for that position; and it is not seriously disputed here that within certain limits leases can be granted. The above cases proceeded largely on the interpretation of S. 66, T. P. Act, which, by implication, gives the mortgagor a great deal of freedom in the management of his lands and even allows him to commit waste provided that the security is not thereby rendered insufficient. It is argued for the appellant that the only test of the validity of a lease is whether it renders the security insufficient and that before a lease can be declared to be invalid, it is necessary for the person seeking to avoid the lease to strictly prove that the security has been rendered insufficient.

In A I R 1935 All 511[3] the amount of property leased was very small and it made no appreciable difference to the mortgage security. In the present case, however, the lease, as already observed, was for a period of ten years; which means that even if the property is sold, the purchaser, whether he be the mortgagee or a third party, can have no hope of getting possession for many years to come. Moreover, although the lease was bona fide in the sense that it was for consideration and that the appellant was working only to obtain satisfaction of his own decree, there can be no doubt that he had in view the position of his rival creditors and that this lease was brought about for the purpose of defeating the attempt of defendant 1 to proceed against the lands for the satisfaction of his own decree. The learned Judges who decided A I R 1932 Rang 113[4] were of opinion that a lease could not operate unless it was made in the ordinary course of management and that if it was one on exceptional terms, it ought not to operate. Pandalai J., in 65 M L J 826,[5] reviewed all the cases on this question and came to the conclusion that a lease is void, unless it is one granted in the ordinary course of management. Page C. J. in A I R 1932 Rang 113,[4] thought that S. 65-A was a statement of the then existing law. Following Pandalai J. in the above case I hold that the present lease cannot be held to be valid either against the mortgagee or against the other creditors affected by it. The case in 65 M L J 826[5] is sought to be distinguished on the ground that there it was an action on the mortgage, whereas it is a mere accident in the present case that the person who is seeking to execute his money decree against the equity of redemption should be the mortgagee. It is no doubt true that we must regard defendant 1 not as a mortgagee but as a simple money creditor executing his decree; but if the lease is a void one, he cannot be bound by it.

The remaining question is whether the appellant is entitled to redeem. It was held in 40 C W N 57[6] that even where a lease was void, the lessee would be entitled to redeem. With all due respect to the learned Judge who decided that case, it is difficult to see how if a lease is void, (as it was in that case, because it related to a mortgage after the passing of S. 65-A, T. P. Act,) it could confer any right at all; but that case was decided largely on the authority of (1888) 39 Ch D 456.[7] I do not however consider this last case an authority for that position. That case was naturally one of an English mortgage, in which the ownership of the property passed by law to the mortgagee, leaving the mortgagor no legal title. The mortgagor therefore had no right left in law to deal with the property and a lease would therefore be technically void. It was however pointed out that although in law such was the position, yet equity recognized what was 'vulgarly known as an equity of redemption' which was regarded in equity as an estate. If it was an estate, then the mortgagor could transfer a part of it or the whole of it, and the transferee would therefore have some right in the property which would entitle him to redeem. Such a lease, if it had taken place in India, would not have been void at all. If a lease is declared to be void

---

1. Radha Pershad v. Monohur Das, (1881) 6 Cal 317=7 C L R 293.
2. Ali Hassan v. Dhirja, (1882) 4 All 518 = 1882 A W N 118.
3. Niader Singh v. Ram Chandar, (1935) 22 AIR All 511=154 I C 1009=1935 A L J 360.
4. M. P. M. S. Firm v. Ko Pyu, (1932) 19 A I R Rang 113=138 I C 213=10 Rang 210.
5. Moidunni Haji v. Madhavan Nair, (1933) 20 A I R Mad 876=148 I C 1115=65 M L J 826.
6. Basanta Kumar v. Adarmani, (1935) 40 C W N 57=164 I C 241.
7. Tarn v. Turner, (1888) 39 Ch D 456 = 57 L J Ch 1085=59 L T 742=37 W R 276.

by a statute then the lessee can acquire no right at all.

The learned advocate for respondent 1 argues that there was a merger of his mortgage with the equity of redemption which would prevent the lessee from redeeming. He points out that under S. 101, T. P. Act, only a subsequent encumbrancer can redeem. At the relevant time, however there could not have been any such merger; for the suit relates to a time when the mortgagee was seeking to execute his simple money decree by sale of the equity of redemption. It is pointed out by respondent 1 that the plaint does not contain a prayer for redemption; and that therefore this Court should not allow the plaintiff to redeem. Both for that reason and on the ground that the lease by the mortgagor for an unusual term to defeat the creditors would not be binding on defendant 1, the appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 671

LEACH C. J. AND KUNHI RAMAN J.

Visalakshi Ammal — Appellant,

v.

C. Krishnaveni Ammal and others — Respondents.

O. S. A. No. 30 of 1938, Decided on 4th September 1939, from judgment and decree of Wadsworth J., *Reported in A I R 1938 Madras 547.*

Registration Act (1908), S. 17 — Equitable mortgage — Collateral letter signed at time of deposit of title deeds and delivered to mortgagee by way of security for loan held required registration: *48 M L W 119=A I R 1938 Mad 547, Reversed.*

A mortgagor borrowed money on a promissory note and as security deposited the title deeds of certain property. At the time of the deposit the mortgagor signed and delivered to the mortgagee a letter stating that he had received the loan and for that sum had deposited with mortgagee as security title deeds relating to certain property, further adding that at the time of the discharge of the bond he would take back the letter as well as the title deeds. In a subsequent mortgage the aforesaid letter was described not only as a collateral security letter but as security for the loan :

Held that the letter constituted the bargain between them and operated to declare the rights of the mortgagee in the property. Consequently the letter fell within S. 17, Registration Act, and ought to have been registered. If not registered it could not be admitted in evidence which meant that the equitable mortgage could not be proved : *48 M L W 119=A I R 1938 Mad 547,* **Reversed;** *Case law reviewed; A I R 1924 Mad 547, Disting.* [P 674 C 1]

N. K. Mohanarangam Pillai — *for Appellant.*

Srinivasaraghavan and Thayagarajan, K. Narasimha Ayyar and T. V. Subramania Ayyar — *for Respondents.*

Leach C. J. — This appeal raises the question whether an equitable mortgage is unenforceable by reason of the non-registration of a letter signed by the mortgagor at the time of the deposit of the title deeds. One P. M. Sadasiva Chetty, his sons Subramanian and Somasundaram, (respondents 3 and 4), his brother Gangadhara Chetty, and Gangadhara Chetty's son Thayamanaya (defendant 3 in the suit) constituted an undivided Hindu family. The family owned immovable property in Madras, 2.10 acres of land in Arasur village, Chingleput District, and .42 acres of land and a rice mill in Ponneri village, which is also in the Chingleput District. The properties in Madras consisted of three houses and their sites, known as 16, Audiappa Chetti Street, 41 Guruvappa Chetty Street and 105 Egmore High Road, respectively. On 2nd August 1930 Sadasiva, who was the manager of the family, borrowed from respondents 1 and 2 Rs. 1900 on a promissory note and as security deposited the title deeds of No. 16, Audiappa Chetty Street. Before us it has not been disputed that this money was borrowed for the purposes of the family. At the time of the deposit Sadasiva signed and delivered to the mortgagees a letter in Tamil of which the following is the official translation :

> On 2nd August 1930, the collateral letter executed in favour of two persons (1) C. V. Krishnaveni Ammal and (2) C. Sundaram Chetty, residing in house No. 3, Cuddapah Rangiah Chetty Street, Periamet, Madras, by P. M. Sadasiva Chettiar, son of the late P. Munisami Chetti, Vannia Vaisya Caste, Saivaite, merchant, residing in house No. 16, Audiappa Chetti Street, Chintadripet, Madras. On executing a pronote to you this date Rs. 1900 (rupees one thousand and nine hundred) has been received in cash from you. For this sum, I have kept with you as security, house No. 16, Audiappa Chetty Street, said petta, said Madras, and the original title deeds relating to the property. At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds.
>
> To this effect have I executed this collateral letter with consent.

On 22nd August 1931, 41, Guruvappa Chetty Street, and 105, Egmore High Road were mortgaged to defendant 6 in the suit. He having died he is now represented by his executrix, respondent 6. This mortgage was effected by a registered instrument signed by Sadasiva for himself as manager of the joint family and as guardian of defendant 3, whose father was then dead. On 19th April 1932 Sadasiva and his eldest son, respondent 3, executed two mortgage deeds in favour of respondents 1 and 2, one to secure Rs. 2000, made up of the Rs. 1900 borrowed on 2nd August 1930 and a further advance of Rs. 100, and the other to secure Rs. 500. The security for the first of these mortgages was No. 16, Audiappa Chetty Street and this mortgage was intended to take the place of the equitable mortgage. The security for the sum of Rs. 500 was the .42 acres of land and the rice mill in Ponneri village. The suit out of which the appeal arises was filed to enforce the mortgages.

On 24th March 1931 the minor defendant 3 through his mother, the appellant, instituted a partition suit on the original side of this Court (C. S. No. 471 of 1931). The minor died during the pendency of the suit and the appellant was made a party as his legal representative. The mortgage of 19th April 1932 which replaced the equitable mortgage of 2nd August 1930 having been created after the partition suit had been filed did not affect the minor's estate and the mortgagees are relegated to their rights if any under the equitable mortgage. The learned trial Judge (Wadsworth J.) held that the letter which was given with reference to the deposit of title deeds did not require registration and therefore the minor's estate was bound by the equitable mortgage. On this basis he granted the mortgagees a mortgage decree in respect of the Rs. 1900. Other contentions were raised before the learned Judge but the appeal has been confined solely to the question whether equitable mortgage of 2nd August 1930 can be enforced. In the mortgage deed of 19th April 1932 for Rs. 2000, made up of the Rs. 1900 borrowed on the equitable mortgage and the further advance of Rs. 100, there is the following recital:

> A sum of Rs. 1900 (rupees one thousand and nine hundred) has already been borrowed from you on 2nd August 1930 by executing a bond and by giving you a collateral security letter as security thereof.

The appellant's case is that the letter given by Sadasiva at the time of the deposit of title deeds, read in the light of the recital in the mortgage deed of 19th April 1932 just quoted, must be construed as a declaration of the mortgagee's rights on the property and therefore required registration under S. 17, Registration Act. Not having been registered it could not be admitted in evidence by reason of S. 49, Registration Act. The learned Judge treated the letter as a mere memorandum of a transaction previously completed and on this footing held that it did not require registration.

Before considering certain authorities which have been quoted to us I will revert to the facts. As I have already stated, the execution of the promissory note, the deposit of the title deeds and the execution of the letter all took place on 2nd August 1930. It may be taken that the signing of the promissory note and the deposit of title deeds took place before the letter was signed in actual point of time. The evidence discloses that five or six days before 2nd August the title deeds were handed over to the mortgagees to enable their representative to scrutinise them, the understanding being that if the title deeds proved to be in order they would advance money on equitable mortgage. The learned Judge has held that inasmuch as respondent 2 said that the examiner of the documents had approved of the title five or six days before 2nd August 1930, it was reasonable to infer that for these five days the title deeds remained with respondent 2 as security for the loan and therefore there was a completed mortgage agreement some days anterior to 2nd August 1930. I find myself unable to share this opinion. The title deeds were handed over for the purpose of examination of the title and they must be deemed to have remained with the mortgagees for that purpose until they intimated to Sadasiva on 2nd August 1930 that they were willing to advance the money. On the evidence both of respondent 2 and of the person who examined the deeds it is clear that they were handed over merely for the purpose of examination of title and that there was no deposit by way of equitable mortgage until 2nd August 1930. The case therefore cannot be decided on the basis that there was a completed transaction before that date. With these observations I will now proceed to the examination of the authorities. In 50 Cal 338[1] the Privy Council had to consider a memorandum which was signed and delivered by the mortgagors at the time of the deposit of title deeds by way of equitable mortgage. It was held in that case that oral proof of the mortgage was inadmissible because the document drawn up constituted the bargain between the parties. There the memorandum was in the following terms :

---

[1] **Subramanian v. Lutchman, (1923) 10 A I R P C 50=71 I C 650=50 I A 77=1 Rang 66=50 Cal 338 (P C).**

> We hand you herewith title deeds relating to Fifth Class Lot Nos. 78, 79 and 80, Block E, each measuring 25 by 50, with building thereon belonging to Saleman Ahmad Seedat, also his promissory note for rupees sixty-three thousand (Rs. 63,000) due to us, this please hold as security against advances made to us; we also hand you second mortgage executed in our favour by C. Rangaswamy Moodaliar on First Class Lot No. 6 in Block F-1. On this we had advanced Rs. 32,000. Please also hold this as further security against advances made to us. We promise not to deal with same till your amount due is fully paid and satisfied.

Lord Carson who delivered the judgment of the Board said that their Lordships had no doubt that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected. Their Lordships were here applying the principles laid down in 43 Cal 895[2] at p. 900 and (1872) 5 H L 321.[3] The question of the admissibility of a memorandum relating to a deposit of title deeds was considered by the Privy Council in 54 Mad 257.[4] There the memorandum consisted of a list of title deeds with the following introductory words :

> Written to E. N. A. Samoo Battar by Krishnaswami Ayyar, of S. V. Ramaswami Ayyar and Brothers. As agreed upon in person I have delivered to you the undermentioned documents as security.

Section 17, Registration Act, requires registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property. Lord Tomlin, in delivering the judgment of the Board, pointed out that the question which fell to be determined was whether the memorandum, having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff, was an instrument of this nature. Their Lordships regarded the memorandum as a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties, and therefore did not require registration. While their Lordships did not think that the language of Lord Carson in 50 Cal 338[1] conveyed or was intended to convey the meaning that no memorandum relating to a deposit of title deeds could be within S. 17, Registration Act, unless it embodied all the particulars of the transactions of which the deposit formed part, they were of opinion that no such memorandum could be within the Section unless on its face it embodied such terms and was signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit was concerned, it constituted the agreement between the parties. In the recent case in 43 C W N 806[5] the Privy Council after reviewing their earlier decisions expressed themselves thus:

> Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered.

Therefore what is to be considered in the present case is whether the memorandum of 2nd August 1930 was made an integral part of the transaction and is an instrument intended to declare the right of the mortgagees in the property and not merely a record of what had transpired. The memorandum under discussion is written in part in the past tense. It states :

> On executing a pro-note to you this date, Rs. 1900 has been received in cash from you. For this sum, I have kept with you as security house No. 16, Audiappa Chetti Street, said petta, said Madras, and the original title deeds relating to the property.

But it goes on to say :

> At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds,

and concludes with this statement : "To this effect have I executed this collateral letter with consent." If the letter is read as a whole there is a great deal to be said for the argument that it was intended to constitute the bargain between the parties, but our attention has been drawn to the decision of Schwabe C. J., and Ramesam J. in 47 Mad 398[6] where it was held that a memorandum in the following terms did not require registration :

---

[2] Pranjivandas Mehta v. Chan Ma Phee, (1916) 3 A I R P C 115=35 I C 190=43 I A 122=8 L B R 458=43 Cal 895 (P C).

[3] Shaw v. Foster, (1872) 5 H L 321=42 L J Ch 49=27 L T 281=20 W R 907.

[4] Obla Sundarachariar v. Narayana Ayyar, (1931) 18 A I R P C 36=131 I C 328=58 I A 68=54 Mad 257 (P C).

1940 M/85 & 86

[5] Hari Sankar Paul v. Kedar Nath, (1939) 26 A I R P C 167 = 181 I C 935 = 66 I A 184= I L R (1939) 2 Cal 243=43 C W N 806=I L R (1939) Kar (P C) 287 (P C).

[6] Krishnaiya v. Ponnuswami Aiyar, (1924) 11 A I R Mad 547=84 I C 629=47 Mad 398=46 M L J 295.

> Collateral security letter in respect of a house executed in favour of Messrs. Peruru Viswanadham and Koneti Desikacharyulu Co. of Madras. As you have this day obtained an assignment of the sum of Rs. 1945 due by me to Messrs. Peruru Viswanadham & Co. the same being the sum of principal and interest due, I have this day executed a pronote in your favour for this sum and the sum of Rs. 500 taken today, i. e., the total of Rs. 2455; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras.

This memorandum has much in common with the memorandum under consideration in the present case. It is described as a collateral security and states what had preceded its execution. The learned Judges however treated it merely as a record of a completed transaction made for the purpose of recording facts for the information of a new firm. The position here is not analogous and there is the further factor that in the mortgage deed of 19th April 1932 which the mortgagees obtained from the mortgagor the memorandum of 2nd August 1930 is described not only as a collateral security letter but as security for the loan. Can it be said in these circumstances that the parties were merely contemplating a record of a completed transaction and not an operative instrument? When the memorandum is read in the light of the recital in the subsequent deed of mortgage it seems to me that the only conclusion open is that it constituted the bargain between them and operated to declare the rights of the mortgagees in the property. Consequently I hold that the memorandum falls within S. 17, Registration Act, and ought to have been registered. Not having been registered it cannot be admitted in evidence which means that the equitable mortgage cannot be proved. I would allow the appeal with costs both here and below against respondents 1 and 2.

Kunhi Raman J. — I agree.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 674

HORWILL J.

Venkataramasastri — Appellant.

v.

Venkatasubramania Dikshitar and another — Respondents.

Second Appeal No. 801 of 1938, Decided on 15th December 1939, against decree of Sub-Judge, Vellore, in A. S. No. 94 of 1937.

(a) Court-fees Act (1870), S. 12 (2)—S. 12 (2) applies to all parties to appeal where deficient court-fee is paid whether by appellant or by any other party.

Section 12 (2) applies to all the parties to the appeal. Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. The Section has not been intended to apply only to a case where the deficiency was by the appellant. [P 674 C 2; P 675 C 1]

(b) Interpretation of Statutes — Section primarily intended to apply to suits— Principle of construction in applying it to appeals stated.

Where a Section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the Section good sense. [P 675 C 1]

V. Govindarajachari and V. V. Raghavan — *for Appellant.*

A. Viswanath Aiyer — *for Respondents.*

Judgment. — The plaintiff, who is the appellant in this Court brought a suit on insufficient court-fee and he was granted a decree. The defect was not noticed during the course of the trial. In appeal to the Court of the Subordinate Judge of Vellore, he was called upon to pay the deficient court-fee under S. 12, Court-fees Act, and as he did not do so within the time allowed, S. 10 (2) was applied and his suit dismissed. This second appeal has therefore been preferred, the plaintiff contending that S. 12, Court-fees Act, does not apply to his case. The argument of the learned advocate for the plaintiff in this Court is that S. 12 (2) only applies to cases where the plaintiff is the appellant. This sub-section runs :

> But whenever any such suit comes before a Court of Appeal . . . . if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided.

If this sub-section had ended with the word "decided" I am quite sure there would never have been any doubt at all that it applies to all the parties to the appeal. Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. If this sub-section had been intended to apply only to a case where the deficiency was by the appellant, it would not have been necessary to say "the party by whom such fee had been paid." The simple word "appellant" would have been sufficient. A doubt has however arisen because of the last few words of the sub-section "and the provisions of S. 10, para. 2 shall apply." S. 10, para. 2 applies only to suits. It is argued that if the word "appeal" replaces the word "suit" in S. 10 (2), then the appeal would have to be dismissed, which would work a grave injustice on the appellant when the respondent is the defaulter. That was the reasoning that impressed the learned Judge who decided 20 All 362.[1] The matter came before a Full Bench of the Allahabad High Court in 28 All 270,[2] where the argument of 20 All 362[1] was adopted. It was therefore held that S. 12 (2) could not apply to cases where the plaintiff was not the appellant and that there was therefore no provision in the Court-fees Act for the recovery of deficient court-fee from a plaintiff-respondent. What a Court could do, the learned Judges said, was to suspend the execution of the decree until the deficit court-fee was paid. The difficulty of that course is that it would be in the interests of a plaintiff who has made default in the payment of proper court-fee to await the result of the appeal. If he was unsuccessful in the appeal, then obviously he would certainly not pay court-fee. This difficulty was seen in 51 All 886[3] and the learned Judges there held that the course suggested in the earliar Allahabad cases was not the only one. If the plaintiff did not pay the deficit court-fee when called upon to do so by the Appellate Court, a contempt of Court was committed and the Appellate Court could therefore refuse to hear the respondent or his advocate and dispose of the appeal in his absence.

There is no authority in any of the Codes (or previously reported decisions as far as I know) for the adoption of the procedure suggested in these cases. S. 12 (2), except for the last few words, provides no difficulty at all; and the sub-section clearly enough applies to all cases where a deficient court-fee has been paid in the first Court, whether by the appellant or by any other party. Is it possible that because of some little difficulty in applying the wording of S. 10 (2) to appeals by a defendant, the rest of the Section is nullified and can have no application at all to cases where the plaintiff is not the appellant? Where a Section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the Section good sense. If that is done, I do not think there is any difficulty in understanding S. 10 (2). Several decisions of other High Courts have been quoted in which the Allahabad decisions have been dissented from: 56 I C 316[4] was a Bench decision of the Patna High Court. 15 I C 463[5] is a Full Bench decision of the Punjab Chief Court. 7 Cal 348[6] is a Bench decision of the Calcutta High Court. 60 I C 654[7] is a decision of a Single Judge of the Oudh Chief Court. In all these cases the Allahabad decisions have been dissented from; and it was held that in applying S. 10 (2) to appeals and reading it with S. 12 (2) the word "suit" should be deemed to include "appeals." If this is done, there is no difficulty in interpreting the Section. It has been pointed out that in 40 I C 50[8] a Single Judge of the Patna High Court followed the Allahabad decisions. He did so, however, without discussing the matter in question here and that decision cannot be good law in Patna in view of the Bench decision in 56 I C 316.[4] It has been moreover pointed out by Mr. Viswanatha Ayyar for the respondents that the actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit for the sub-section begins, "But whenever any such suit comes before the Court on appeal." If we remember this, there is really no necessity for altering the word "suit" to "appeal" in S. 10 (2) when we apply it to cases where the court-fee has not been paid by a plaintiff-respondent. The appeal is accordingly dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

[1] Narain Singh v. Chaturbhuj Singh, (1898) 20 All 362=1898 A W N 72.

[2] Mohan Lal v. Nand Kishore, (1905) 28 All 270 =2 A L J 839=1905 A W N 280 (F B).

[3] Baijnath v. Dhani Ram, (1929) 16 A I R All 577=117 I C 107 = 51 All 886 = 1929 A L J 1024.

[4] Brij Krishna Das v. Murli Rai, (1920) 7 A I R Pat 656=56 I C 316=4 Pat L J 703.

[5] Dyal Singh v. Ram Rakha, (1912) 54 P R 1912=15 I C 463=136 P W R 1912 (F B).

[6] Shama Soondary v. Hurro Soondary, (1881) 7 Cal 348=8 C L R 528.

[7] Ram Nidh v. Balkaran Singh, (1920) 7 A I R Oudh 167=60 I C 654=23 O C 388.

[8] Subbaiya Pandaram v. Mahomed Mustapha Maracayar, (1918) 5 A I R Mad 974 = 40 I C 50=32 M L J 85.

A. I. R. 1940 Madras 675

KUNHI RAMAN J.

Mattapalli Appa Rao — Petitioner.

v.

Ch. Ramamurthi and others — Respondents.

Civil Revn. Petn. No. 714 of 1938, Decided on 9th November 1939, to revise order of District Court, East Godavari at Rajahmundry, D/- 7th December 1937.

Provincial Insolvency Act (1920), S. 66 (2)— Allowance under S. 66 (2) is discretionary with Court — Application by insolvent claiming expenses for his daughter's marriage does not

strictly fall under S. 66 (2) — But it may be brought within category of 'allowance for the support of himself and his family' — Proper course is to apply for increase of allowance for period during which marriage is contemplated —But it cannot be claimed as of right.

The making of the allowance under S. 66 (2) is left to the discretion of the Court. An application by the insolvent claiming a lump sum for meeting the marriage expenses of his daughter does not come strictly within the scope of this Section. But under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the insolvent to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by Court bearing in mind the considerations that ought to prevail in disposing of applications under S. 66 (2). The claim can certainly not be made as a matter of right : *26 Mad 505 and A I R 1933 Lah 116, Rel. on ; (1874) 9 Ch 722 ; (1905) 1 K B 465 ; (1866) 4 Ch D 150 and A I R 1927 P C 113, Ref.* [P 677 C 1, 2]

V. Viyyanna — *for Petitioner.*

D. Narasa Raju — *for Respondents.*

Order.—This civil revision petition arises out of certain insolvency proceedings pending in the Court of the learned Subordinate Judge of Cocanada (I. A. No. 204 of 1937 in I. P. No. 29 of 1932). The petitioner was adjudged insolvent and all his properties became vested in the Official Receiver of East Godavari. On an application made by the petitioner under S. 66 (2), Provincial Insolvency Act, it is stated that a monthly allowance of Rs. 50 out of the estate has been made in his favour by the learned Subordinate Judge. While this order was in force, the petitioner presented another application for an allotment of Rs. 4000 to be made for celebrating the marriage of his daughter who had just attained the age of 14 years. It was conceded in the Subordinate Judge's Court that this amount included a sum of Rs. 2000 which petitioner wanted for "katnam" (dowry). The balance of Rs. 2000 was claimed by him for meeting the actual expenses of the marriage. The learned Subordinate Judge has held that in any event, the petitioner was not justified in claiming Rs. 2000 to enable him to give it as dowry at the time of the marriage of his daughter and that it was not open to him to claim the balance of Rs. 2000 under S. 66 (2), Provincial Insolvency Act. In the course of his order the learned Subordinate Judge has recorded that in his opinion a sum of Rs. 500 would be sufficient for meeting the expenses of the marriage of the petitioner's daughter. This however was only an observation made by him in the course of his order. On appeal to the learned District Judge of East Godavari, the order made by the learned Subordinate Judge was confirmed and the appeal was dismissed. It is against this order that the present revision petition is filed.

The learned advocate for the petitioner contends that the property of the insolvent must be deemed to have vested in the Official Receiver subject to all the liabilities that could have been enforced against it in the hands of the insolvent himself. In support of this proposition he has cited certain English decisions where the view taken is that the trustee in bankruptcy stands in the position of the bankrupt, that he takes the property of the insolvent subject to rights of third parties and that he is in effect the legal representative of the bankrupt: (1874) 9 Ch 722,[1] (1905) 1 K B 465[2] and (1866) 4 Ch D 150.[3] He has also cited the case reported in 54 I A 204,[4] where a right of pre-emption to which a third party was entitled with regard to certain property of the insolvent was enforced subsequent to insolvency. The substance of these decisions has been summarized in Mulla's Commentaries on the Provincial Insolvency Act where the learned author states that the property which the Official Receiver takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens.

The learned advocate for the respondent, on the other hand, argues that according to Hindu law the creditor's rights are recognized as supreme even as against the sons of the insolvent and that there is no warrant for the claim put forward on behalf of a daughter. He cites the decision reported in 26 Mad 505,[5] in support of his contention. There a wife had expended moneys for celebrating her daughter's marriage and subsequently sued her husband for recovering the amount so expended but it was held that she was not entitled to recover. He also relies on the decision reported in 14

---

[1] Ex parte Holthausen; In re Scheibler, (1874) 9 Ch 722=44 L J Bk 26=31 L T 13.

[2] In re East Gate; Ex parte Ward, (1905) 1 K B 465=74 L J K B 324=92 L T 207=21 T L R 198=53 W R 432=12 Manson 11.

[3] In re Mapleback; Ex parte Caldacott, (1866) 4 Ch D 150=46 L J Bk 14=35 L T 503 = 25 W R 103=13 Cox C C 374.

[4] Sheobaran Singh v. Kulsum-un-nissa, (1927) 14 A I R P C 113=101 I C 368=49 All 367=54 I A 204 (P C).

[5] Sundari Ammal v. Subramania Iyer, (1903) 26 Mad 505.

Lah 399,[6] where it is observed in the judgment that

> it is settled law that the debts contracted by a Hindu governed by Mitakshara school take preference over the right of maintenance of his wife and minor children.

In Mayne's Hindu Law at p. 429, the case law relating to this subject has been summarized:

> In cases governed by the Mitakshara law a father may sell or mortgage not only his own share but also the share of his male issue in family property, for the purpose of satisfying antecedent debts of his own not incurred for any family necessity or benefit, provided they are not immoral or illegal, and the sale or mortgage may be enforced against his sons by a suit or proceedings to which they are not parties. . . .

A creditor may enforce payment of the personal debt of a father not being illegal or immoral, by attachment or sale of the entire interest of father and sons in the family property and it is not absolutely necessary that the sons should be parties either to the suit itself or to the proceedings in execution. In view of these authorities, it is not possible for the petitioner to contend that the daughter is entitled as a matter of right to claim the amount mentioned in the petition from out of the estate of the insolvent as against the creditors of the insolvent. The application, as already stated, was presented under S. 66 (2), Provincial Insolvency Act. This clause of the Section is worded as follows:

> The Court may from time to time make such allowance as it may think just to the insolvent out of his property for the support of himself and his family . . . . but such allowance may at any time be varied or determined by the Court.

It will be seen that the making of the allowance is left to the discretion of the Court. It is not possible to hold that an application like the present where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of this Section. I am prepared to hold that under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the petitioner to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under S. 66 (2), Provincial Insolvency Act. The claim can certainly not be made as a matter of right, for, there is no authority for holding that the insolvent has a right to claim out of his estate the expenses that he contemplates incurring for celebrating the marriage of his daughter. In these circumstances, I am not satisfied that the view taken by the lower Courts is wrong. The petitioner may, if so advised, make an application for increasing the allowance already made to him by the learned Subordinate Judge but the petition that was filed by him in the learned Subordinate Judge's Court out of which this revision petition arises was clearly not sustainable. This civil revision petition must therefore be dismissed. I make no order as to costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 677

LAKSHMANA RAO J.

Kallumatam Gurubasayya—Petitioner.

v.

Sanna Setra Siddalingappa — Respondent.

Criminal Revn. Case No. 1094 and Petn. No. 1029 of 1939, Decided on 22nd February 1940, to quash charge framed by Sub-Divisional Magistrate, Bellary.

Penal Code (1860), S. 193 — Complaint by Court is necessary for prosecution under S. 193 —S. 193 cannot be evaded by filing complaint of defamation.

A complaint by the Court is necessary for a prosecution for an offence under S. 193 and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. [P 678 C 1]

A. Bhujanga Rao — *for Petitioner.*

A. Gopalacharlu — *for Respondent.*

Public Prosecutor — *for the Crown.*

Facts. — The complaint of an offence under S. 500, I. P. C., for defamation was based on an averment made in the plaint filed by the accused against the complainant who is defendant 2 in the suit in the District Munsif's Court, Bellary, praying for partition on the strength of a sale deed executed in his (accused's) favour by one *D*. The averment complained of was that the complainant was incurring reckless debts on account of drinking and immoral habits which the complainant stated is false and was made maliciously and wantonly in bad faith and needlessly and with intent to harm his reputation among the public and also to prejudice the Court. After enquiry the Magistrate framed a charge. Against this order framing a charge the revision petition has been filed.

---

[6] Jawahar Singh v. Parduman Singh, (1933) 20 A I R Lah 116 = 141 I C 424=14 Lah 399= 34 P L R 291.

Order.—The complaint is founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of the accused in the family properties and if the allegation is false the offence would be one under S. 193, I. P. C. A complaint by the Court is necessary for a prosecution for an offence under S. 193, I. P. C.; and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. In this view it is unnecessary to consider whether a prosecution at this stage is not an abuse of the process of Court and the charge is quashed.

C.R.K./G.N. *Charge quashed.*

A. I. R. 1940 Madras 678

ABDUR RAHMAN J.

Puliyath Govinda Nair — Petitioner.

v.

Parekalathil Achutan Nair — Respondent.

Civil Revn. Petn. No. 269 of 1937, Decided on 2nd February 1940.

(a) Contract Act (1872), S. 25 — Plaintiff agreeing to release defendant's brother from liability on payment of certain sum by defendant—Agreement to release from liability if same was enforceable at time of agreement held was good consideration.

An agreement by the plaintiff to release the defendant's brother from liability—if it is legally enforceable at the time when the agreement is reached—is quite a good consideration for a new agreement between the parties whereby the defendant undertakes to pay a certain amount. [P 678 C 2]

(b) Contract Act (1872), S. 25 (3) — Words "person to be charged therewith" include person who agrees to become liable for payment of debt due by another.

The words "by the person to be charged therewith" in S. 25 (3) are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. [P 678 C 2 ; P 679 C 1]

(c) Contract Act (1872), S. 25 (3)—S. 25 (3) contemplates distinct promise to pay — Debtor in letter asking creditor to come and receive 50 paras of paddy "towards what was to be given to" him—Letter held did not disclose express promise to pay remaining paddy.

The promise referred to in S. 25 (3) must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. There must be a distinct promise to pay before the document can be said to fall within the provisions of the Section. [P 679 C 1]

The debtor asked his creditor in a letter to come and receive 50 paras of paddy "towards what was to be given to" him :

Held that although the letter contained a definite request to receive 50 paras of paddy, yet there was nothing in it which could be said to disclose an express promise to deliver the remaining paddy: *1910 M W N 547 ; 30 All 268 ; 33 Cal 1047 and A I R 1933 Lah 209, Rel. on ; 23 Mad 94 and A I R 1935 Lah 984, Expl.* [P 679 C 1]

(d) Contract Act (1872), S. 25 (3)—Promise to pay part of barred debt does not imply promise to pay whole.

A promise to pay a part of the barred debt cannot be taken to be a promise to pay the whole of the debt. If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt. [P 679 C 2]

P. Govinda Menon — *for Petitioner.*

N. R. Sesha Ayyar — *for Respondent.*

Order. — A suit was instituted by the petitioner for the recovery of Rs. 288 odd, being the price of paddy alleged to have been due by the respondent's brother and verbally agreed to be paid by the respondent. The lower Court found in favour of the agreement but refused to give effect to it as it was held to be without consideration. The plaintiff has consequently come up in revision. It may not be quite correct to say that the agreement between the parties to the suit was without any consideration. The agreement by the plaintiff to release the defendant's brother from liability—if it was legally enforceable at the time when the agreement was said to have been reached—was quite a good consideration for the new agreement between the parties to the suit. But if the plaintiff's claim against the defendant's brother was barred by limitation on the date on which this agreement was arrived at, and the contract was not reduced to writing as required by S. 25 (3), Contract Act, it would remain unenforceable. Mr. Govinda Menon contends, however, that this Section has no application to an agreement which was entered into between the parties to the present suit but must be confined in its operation to the agreement arrived at between the original parties thereto, if attempted to be enforced by the original creditor against the original debtor. S. 25, Contract Act, so far as it is relevant to the present case, reads as follows :

> An agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized on that behalf to pay, wholly or in part, a debt of which the creditor might have enforced payment, but for the law for the limitation of suits.

The words "by the person to be charged therewith" are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. This difficulty seems to have been recognized on behalf of the plaintiff and a letter Ex. (c) was produced by him at the trial. This was written by the defendant on 20th May 1933 to the plaintiff asking him to come and receive 50 paras of paddy "towards what was to be given to" him. A perusal of this letter shows that although it contained a definite request to receive 50 paras of paddy yet, there was nothing in it which could be said to disclose an express promise to deliver the remaining paddy; and in the absence of an express promise, this letter cannot be held to comply with the requirements of the Section. The promise referred to in S. 25 sub-cl. 3, Contract Act, must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words, there must be a distinct promise to pay before the document can be said to fall within the provisions of this Section: *see* (1910) M W N 547,[1] 30 All 268,[2] 33 Cal 1047[3] and A I R 1933 Lah 209.[4] Reliance was placed by the learned counsel for the petitioner on 23 Mad 94[5] and A I R 1935 Lah 984,[6] but they do not bear out his contention. It was held in the first case that a document sufficiently complies with S. 25, Contract Act, if an intention to pay a debt wholly or in part has been expressed therein in such a way as to constitute a promise and the debt is sufficiently identifiable although the amount promised to have been paid remained unstated. This is not the same thing as saying that the promise to pay the debt need not have been expressed or that an implied promise was enough for the purposes of this Section. The Lahore case lays down nothing more than that a letter containing a promise to pay a debt which was barred by the law of limitation is itself an agreement enforceable in law. This follows directly from the language of the Section but renders no assistance to the petitioner's case.

It was then urged by Mr. Govinda Menon that the express promise to pay a portion of the debt due was quite enough to bring the case within S. 25 (3) and that after such a promise not only could the portion of the debt so promised be sued for, but that it provided a good cause of action even in regard to the portion for which there was no express promise in the document. The contention that if a person promises to pay a part of the debt, he should be taken to have promised to pay the whole of the debt has in my opinion no substance. If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt. If, on the other hand, he promises to pay the whole of the barred debt in writing he could be sued for the whole of the debt. Illustration (e) given in the Section would show what the Legislature really meant by the use of the words "wholly or in part of the debt." If the contention raised by Mr. Govinda Menon were accepted, it would lead to startling results. If a person promises to pay only a portion of the debt which is barred by limitation, he would according to Mr. Govinda Menon's construction of the Section become liable to pay the balance of the debt as well which he had not promised to pay and which apparently he had no intention to pay. This could never have been intended by the Legislature and this would be the inevitable conclusion if this contention were accepted. It must therefore be held that inasmuch as the letter Ex. C contains no express promise to pay the portion of the debt now sued for, it is of no value to the plaintiff in this suit.

In the end it was contended that there was no proof on the record that the debt in regard to which the defendant had made a promise was barred by limitation. But the plaintiff's own statement, if read in extenso, leaves no room for doubt that it was. The result is that this revision fails and is dismissed. But having regard to the fact that the plea in regard to S. 25 (3) was not raised on behalf of the defendant specifically I will leave the parties to bear their own costs throughout.

C.R.K./G.N. *Revision dismissed.*

---

[1] Ramaswami Pillai v. Kuppuswami Pillai, (1910) M W N 547=7 I C 901.

[2] Govind Das v. Sarju Das, (1908) 30 All 268=5 A L J 274=1908 A W N 129.

[3] Maniram Seth v. Seth Rup Chand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130 (P C).

[4] Mukhi Lal v. Gul Muhammad, (1933) 20 A I R Lah 209=141 I C 617=34 P L R 430.

[5] Appa Rao v. Suryanarayana, (1900) 23 Mad 94.

[6] Maidens Hotel, Delhi v. Willnot, (1935) 22 AIR Lah 984=161 I C 293=38 P L R 329.

During the discussion between the bill-collector and the complainant the former shouted "Shameless fellow, I will shoe you" :

Held that no offence under S. 504 was committed. [P 682 C 1]

V. T. Rangaswami Ayyangar — *for Petitioner.*

Public Prosecutor—*for the Crown.*

Order.—The petitioner is a bill-collector and he went to the complainant to collect the amount due by him. The complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "Shameless fellow, I will shoe you." This does not amount to an offence under S. 504, I. P. C., and the conviction of the petitioner under that Section is unsustainable. It is therefore set aside and the fine if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

A. I. R. 1940 Madras 682

LAKSHMANA RAO J.

Public Prosecutor, Madras—Appellant.

v.

D. S. Raju Gupta and others — Respondents.

Criminal Appeal No. 240 of 1938, Decided on 14th March 1939, against acquittal by Sub-Divisional Magistrate, Vizagapatam, in C. C. No. 258 of 1936.

Provident Insurance Societies Act (1912), S. 22 — Bank preparing false revenue account and balance sheet to conceal deficit from shareholders—Managing director and auditor signing same with knowledge of real facts are guilty under S. 22 though actuated by best intention.

Where the bank prepares false revenue account and balance sheet in order to conceal deficit from the share holders and the managing director and the auditor sign the same with the knowledge of real facts, they are both guilty under S. 22 though they might have acted with the best of intentions. [P 683 C 1]

K. Venkataraghavachari—*for Appellant.*

Kasturi Seshagiri Rao, J. Krishnamurthi and S. Vepa — *for Accused (Respondents).*

Judgment. — This is an appeal by the Provincial Government against the acquittal of the respondents of an offence under S, 22, Provident Insurance Societies Act (5 of 1912). Respondent 1 was the managing director of the Bharathamatha Commonwealth Insurance Bank Ltd., Vizagapatam, and respondent 2 was the Secretary. Respondent 3 was the accountant and respondents 4 to 6 were directors. Respondent 7 was the auditor and Exs. C and B, the revenue account and balance sheet for the period from 1st November 1934 to 31st December 1935, were prepared by the Bank and audited by respondent 7. The revenue account was signed by respondents 1 to 5 and the balance sheet bears the signatures of respondents 1 and 4 to 6. Both were signed by respondent 7 in token of his audit, and they were filed with the Registrar of Provident Insurance Societies as required by S. 14 of the Act on 15th April 1936. They make it appear that the bank worked at a profit of Rs. 260-11-8 and were printed and circulated to the share-holders of the Bank. There was in fact a deficit and the prosecution case is that in order to conceal it from the share-holders the revenue account and balance sheet were manipulated. A sum of Rs. 15,000 was shown on the assets side of the balance sheet as "goodwill" and a like sum was included in Rupees 15,271-13-6 shown on the credit side of the revenue account under the head "revival, annual fees and other items." A sum of Rs. 13,986-4-9 was shown in the balance sheet as cash at branches though that amount had been spent by the branches before 31st December 1935 and a sum of Rs. 2350 payable to the managing agents towards remuneration was entered on both sides of the balance sheet. The statements were false to the knowledge of respondents 1 to 6 and they were certified to be correct by respondent 7.

The entry relating to the remuneration of the managing agent might have been made on both sides of the balance sheet under a mistaken notion as to the correct method of accounting, and it might be that the sum of Rs. 13,986-4-9 was shown as cash at branches since it so appeared in the books of the head office and the accounts submitted by the agents had not been passed. That such amounts have to be shown as branch or agents' balances was admitted by P. W. 3, the liquidator, and these statements cannot be said to be false to the knowledge of any of the respondents. But the inclusion of Rs. 15,000 in the revenue account under the head "revival, annual fees and other items" is patently false, and the explanation offered, viz. that by Ex. R-1, the resolution of 30th December 1935, a goodwill account was created by the directors for Rs. 15,000 out of the organization expenditure of Rs. 24,875-12-6 is neither acceptable nor helpful. The resolution does not advert to the organization expenditure, and even otherwise the goodwill account must have been created in order to conceal the actual organization expenditure from the share-holders. The entry of Rupees 9875-12-6 under the head organization expenditure on the assets side of the balance sheet is otherwise inexplicable and such of the respondents as were aware of the true facts would be guilty under S. 22, Provident Insurance Societies Act. Respondent 2 entered service on 3rd January 1936 and respondent 3 became the accountant about that time. Under the circumstances it was not seriously contended that they knew or must have known the real facts, and the evidence of P. W. 5 shows that respondents 4 and 5 had no personal knowledge of the affairs of the company. Respondent 6 signed the balance sheet on the assurance of respondents 1 and 7, and there is no ground for interference with the acquittal of respondents 2 to 6. But it is clear from the evidence that respondents 1 and 7 knew the real facts and they would be guilty under S. 22, Provident Insurance Societies Act, though they might have acted with the best of intentions. The acquittal of respondents 2 to 6 is therefore confirmed and the acquittal of respondents 1 and 7 is set aside. They are convicted under S. 22, Provindent Insurance Societies Act, and having regard to all the circumstances, sentenced to pay a fine of Rs. 100 each with rigorous imprisonment in default for one month.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 683

LEACH C. J. AND KUNHI RAMAN J.

Abubucker Ebrahim and another — Appellants.

v.

Maganlal K. Javeri — Respondent.

O. S. Appeal No. 72 of 1938, Decided on 16th August 1939, from judgment and decree of Gentle J. in C. S. No. 205 of 1935, D/- 5th October 1938.

Malicious Prosecution—Suit for damages for malicious prosecution — What plaintiff should prove stated.

In order to succeed in an action for malicious prosecution, the plaintiff has to prove : (1) absence of reasonable and probable cause for the prosecution, and (2) malice on the part of the person who launched the proceedings. In deciding whether there is absence of reasonable and probable cause for the prosecution, the Court can only have regard to the facts known at the time of the presentation of the complaint. Malice may be implied when there is absence of reasonable and probable cause, but it does not necessarily follow from the fact that proceedings have been launched without reasonable and probable cause that the person launching them did in fact act maliciously. Whether malice should be implied will be depending on the circumstances. It would be a proper inference if it is shown that the defendant acted recklessly : (Malice held not proved.) [P 684 C 1, 2]

S. Ramaswami Ayyar for I. Chakrapani — *for Appellants.*

T. V. Ramanatha Ayyar — *for Respondent.*

Leach C. J.—The appellants appeal from a decree passed by the original side of this Court awarding the respondent damages for malicious prosecution. Appellant 1 carries on business in edible oils in Bombay and has a branch office in Madras. The Madras branch was opened in the month of January 1933 and the respondent was placed in charge of it. At the end of August 1933, the respondent's services were dispensed with and on 22nd October 1933 appellant 2 became the manager of the Madras branch. On 31st October 1933, appellant 2 received a visit from one Subramaniam Chetty and a broker named Murthi. It is common ground that Murthi had acted as the broker in transactions with appellant 1's Madras branch during the period the respondent was in charge of it. Murthi represented to appellant 2 that Subramaniam Chetty was a big merchant carrying on business in Mambalam, Madras, and on the strength of his recommendation appellant 2 agreed to sell Subramaniam Chetty 75 cases of edible oils at the price, Rupees 14-8-0 per case, payment to be made in three days time.

The contract having been entered into the goods were delivered to Subramaniam Chetty. He did not pay for them on the day arranged and has never paid for them. On 5th November 1933 appellant 2 met Murthi and told him that Subramaniam Chetty had defaulted. Murthi then said that Subramaniam would be coming to pay the amount in the course of that day or the next. Subramaniam Chetty did not appear that day or the next day and appellant 2 was unable to trace his whereabouts, but as the result of inquiries he ascertained that the respondent was doing business in vegetable oils and that the cases which had been sold to Subramaniam Chetty had been removed to a small godown in Thathamuthiappan Street, Madras, which had been rented by the respondent and Murthi. As default had been made in payment, appellant 2 grew anxious and it is his case that he asked Murthi to accompany him to Mambalam to show him where Subramaniam Chetty lived. Murthi put him off by various pretexts and he never found Subramaniam Chetty. On 10th November 1933 appellant 2 in the name of appellant 1 wrote a letter to the officer in charge of the Law College Police Station, Madras, setting out substantially these facts. The letter concluded with the following paragraph:

> Under these circumstances, we are obliged to infer and believe that all these three persons have colluded together with the sole object of defrauding us of the cost of the goods and thus cheat us from the very beginning. Now we find on further inquiry that the said godown is empty the said 75 cases having been despatched to some destination. As the parties have done a criminal act we request you to apprehend and book them for the offence committed and also make enquiries both at Salt Cottaurs, Madras Beach, and Egmore Stations, to the stations to which the cases have been despatched and stop delivery of the same.

On receipt of this letter, the police searched for Subramaniam Chetty, Murthi and the respondent, and on 11th November arrested them, charging them with cheating under Ss. 415 and 420, I. P. C. The magisterial proceedings continued until 10th July 1934 when the three accused were discharged. On 9th May 1935, ten months later, the respondent filed the suit out of which this appeal arises. The case was tried by Gentle J. who held that the respondent had proved his case and was entitled to the sum of Rs. 1500 as damages. In the course of his evidence the respondent stated that he had bought the 75 cases from Subramaniam Chetty at the price of Rs. 14-10-0 per case, two annas more than Subramaniam had paid. He also stated that he had re-sold 50 of the cases at Rs. 13-8-0 per case on 4th November 1933 and the balance, except two cases, at the price of Rs. 14-6-0. He alleged that the goods were sold minus their cases and that he was able to dispose of the cases at twelve annas each. This statement rests entirely on his own evidence which is not of a convincing nature. The transactions which the respondent had entered into in respect of these goods were not known to the appellants when the letter of complaint was written to the police. All that was known was that the goods had been removed immediately to the godown which the respondent and Murthi had rented and that the goods had disappeared. It also transpired during the course of the suit that this godown had only been rented by the respondent and Murthi on 1st November 1933, the day after the sale to Subramaniam Chetty.

In order to succeed in an action for malicious prosecution the plaintiff has to prove: (1) Absence of reasonable and probable cause for the prosecution, and (2) malice on the part of the person who launched the proceedings. In deciding whether there is absence of reasonable and probable cause for the prosecution the Court can only have regard to the facts known at the time of the presentation of the complaint. The learned Judge held that the fact that the goods had been removed to the godown rented by the respondent and Murthi and had been disposed of from there did not constitute sufficient reason for proceeding against the respondent. Consequently he found that the respondent had proved that there was absence of reasonable and probable cause for the prosecution. Dealing with the question of malice the learned Judge said :

> The plaintiff in addition must, as I have pointed out earlier, also show there was malice. This does not mean ill-will, spite or hatred, but a wrong motive. Defendant 2 having failed to receive payment and being unable to find the purchaser of his master's goods, was disturbed. He obviously thought his conduct would incur his employer's displeasure and when it was ascertained that the goods which had been sold were delivered at the plaintiff's godown, his only thought was to be able to have the plaintiff together with others in the custody of the police in the hope perhaps that this would appease his employer. Not having made any enquiry at all and recklessly making the charge he did he could not have bona fide come to the conclusion that there was reasonable and probable cause for the prosecution. If he had not the information bona fide to come to that conclusion, in my view, it shows that he was guilty of malice.

I concur in the finding of the learned Judge that the respondent did prove want of reasonable and probable causes for the prosecution. Knowledge that the goods had been removed to a godown rented by the respondent and Murthi and had disappeared was not sufficient to justify the complaint against the respondent. But I am unable to concur in the finding of the learned Judge that the respondent has established malice and I do not accept the conclusion that appellant 2 was actuated in his complaint against the respondent by the thought that if he preferred the complaint and got him arrested it would appease his employer. Malice may be implied when there is absence of reasonable and probable cause, but it does not necessarily follow from the fact that proceedings have been launched without reasonable and probable cause that the person launching them did in fact act maliciously. Whether malice should be implied will be depending on the circumstances. It would be a proper inference if it is shown that the defendant acted recklessly. The position is stated in the well known judgment of Hawkins J. in (1882) 8 Q B D 167[1] in which Huddleston B. concurred. Hawkins J. said :

> The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act (*see* (1825) 4 B & C 247[2] at p. 255 per Bayley J.) but malice in fact—malus animus—indicating that the party was actuated either by spite or ill will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question, the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them uninfluenced by any opinion of the Judge unless that opinion accords with their own view. If among the circumstances it appears to the jury that there was no reasonable ground for the prosecution, they may—though by no means bound to do so—well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the Judge upon that point if it differed from their own — as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the Judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the Judge alone to determine, upon the facts found, for the jury; as evidence of malice it is a question wholly for the jury, who even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interests of justice in which case they ought not in my opinion to find the existence of malice ; (1833) 5 B and Ad 588,[3] (1847) 10 Q B 252[4] at page 254, (1870) 4 H L (Eng & Ir) 521[5] at p. 538 per Lord Westbury.

What the Court has to decide is whether the facts here justify the inference that the respondent was actuated by malice in the sense here indicated. It is not disputed that if appellant 2 were actuated by malice, his employer, appellant 1, would also be liable. I am of opinion that the evidence on the record does not justify the Court holding that malice on the part of appellant 2 has been proved. I go further. In my opinion the evidence points to the conclusion that appellant 2 honestly thought that his employer had been defrauded. The goods were sold on 31st October 1933 on the condition that the money would be paid within three days. It was not then paid and in spite of what Murthi had said in the interval it had not been paid by 10th November when the letter of complaint was written. Appellant 2 had traced the goods to a godown which the broker and the respondent had rented and from there they had disappeared. Appellant 2 is not a lawyer but a layman and I can understand that in the circumstances mentioned he formed the honest conclusion that the respondent was implicated in a fraud. The question is not whether a fraud had been committed but whether appellant 2 believed that it had. I consider that there is indication that he honestly held that opinion. The respondent not having proved malice the fact that he has shown the absence of reasonable and probable cause does not help him. He must succeed on both points and having failed on one his suit must be dismissed. The appeal will be allowed and the suit dismissed with costs in favour of the appellants both here and below.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 685

LAKSHMANA RAO J.

S. Ramaswami Ayyar — Petitioner.

v.

Commissioner, Chittoor Municipality — Respondent.

Criminal Revn. Case No. 1100 and Petn. No. 1035 of 1939, Decided on 15th February 1940, to revise order of Sub-Divisional Magistrate, First Class Chittoor, D/- 25th October 1939.

Criminal Trial — Evidence — Marking of irrelevant documents is no ground for ordering retrial.

The marking of an irrelevant document in evidence in a criminal trial is not a ground for ordering retrial. [P 686 C 1]

V. T. Rangaswami Iyengar and K. Kalyanasundaram Iyer — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts. — The accused was convicted and sentenced to pay a fine of Rs. 50 for an offence under S. 5 (1) (b), Prevention of Adulteration Act, 1918, by the Stationery Sub-Magistrate of Chittoor for having stored ghee in his coffee hotel for sale which was found to contain 90 per cent. of fat not derived from milk or cream. In appeal to the Divisional Magistrate the conviction and sentence were set aside and retrial ordered on the ground that the Stationery Sub-Magistrate had referred to an irrelevant document and had been prejudiced in the case from the beginning. Against the appellate order of the Divisional Magistrate this revision petition has been preferred.

---

[1] Hicks v. Faulkner, (1882) 8 Q B D 167 = 30 W R 545=51 L J Q B 268.

[2] Bromage v. Prosser, (1825) 4 B & C 247=6 D & R 296=1 Car & P 475=3 L J (O S) K B 203 =28 R R 241.

[3] Mitchell v. Jenkins, (1833) 5 B & Ad 588=2 N & M 301=3 L J K B 35.

[4] Turner v. Ambler, (1847) 10 Q B 252=16 L J Q B 158=6 Jur 346.

[5] Lister v. Perryman, (1870) 4 H L (Eng & Ir) 521=39 L J Ex 177=23 L T 269=19 W R 9.

Order.— The marking of an irrelevant document in evidence is not a ground for ordering retrial and the order of the Sub-Divisional Magistrate cannot be sustained. It is therefore set aside and the Sub-Divisional Magistrate will dispose of the appeal in accordance with law.

C.R.K./G.N. *Order set aside.*

A. I. R. 1940 Madras 686

PATANJALI SASTRI J.

Kannomkot Kelu Kurup — Appellant.

v.

Cheriyath Manayil Paru Amma — Respondent.

Second Appeal No. 550 of 1936, Decided on 17th October 1939, against decree of Dist. Court, North Malabar, in A. S. No. 119 of 1935.

Transfer of Property Act (1882), Ss. 76 and 77 — Usufructuary mortgage providing that rents payable by mortgagor to jenmi should be paid by mortgagee out of receipts from mortgaged property and balance should be taken in lieu of interest on principal money—Rents not paid by mortgagee to jenmi—Mortgagor in redemption suit can claim adjustment of unpaid rents against mortgage amount—Claim of mortgagor for back rents cannot be treated as claim to set off.

The principle underlying Ss. 76 and 77 is of course that the usufruct of the mortgaged property represents mortgagor's money in the hands of the mortgagee for which he is bound to account at the time of redemption, except to the extent to which he is expressly authorized to appropriate such usufruct towards interest due to him or towards interest and principal, if any surplus is left after meeting the interest. [P 687 C 1]

A usufructuary mortgage provided that out of the rents and profits of the mortgaged property rent payable to the jenmi by the mortgagor should be paid every year by the mortgagee and the balance should be appropriated in lieu of interest on the principal money. The mortgagee did not pay the rents due to the jenmi according to the stipulation in the deed:

Held that in the suit for redemption the mortgagor was entitled to claim an adjustment of these unpaid rents due to the jenmi against the mortgage amount as a condition of redemption: *A I R 1930 Mad 160, Rel. on; 31 All 583 (P C); A I R 1929 Pat 37 and AIR 1933 P C 136, Expl.; 10 I C 113, Doubted and not foll.* [P 686 C 2, P 688 C 2]

Held further that the claim of the mortgagor for the back rents payable to the jenmi should not be treated as a claim to set off and interest should be allowed on these arrears: *8 Mad 381, Rel. on.* [P 688 C 2]

C. S. Krishnamurthi Iyer — *for Appellant.*

K. P. Ramakrishna Iyer — *for Respondent.*

Judgment.—The main question for decision in this appeal is a short one and it arises on a few undisputed facts. The appellant as the successor-in-interest of the mortgagor sued the respondent in whom the mortgage right has become vested for redemption of a usufructuary mortgage of kuzikhanam rights in the suit paramba. The mortgage, marked Ex. A in the case, was executed on 25th January 1894 and it provided that out of the rents and profits of the paramba, the purapad (rent) payable to the jenmi should be paid every year and the balance should be appropriated in lieu of interest on the principal money. The mortgagee not having paid the rents due to the jenmi according to the stipulation in the deed, the latter brought a suit in 1909 against the predecessors-in-interest both of the appellant and of the respondent herein and obtained a decree for possession of the property with the rents due. This decree however was not duly executed and has now become unenforceable owing to lapse of time.

The contention of the respondent is that the appellant is not entitled to claim an adjustment of these unpaid rents due to the jenmi against the mortgage amount and compensation for improvements payable by the appellant as a condition of redemption, as the benefit of the non-payment of these rents, which have now become irrecoverable should go to him, the appellant being only entitled to be kept indemnified against the claims of the jenmi. This contention was rejected by the trial Court, but was upheld by the learned District Judge on appeal and is urged again before me on behalf of the respondent. It is not disputed that the question has to be decided with reference to the provisions of Ss. 76 and 77, T. P. Act. S. 76, so far as it is material here, provides:

> When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property . . . . (h) his receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in cls. (c) and (d) and interest thereon be debited against him in reduction of the amount, if any, from time to time, due to him on account of interest and, so far as such receipts

exceed any interest due, in reduction or discharge of the mortgage money, the surplus if any, shall be paid to the mortgagor.

Section 77 says :

> Nothing in S. 76, cls. (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal.

It is perfectly clear that, by virtue of these provisions, the mortgagee is under a statutory obligation to apply the net receipts from the mortgaged property in reduction of the interest due to him and the surplus, if any, in reduction of the principal money and this obligation is excluded only if and in so far as there is a contract between the parties that such receipts shall be taken in lieu of interest on the principal money or in lieu of interest and portions of the principal as the case may be. The principle underlying these provisions is, of course, that the usufruct of the mortgaged property represents mortgagor's money in the hands of the mortgagee for which he is bound to account at the time of redemption, except to the extent to which he is expressly authorized to appropriate such usufruct towards interest due to him or towards interest and principal, if any surplus is left after meeting the interest. In the present case, the contract between the mortgagee and the mortgagor provides that rent payable by the mortgagor to the jenmi should be paid by the mortgagee out of the receipts from the mortgaged property and the balance should be taken in lieu of interest on the principal money. To the extent therefore of the receipts not paid to the jenmi as rent according to the stipulation in the deed, S. 77 cannot operate to exclude the statutory liability to account which S. 76 (h) casts on the respondent as the mortgagee in possession.

This principle was recognized in 57 M L J 800.[1] In that case the annual profits from the mortgaged property were estimated to be Rs. 240 out of which the mortgagee was required annually to pay Rs. 100 for revenue and village expenses, Rs. 60 to the mortgagor and appropriate the balance Rs. 80 towards the mortgage debt. The deed also provided that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower. After a certain period, the annual payment of Rs. 60 was never made to the representative-in-interest of the mortgagor. In a suit for redemption before the expiry of 55 years, the question arose whether the unpaid sums of Rs. 60 should have been adjusted as they fell due against the mortgage debt in which case, the mortgage debt would have been completely discharged by the time the suit was brought, or whether the mortgagor's only remedy was to recover such unpaid amounts separately, i. e. otherwise than in connexion with the mortgage transaction, in which case the mortgage would still remain outstanding. The learned Judges held that the unpaid sums of Rs. 60 as they fell due every year should be taken as adjusted against the mortgage debt, and observed :

> A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be liable to apply it in reduction of the debt. S. 76 (h) enacts that the mortgagee should apply the usufruct, first in reduction of the interest, then of the principal. This, he is bound to do under the law; so that, if a part of the profits initially excluded was not applied as directed, it became usufruct as a matter of course and without a special contract to that effect. The proper way then of viewing the question, is: has the part excluded, in the events that have happened, regained its character of rents and profits? If so, the mortgagee has no option but to appropriate it to the mortgage debt.

They reinforced their conclusion by putting an illustration which, in substance, is the present case :

> Let us suppose that the revenue on this land had been remitted by the zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust, against the mortgage debt? Clearly not. The same principle applies to the facts of the case.

The respondent's learned counsel attempted to distinguish the decision on the ground that the mortgagee had agreed to pay the mortgagor Rs. 60, whereas all that the mortgagee in the present case undertook to do was to pay rent due to the jenmi out of the usufruct. I am unable to see how this difference affects the principle on which that decision was clearly based. In fact, the illustration which the learned Judges used in support of their conclusion clearly shows that the principle should apply *a fortiori* to a case like the present. The learned counsel for the respondent placed reliance in support of his contention on certain decisions, namely 31 All 583,[2] 10 I C 113,[3] 7 Pat 44[4] and 37 C W N 457.[5] The facts of the first of these cases were entirely different and no question arose with reference to Ss. 76 (h) and 77. A mortgagee decree-holder purchased the mortgaged property subject to earlier encumbrances thereon and it turned out subsequently that these encumbrances were unenforceable. The mortgagor thereupon sued to recover from the purchaser the amount of those encumbrances as unpaid purchase money and it was held by their Lordships of the Privy Council that he had no right to recover those amounts as all that he was entitled to was an indemnity against the incumbrances affecting the land.

---

[1] 1. Seshayya v. D. Lakshminarasimha Rao, (1930) 17 AIR Mad 160=124 I C 282=57 M L J 800.

I am clearly of opinion that this principle cannot apply to the facts of the present case which has to be decided with reference to the statutory provisions referred to above. Indeed, even in the case of vendor and vendee, it has been held by this Court in 36 Mad 348[6] that the principle of the above decision will not apply if the vendee agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to the encumbrancers on behalf of the vendor. In such a case, the purchaser is regarded as agreeing to pay to the encumbrancers moneys belonging to the vendor but left with him (the vendee) to make the payment as agent of the vendor: *see also* (1937) 2 M L J 307.[7] 10 I C 113[3] is the decision of a single Judge, Griffin J. of the Allahabad High Court. The case, no doubt, resembles the present one on the facts and does support the contention of the respondent, but no reference is made to Ss. 76 and 77, T. P. Act, and all that is referred to by way of authority for the view taken was a previous unreported decision of that Court. With all respect to the learned Judge, I think the decision is open to question and I am unable to follow it. In 7 Pat 44,[4] there was a term in the usufructuary mortgage deed that all profits from increased income should go to the mortgagee and this was particularly stressed by James J. who observed:

> The mortgage bond specifies a sum of Rupees 91-15-0, as the annual income which the mortgagees may expect to derive from the property; but it is expressly provided that any income in excess of this shall go to the mortgagees in possession and that the mortgagors will have no concern with it. Mr. Pugh contends on behalf of the appellants that the assignee of the equity of redemption is not concerned to know how the mortgagees applied their annual profits, provided that no additional liability was thereby cast upon the mortgagors.

The decision therefore appears to proceed on an express term in the mortgage bond there in question. Though S. 77, T. P. Act, was referred to in the opening sentence of the judgment as reported, there is no discussion either of that Section or of S. 76 (h) to show how the conclusion arrived at is in accord with those provisions, and the decision in 10 I C 113[3] was merely followed. In 37 C W N 457[5] there was a provision in the mortgage deed that the mortgagee shall appropriate the surplus profits towards interest, "the mortgagors having no claim for profits and the mortgagee having no claim for interest" and it was held that the case fell within S. 77 and the mortgagee was not liable to account for the rents and profits. This decision has clearly no application to the present case. Two subsidiary questions were also raised by the respondent's counsel; first, that the claim of the appellant for the back rents payable to the jenmi should be treated as a claim to set off and that only so much of it as is not barred by limitation should be allowed; secondly, in any case, no interest should be allowed on these arrears. Both these contentions are however answered by the decision in 8 Mad 381[8] where it is pointed out that a claim of the kind put forward by the appellant cannot properly be described as a set-off and that in taking accounts in such cases, interest on both sides should be allowed. It is a matter of adjustment in the taking of accounts in the redemption action: *vide* the last paragraph of S. 76, T. P. Act. For the reasons indicated, the decree of the lower Appellate Court is set aside and that of the Court of the District Munsif restored. Interest at 6 per cent. per annum on future unpaid rent will be allowed till delivery of possession. The appellant will have his costs here and in the lower Appellate Court. This will be subject to such orders as may be passed in C. M. P. No. 3694 of 1939 which will be sent to the trial Court for disposal.

---

[2] Izzat-un-nisa Begum v. Partab Singh, (1909) 31 All 583=3 I C 793=36 I A 203 = 6 A L J 817 (P C).

[3] Fakir Mohammad Khan v. Ali Sher Khan, (1911) 10 I C 113.

[4] Raghubar Narayan v. Mohit Narayan, (1929) 16 A I R Pat 37=114 I C 473=7 Pat 44=11 P L T 83.

[5] Bachchu Lal v. Syed Mohammad, (1933) 20 A I R P C 136=144 I C 1025=37 C W N 457 (P C).

[6] Raghunatha v. Sadagopa, (1911) 36 Mad 348= 12 I C 353=21 M L J 983.

[7] Venkatarayadu v. Ramakrishnayya, (1937) 24 A I R Mad 810=173 I C 515=(1937) 2 M L J 307.

[8] Kanna Pishorodi v. Kombi Achen, (1885) 8 Mad 381.

C.R.K./D.S. *Decree set aside.*

A. I. R. 1940 Madras 689

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Thadi Chandrayya and others — Appellants.

v.

Vaitla Seethanna and another — Respondents.

Letters Patent Appeal No. 99 of 1938, Decided on 8th December 1939, against judgment and decree of Wadsworth J., D/- 14th November 1938, *Reported in A I R 1939 Mad 397.*

Limitation Act (1908), S. 14 — For want of pecuniary jurisdiction Court returning plaint filed within time for presentation to proper Court—Plaintiff re-presenting it to same Court after amendment by striking out part of claim — Plaint becoming time-barred on date of re-presentation — Suit held must be deemed to have been instituted on date of re-presentation when Court had jurisdiction to entertain it and was therefore barred : *49 M L W 25=A I R 1939 Mad 397*, ***Reversed.***

The original plaint was filed within time but for want of pecuniary jurisdiction was returned by the Court for presentation to proper Court. The plaintiff with a view to bringing the claim within jurisdiction amended the plaint by striking out part of his claim and re-presented it to the same Court. The claim however on the date of re-presentation had become time-barred. The Court allowed the amendment and approved the plaint treating it as a continuation of the original plaint :

Held that a Court which had no jurisdiction could not pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred upto the time of the return of the plaint, and that the suit must be deemed to have been instituted on the date of re-presentation of the amended plaint which the Court had jurisdiction to accept and was therefore barred. Having deliberately under-valued his relief in the first instance the plaintiff could not claim the benefit of S. 14 : *49 M L W 25=AIR 1939 Mad 397*, **Reversed** *; AIR 1919 Mad 1071 and AIR 1928 Mad 384, Rel. on ; 5 M L J 58, Foll.; 33 Mad 262; A I R 1926 Mad 133; A I R 1931 Mad 8 and A I R 1931 Mad 716, Disting.* [P 690 C 1; P 691 C 1]

G. Lakshmanna and G. Chandrasekhara Sastri — *for Appellants.*

V. Viyanna and Ch. Raghava Rao — *for Respondents.*

Leach C. J.—The question which arises in this appeal is one of limitation. The suit was filed by respondent 1 in the Court of the District Munsif of Ramchandrapur. He was the reversioner to the estate of one Ramanna, which after Ramanna's death devolved upon his daughter Pullamma. The reversion opened on 3rd July 1916, when Pullamma died. Respondent 1 was born on 1st November 1908 and therefore attained his majority on 1st November 1926, which gave him until 1st November 1929 in which to file the suit. On 30th October 1929 he filed a plaint in the Court of the District Munsif and asked for possession of the suit properties from the appellants who were in possession under the alienations created by Pullamma. In the plaint the properties were described in two Schs. A and B. The properties in Sch. A were valued at Rupees 693 and the mesne profits thereof at Rupees 2040. The properties in Sch. B were valued at Rs. 250. In their written statement the appellants challenged the correctness of the valuation of the properties in Sch. B. They contended that there had been gross under-valuation. The consequence was that the District Munsif directed the appointment of a Commissioner to estimate the value of the properties. But the plaintiff deliberately abstained from taking out the commission and from this conduct the District Munsif drew the legitimate inference that the aggregate value of the properties mentioned in the plaint was over Rs. 3000 and he therefore held that he had no jurisdiction to entertain the suit.

On 6th August 1930 the District Munsif accordingly returned the plaint to respondent 1 for presentation to the Court of the Subordinate Judge. Respondent 1 took the plaint away, amended it by striking out his claim for possession of the properties mentioned in Sch. B, and later in the day re-presented it to the District Munsif. On 11th August 1930 the District Munsif again returned the plaint to respondent 1 as he considered that it was a new suit and which necessitated the filing of a new vakalat. On 14th August 1930 respondent 1's pleader re-presented the plaint without filing a fresh vakalat. He contended that the plaint was a continuation of the plaint which was presented on 30th October 1929. On 15th August 1930 the Court once more returned the plaint to respondent 1, intimating that it must be treated as a fresh suit. On that date respondent 1's pleader re-presented it with an application that the amendment which he had made might be allowed and the plaint approved. He also asked that the plaint should retain its old number. The

District Munsif agreed to this course and passed a formal order of the nature indicated.

The only question which arises now is whether the suit must be deemed to have been instituted on 30th October 1929, when the original plaint was presented, or on 6th August 1930, when the plaint was re-presented after it had been returned by the District Munsif for filing in the proper Court and had been amended by the elimination of Sch. B and the relief claimed in respect of the properties therein mentioned. The District Munsif held that the suit must be deemed to have been filed on 6th August 1930 and therefore was barred by the law of limitation. On appeal the Subordinate Judge of Rajahmundry held that the suit was in time, as in his opinion the correct date was 30th October 1929. On second appeal,* Wadsworth J. agreed with the Subordinate Judge, but gave a certificate for a further appeal under Cl. 15, Letters Patent. The learned Judge considered that the filing of the amended plaint on 6th August 1930 must be deemed to be a continuation of the suit which was filed on 30th October 1929 and therefore was in time. We are of the opinion that the District Munsif was right and that the date of the institution of the suit must be taken to be 6th August 1930. In 41 Mad 701,[1] Sadasiva Ayyar J. held that when a Court of first instance has decided that a suit is beyond its jurisdiction it has no power to pass any other judicial order, except those which statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under O. 7, R. 10, Civil P. C., or an order awarding costs under S. 35 of the Code. We agree with this statement. A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred upto the time of the return of the plaint. The opinion of Sadasiva Ayyar J. was shared by Venkatasubba Rao J. in 54 M L J 409.[2]

In 5 M L J 58,[3] a Bench of this Court, consisting of Collins C. J. and Parker J. had to deal with a case on all fours with the present one. The Court there held that the date of the suit was the date when the plaintiff presented to the Court a plaint which accorded with its jurisdiction. In that case the plaintiffs filed their suit in the Court of the District Munsif for certain offices in a temple and their emoluments. The case was carried to this Court which ordered the plaint to be returned for presentation to the proper Court, namely the Court of the Subordinate Judge. Instead of presenting the plaint to the Subordinate Judge, the plaintiffs abandoned part of their claim so as to bring it within the jurisdiction of the Munsif's Court and re-presented the plaint to the District Munsif's Court. The Bench agreed with the Subordinate Judge that the plaintiffs were not entitled to the benefit of S. 14, Limitation Act, in the circumstances of the case. The first plaint was returned as the suit as framed was beyond the jurisdiction of the District Munsif's Court. The plaintiffs had then abandoned part of their claim and had sued again in the same Court which they might have done at first. In the circumstances it was held that the suit was barred.

In the course of his judgment, Wadsworth J. referred to 33 Mad 262,[4] 22 M L W 582[5] and 59 M L J 953.[6] The judgments in these cases are not really in point. In 33 Mad 262,[4] the plaintiff filed a plaint in the District Munsif's Court and it was returned to him as he had undervalued the properties claimed. If they had been properly valued the value would have exceeded the pecuniary jurisdiction of the Court. After the plaintiff had obtained possession of the plaint he struck out part of the relief claimed, and in this way brought the value of the suit within the pecuniary jurisdiction of the District Munsif's Court. He then presented it to the District Munsif who accepted it. On an application for revision, Abdur Rahim J. held that there was nothing illegal in the amendment and that it was competent to the Court to accept the amended plaint. But in this case there was no question of limitation. The Court was not called upon to decide whether the date of the presentation was the date when the plaint was originally filed or when the plaint was represented after amendment.

Reported in A I R 1939 Mad 397.

[1] Kannuswami Pillai v. Jagathambal, (1919) 6 A I R Mad 1071=46 I C 265=41 Mad 701=35 M L J 27.

[2] Govindaraja Naicker v. Kasim Sahib, (1928) 15 A I R Mad 384=108 I C 542 = 54 M L J 409.

[3] Nayinakamen Bhattar v. Madureswara Bhattar, (1895) 5 M L J 58.

[4] Karumbar Pandrapandaram v. Audimula Ponnapandaram, (1910) 33 Mad 262=3 I C 725.

[5] Ramachandrayya v. Venkataratnam, (1926) 13 A I R Mad 133=92 I C 800=22 M L W 582.

[6] Varada Pillai v. Govindaraja Pillai, (1931) 18 A I R Mad 8=129 I C 254=59 M L J 953.

Therefore we cannot regard this decision as conflicting with the opinion which I have just expressed. In 22 M L W 582,[5] the plaintiff was allowed to amend his plaint to bring it within the jurisdiction of the District Munsif's Court where he had filed it, instead of having the plaint returned to him for presentation to the Court of the Subordinate Judge. The District Munsif allowed the plaint to be amended, and the question was whether his order was passed without jurisdiction. Odgers J. held that the District Munsif had jurisdiction. It is unnecessary to consider whether this decision is right. Here again there was no question of limitation. 59 M L J 953[6] calls for no comment.

On behalf of the respondent a further case has been quoted to us, namely the decision of Jackson J. in 34 M L W 252.[7] There the plaintiff had not paid the proper court-fee and he was ordered to provide the additional stamp required. Instead of doing so he reduced the amount of his claim. By doing this the relief claimed was covered by the stamp. The question was whether the date of the suit should be taken to be the date of the filing of the plaint in the first instance or the date when it was amended and re-presented by the plaintiff. Here the Court had jurisdiction throughout and the only question was whether the plaintiff should pay the additional court-fee or whether he should reduce his claim and thus avoid the necessity of paying additional court-fee. We do not regard this case as having any bearing, but even if it has, it is not binding on us. We hold that the suit was instituted on 6th August 1930 when the Court was presented with the plaint which it had jurisdiction to accept. The hardship which respondent 1 is now experiencing is of his own making. He cannot claim the benefit of S. 14, Limitation Act, because he deliberately undervalued his relief in the first instance. If he had not done this we should have had no hesitation in granting relief under that Section. He has however put himself out of Court. We have to decide the case on the technical objection which the appellants have raised. The objection is sound in law and therefore must be accepted. The appeal will be allowed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

---

[7] Neelachalam v. Narasinga Dass, (1931) 18 A I R Mad 716=134 I C 816=34 M L W 252.

* A. I. R. 1940 Madras 691

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Sree Rajah Vasireddi Balachandrasekhara Varaprasad Bahadur — Appellant.

v.

Mallela Lakshminarasimham and others — Respondents.

Appeal No. 8 of 1937 and Civil Misc. Petns. Nos. 484 and 500 of 1940, Decided on 28th February 1940, against decree of Dist. Court, Kistna, D/- 31st October 1936.

*** (a) Limitation Act (1908), S. 20 — Debtor sending money to his friend for payment to creditor — Friend sending same to creditor through messenger with letter to the effect that amount was sent by debtor for payment to him — Payment amounts to acknowledgment within meaning of S. 20.**

The debtor sent money to his friend for payment to his creditor as part of the principal. The money however was sent to the creditor by the friend through a messenger with a letter that the amount had been sent to him by the debtor for payment and the same may be credited in the debtor's account :

Held that the friend was debtor's agent within the meaning of S. 20 and that the payment operated as an acknowledgment of debt under S. 20 : *A I R 1926 Cal 510, Expl. and Approved.* [P 693 C 1, 2]

*** (b) Hindu Law—Alienation—Coparceners — Coparceners alive at date of alienation of family property alone can challenge it—After-born coparcener cannot challenge it *(Obiter)*.**

The right to challenge alienations of family property is confined to the coparceners alive at the date of the alienation. A coparcener who though born subsequent to the alienation acquires an interest in the coparcenary property before the death of the objecting or non-alienating coparceners cannot challenge it : *A I R 1925 P C 264, Rel. on ; 40 Cal 966 (P C) and A I R 1925 P C 264, Expl.; A I R 1936 Mad 440, Approved; A I R 1931 Mad 550, Not approved.* [P 693 C 2; P 694 C 1]

*** (c) Hindu Law—Alienation — Coparcener —Father entitled to half share on date of mortgage — Mortgagee can execute decree against father's half share—After-born son acquires no right in property alienated by father.**

In a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. [P 696 C 1]

Where at the date of the mortgage executed by him the father is entitled to a half share in the joint family property and that interest which was vested in him would pass to the mortgagee. The property which is effectively carried away from the family is only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half the after-born son would be entitled to participate with the other son : *35 Mad 47; 25 Mad 690 (F B); 5 Cal 148 (P C) and A I R 1937*

Mad 631, Rel. on; A I R 1928 Mad 986, Approved; 14 Mad 408 (F B) and A I R 1933 Mad 158, Not foll.; A I R 1931 Mad 550, Expl. [P 695 C 2; P 696 C 1]

V. Govindarajachari — *for Appellant.*

P. Somasundaram and P. Suryanarayana — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment and decree of the learned District Judge of Kistna in a suit upon a mortgage dated 19th September 1929 executed by defendant 1 for himself and as guardian of his son, defendant 2, in favour of the plaintiff. Defendant 3 is another son of defendant 1 born subsequent to the date of the mortgage. The mortgage was for a sum of Rs. 2500 payable with compound interest at Re. 0-14-6 per cent. per month. The plaint alleged that there was a payment of Rs. 600 on 9th November 1930 and that the said payment was made by one Kasibotla Suryanarayanamurti on behalf of the defendants. The defendants denied that the said sum of Rs. 600 was paid as alleged in the plaint and defendant 1 pleaded that he was not personally liable on the ground that the personal remedy was barred by limitation, the suit having been instituted on 16th March 1936 more than six years from the date of the mortgage. Defendants 2 and 3 denied the truth and validity of the mortgage. Their case was that the amount was not borrowed for any family necessity or for payment of any antecedent debt but for conducting a business newly started by defendant 1 himself. Another point taken was that even assuming the mortgage to be true, it was binding only on the mortgagor's share which must be deemed to be one-third, and defendant 3 though born subsequent to the date of the mortgage would be entitled also to a third share in the property mortgaged.

The learned District Judge found the mortgage to be true but held that it was not binding on defendants 2 and 3 on the ground that the amount borrowed was for the purpose of a business started by the father and not for any antecedent debt or family necessity. He also found that Rs. 600 was paid by the said Suryanarayanamurti but he was not an agent duly authorized within the meaning of S. 20, Limitation Act, and therefore the said payment would not save the bar of limitation in respect of the personal liability of defendant 1. He therefore held that defendant 1 was not personally liable for the debt. In regard to the interest of defendant 1 in the property he held that he was entitled to half a share in the suit property and that defendant 3 cannot repudiate the alienation made before his birth. The plaintiff has preferred this appeal in so far as the decree is against him, that is, in so far as it negatived the personal liability of defendant 1. Defendants 2 and 3 have preferred a memorandum of objections raising the contention that the lower Court should have passed a decree only for a third share of the property and not for a half share.

Two questions therefore fall to be decided, namely (1) whether defendant 1 is personally liable for the debt and (2) what is the share of defendant 1 in the property mortgaged which the plaintiff is entitled to sell in execution of the decree in his favour. The first question turns on the determination of the issue whether the payment of Rs. 600 operates as an acknowledgment of debt within the meaning of S. 20, Limitation Act. The payment of Rs. 600 was apparently made towards the principal and was so treated by the plaintiff. In order that a part-payment of a principal can be relied on for saving the bar of limitation within the meaning of S. 20, Limitation Act, it must fulfil three requisites: (1) the payment must be made by the debtor or his agent; (2) the agent must have been empowered specifically to make the said payment; and (3) there must be an acknowledgment of the said payment in the handwriting of or in a writing signed by the debtor or his agent, that is if the payment was made by the debtor, in the handwriting of or in a writing signed by the debtor or if the payment was made by the agent, in the handwriting of or in a writing signed by the agent. The question is whether the view of the learned District Judge that K. Suryanarayanamurti (P. W. 4) in making the payment was not the duly authorized agent of the defendants within the meaning of S. 20 is correct. P. W. 4 admits that he paid Rs. 600 in part-payment of the debt. He acknowledges the fact of payment in a letter Ex. B signed by him and delivered to the plaintiff, which runs thus:

> Irusalnamah submitted by Kasibotla Ramayya Garu's son Suryanarayanamurti, resident of Challapalli, Divi Taluq:
>
> Out of the amount due under the hypothecation deed executed on 19th September 1929 in your favour by Mallela Venkatapayya Garu's adopted son Lakshmi Narasimham, resident of Godugupeta, Bandar, a sum of Rs. 600 (in words, six hundred) has been sent to me to be credited towards the said deed and so I have sent the same to you.

> I shall get the said amount credited towards the said deed by the said Lakshmi Narasimham.
>
> (Sd.) Kasibotla Suryanarayanamurti,
> 9-11-1930.

Mr. Somasundaram on behalf of defendants 2 and 3 does not dispute the fact of payment but contends that P. W. 4 was not an agent within the meaning of the Section but only a mere messenger who made the payment and that Ex. B therefore cannot save limitation. On the evidence on record, we are clearly of the opinion that P. W. 4 in making the payment was the duly authorized agent of the defendants within the meaning of the Section. P. W. 4 is a close relation of defendant 1. It was P. W. 4 that arranged for the loan. Ex. B clearly says that the sum of Rs. 600 was sent to him for the express purpose of making the payment on his behalf and crediting the same towards the deed. No doubt P. W. 4 says in his evidence before the Court that the money was not sent by defendant 1 but he had the money belonging to one Venkata Ramanamma and in as-much as the plaintiff pressed for the payment of the debt he paid the same on behalf of defendant 1. This story cannot possibly be believed in the face of the express recital in Ex. B. P. W. 4 says that he told defendant 1 that he made the payment of a sum of Rs. 600 to the plaintiff and that defendant 1 told him that he would settle later. Though defendant 1 as D. W. 1 denies P. W. 4 having told him that such a payment was made, we cannot accept this denial as true. Four months before the plaintiff filed the suit the plaintiff sent a registered letter Ex. D dated 3rd March 1936 to defendant 1 wherein the fact of payment of Rs. 600 on his behalf by Suryanarayanamurti was mentioned and no reply was sent thereto. Therefore the recital in Ex. B that Rs. 600 was sent by defendant 1 must be true and there is no reason to think that P. W. 4 was making a false recital. It is very likely that that sum was sent to P. W. 4 as he was the person who arranged for the loan. The decision in 53 Cal 163[1] on which Mr. Somasundaram relies does not support him, on the other hand, as in this case, the payment was made by a friend of the debtor acting as his agent but he did not actually pay the money to the creditor but sent it through a messenger with a letter which was similar in terms to Ex. B. It was held that that was a valid acknowledgment within the meaning of S. 20, Limitation Act.

The next question is whether the decree of the learned District Judge directing a sale of a half share of defendant 1 is right. The contention of Mr. Somasundaram is that an after-born son is entitled to question the alienation made by a father without any legal necessity when on the date of the alienation there were other sons living who could object to the said alienation and as in this case, on the date of the alienation defendant 2 was born and in existence, it therefore follows from this that defendant 3 would be entitled to a third share and what would pass to the alienee would only be a third share of the father and therefore the decree ought to have directed only a sale of the one-third share of the father in the property mortgaged. In support of his contention Mr. Somasundaram relies on the decisions reported in 28 M L W 634,[2] 34 M L W 598[3] and 56 Mad 534.[4] Though in 34 M L W 598[3] it is stated as settled law that if a son was born after the alienation of the family property by his father, if there were other members who had not consented to and validated the alienation, it can be questioned by an after-born son, the proposition would seem to require reconsideration in view of the decision of the Privy Council in 47 All 795=52 I A 443.[5] The learned Editor of Mayne's book on Hindu Law comments on that decision on pp. 511 and 512 thus :

> An observation of the Privy Council in 47 All 795[5] would seem to confine the right to challenge alienations of family property to the coparceners alive at the date of the alienation and to deny such a right to a coparcener who though born subsequent to the alienation acquires an interest in the coparcenary property before the death of the objecting or non-alienating coparceners. The point was not considered and it may not be right to regard the observation as a decision on the question. It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to be overruled. If however the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it, have no right to the property and consequently no right to challenge

---

[1] Ramkumar Sewchand v. Nanuram Poddar, (1926) 13 A I R Cal 510=94 I C 667 = 53 Cal 163.

[2] Amirthalinga Thevan v. Arumuga Ambalagaran, (1928) 15 A I R Mad 986=112 I C 553 = 28 M L W 634.

[3] Chandramani v. Jambeswara, (1931) 18 A I R Mad 550=135 I C 367=34 M L W 598.

[4] Muthu Kumara Sathapathiar v. Sivanarayana Pillai, (1933) 20 A I R Mad 158=141 I C 122 = 56 Mad 534 = 64 M L J 66.

[5] Lal Bahadur v. Ambika Prasad, (1925) 12 A I R P C 264=91 I C 471 = 52 I A 443=47 All 795 = 28 O C 371 (P C).

the alienation it would conflict with what was said by the Board in 40 I A 213=40 Cal 966[6] as well as with the cardinal principle of Hindu law.

With great respect to the learned editor we are not inclined to agree with these remarks. We are inclined to think that the decision of the Privy Council is a direct decision on the question. In that case the facts were as follows : Ram Din and his brother Pateshwari were two brothers. On 6th August 1895 as managers of the family they mortgaged certain family property. They executed two mortgages, one simple and the other usufructuary. On the date of the mortgage Ram Din had two sons, Awadh Behari and Jantri Prasad, both of them minors. Long subsequent to the date of the mortgages the plaintiffs were born to Awadh Behari. On 12th September 1904 Pateshwari and Ram Din sold the property to the usufructuary mortgagee in part satisfaction of his mortgage and for cash received for payment of the other debts. The suit was brought in 1919 to set aside the sale when the plaintiff's father was alive and his right to set it aside was barred by limitation. Dealing with the right of the plaintiffs to question the mortgages their Lordships observed as follows:

> The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated.

These observations of their Lordships seem to be clear and there seems to be no ambiguity about them. If the matter had rested there, one might have said that they were in the nature of an obiter. The learned Judicial Commissioner of Oudh has rested his decision on the ground that on the date of the sale the mortgages must be deemed to be antecedent debts and therefore the sale was justified. But their Lordships were not inclined to rest their decision on this ground but expressly put it on the ground that the plaintiffs were not born on the date of the mortgage. This is how they deal with the question at p. 801:

> The effect of that explanation (the explanation of Sahu Ram's case in 46 All 95=51 IA 129,[7]) in their Lordships' judgment is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property not otherwise improper. In the present case however it is not in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden pro tanto of these encumbrances, cannot be successfully attacked by those so bound.

This decision is therefore a direct decision on the question whether an after-born son is entitled to impeach an alienation made before his birth. And the case in 40 Cal 966[6] does not enunciate any principle in conflict with this decision. In that case the facts were as follows : The plaintiffs were the four sons of one Kedarnath who in October 1898 made a disposition of a part of the family property by way of partition to Jainarayan who was alleged to be an adopted son of his undivided brother's widow. The suit was instituted on 20th December 1907 to set aside the said alienation. Plaintiff 1 was born on 20th December 1886. The other plaintiffs were born between 1892 and 1894. The learned Judicial Commissioner held that as plaintiff 1 instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of S. 7, Limitation Act of 1877, and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. Their Lordships dispose of the correctness of this view thus:

> It was however conceded before this Board, and as their Lordships think, rightly conceded, that if plaintiff 1 succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief.

This does not lend countenance to the view that the younger sons are entitled to impeach the alienation. What was meant by their Lordships was that if the elder son recovers the estate the younger son would be entitled to share in it being joint family property recovered for the family. Apparently in 59 Mad 667[8] their Lordships Madhavan Nair and Stone JJ. were not inclined to agree with the view expressed in 34 M L W 598[3] as settled law—*vide* observations at p. 687—because in that page the learned Judges after a review of the case-law remarked thus:

---

[6] Ramkrishore Kedarnath v. Jainarayan, (1913) 40 Cal 966=20 I C 958=40 I A 213=18 CLJ 237=17 C W N 1189 (P C).

[7] Brij Narain v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689 = 51 I A 129 = 46 All 95 (P C).

[8] Visweswara Rao v. Surya Rao, (1936) 23 A I R Mad 440 = 163 I C 712 = 59 Mad 667 = 70 M L J 360.

> Whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting.

They express an opinion that if before the after-born son is born, the sons in existence were to die, the right is lost to the after-born son, though the right to set aside an alienation may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book at p. 513 where it is stated that it is a right in every member of coparcenary for the time being and as long as that right in the coparcenary exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that the view expressed in Mayne's book is sounder. The scope and effect of the Privy Council decision in 47 All 795[5] may require consideration. But we think that in the view we are taking of the share which the father is entitled to, it is not necessary to decide the point. The question to what share he is entitled is quite distinct from the question whether an after-born son is entitled to question the alienation or not. We will assume he can and deal with the question of the father's share on that footing. So far as our Presidency is concerned, it is accepted law that a coparcener is entitled to alienate his share for value. What the alienee gets by virtue of such an alienation is not a bare right to partition but a vested interest, the extent of which will have to be ascertained by a suit for partition. The Full Bench decision of our High Court in 35 Mad 47[9] has ruled that the interest which an alienee would get would be the share to which the alienor would be entitled at the time of the alienation undiminished by any births or deaths in the family subsequent to the date of the alienation. The rule is thus stated by White C. J. in delivering the judgment of the Full Bench :

> As pointed out by the Privy Council in 5 Cal 148[10] an alienation by a coparcener of his joint interest in family property is inconsistent with the strict theory of a joint and undivided Hindu family. But the doctrine recognizing this right is well established in the presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest, alienated, the test to apply should be the state of the family as regards the number of coparceners, at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession.

The learned Judges in 35 Mad 47[9] expressly dissented from the decision of the Full Bench in 14 Mad 408[11] which took the view that the interest of the alienor would be diminished by births of subsequent members of the family. They in effect followed the view expressed by Bhashyam Ayyangar J. in 25 Mad 690[12] where the learned Judge took the view that the matter was concluded by the decisions of the Privy Council. The learned Judge at p. 718 observes as follows :

> A coparcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property or the whole of a specified portion of the family property . . . . The same thing may take place in the case of involuntary sales also. In all these cases the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer . . . . When the transfer is of an undivided interest in the whole of the family property, the transferee will get whatever may be allotted to the transferor's share in a suit for partition. But if the transfer relates to any specified portion of the family property, there is the risk that it may turn out that in a partition of the whole property it is impracticable or inequitable to allocate either the whole or a part of such specified portion of the share of the transferor.

In giving expression to this view His Lordship was only following the decision of the Privy Council in 5 Cal 148.[10] In that case the mortgage was executed by the father Adit Shahai and on the date of the mortgage he was entitled to a third share. The question was what passed to the purchaser at the execution sale. In dealing with this contention their Lordships of the Judicial Committee observed thus :

> On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his lifetime as a security for the debt, might operate after his death as a valid charge upon Mauza Bussumbhurpore to the extent of his own then share.

In the present case at the date of the alienation the father was entitled to a half share in the joint family property and that interest which was vested in him would pass to the mortgagee. The property which has been effectively carried away from the family was only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the alienation being a mortgage, the afterborn son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu law that in a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. In so far as the alienation of the father's interest is concerned, it must be deemed to have been effectively carried away because he is entitled to alienate it for value. If the view indicated in 35 Mad 47,[9] namely that the alienee gets the interest which the father was entitled to on the date of the alienation is to be followed, the view taken by the learned District Judge in this case that the father was entitled to a half share and the mortgagee is entitled to sell that share in execution of his decree is correct.

---

[9] Chinnu Pillai v. Kalimuthu Chetti, (1912) 35 Mad 47=9 I C 596=21 M L J 246 (F B).

[10] Suraj Bunsi Koer v. Sheo Persad Singh, (1880) 5 Cal 148=6 I A 88=4 C L R 226 = 4 Sar 1 (P C).

[11] Rangaswami v. Krishnayyan, (1891) 14 Mad 408=1 M L J 603 (F B).

[12] Ayyagiri Venkataramayya v. Ayyagiri Ramayya, (1902) 25 Mad 690 (F B).

There is only one reported decision which directly deals with this matter and that is a decision of our learned brother Pandrang Row J. reported in A I R 1937 Mad 631.[13] In that case the father sold the property in 1919. On that date there was only one son in existence and subsequently two sons were born. The alienation was not found to be such as to be binding on the sons. On the date of the suit there were the father and three sons. The question was to what share the alienee would be entitled. The learned Subordinate Judge in that case following 56 Mad 534[4] held that the father would only be entitled to a fourth and the alienee would only get a fourth share. Pandrang Row J. following 35 Mad 47[9] held that the share which the father would get would be the share which he would be entitled to on the date of the alienation which would be half and therefore he gave a decree for a half share. The learned Judge declined to follow 56 Mad 534[4] and if we may say so with respect, rightly.

The Full Bench in 35 Mad 47[9] was constituted for the express purpose of considering the view expressed in 14 Mad 408[11] that the share of the alienee should be determined not on the date of the alienation but on the date of suit and if subsequent to the date of alienation more members were born the alienee would get a reduced share. At the time when the Full Bench was constituted and the question was discussed there were five Judges but at the time when the judgment was about to be delivered one of them ceased to be a Judge of the High Court and the Full Bench was reconstituted with four Judges and the judgment was delivered dissenting from the said view in 14 Mad 408.[11] The judgment was delivered in 1912 and so far as we know, it was accepted as sound law both by the Bench and the Bar and followed till Jackson J. struck a dissenting note in 56 Mad 534[4] and declined to follow the view expressed in 35 Mad 47.[9] Our own view is that the view expressed in 35 Mad 47[9] is the sounder view. In 28 M L W 634[2] though the question was not discussed it was the view that was taken in 35 Mad 47[9] that was followed. This is clear from the following observations of Tiruvenkatachari J. in that case at page 640:

> The only remaining point to be considered is whether defendant 6 who was born after the alienation has any and if so what right in the plaint properties which would entitle him to contest the suit. Under the sale deed, Ex. A the plaintiff acquired only the one-third share of the father Mari Ambalagaran in the joint family properties. The remaining interest therein appertained to the joint family of the alienor; and it so remained at the date of defendant 6's birth with the result that he also acquired an interest in it by his birth.

The view that the father's share was a third and it is only in the remaining interest, that is in the two-thirds the after-born son, defendant 6, could be held to have acquired an interest by birth is in strict conformity with the view expressed in 35 Mad 47.[9] In 34 M L W 598[3] the question of share was not considered at all. We are therefore of the opinion that the decree of the learned District Judge in directing a sale of a half-share of the father is correct.

In the result we modify the decree of the learned District Judge by declaring that the father is personally liable to pay any balance that might remain after the sale of his interest in the mortgaged property and the plaintiff will be entitled to apply for a decree for the said balance against the father personally and against the joint family properties in the hands of defendants 1 to 3. The appellant will have half the costs of the appeal but there will be no costs in the memorandum of objections. Two applications (C. M. P. Nos. 500 and 484 of 1940) have been put in under the Madras Agriculturists Debt Relief Act, 4 of 1938, one by Mr. A. Venkatachalam on behalf of respondent 1 and the other by Mr. Somasundaram on behalf of respondents 2 and 3. The plaintiff will have leave to file a counter-affidavit objecting to the reliefs sought in the said petitions. We direct these applications to be sent to the lower Court for adjudication on the merits. The decree that we pass herein will be subject to any relief which the applicants may get in those petitions.

---

[13] **Kasi Visweswara Rao v. Varahanarasimham, (1937) 24 A I R Mad 631=172 I C 666.**

C.R.K./G.N. *Order accordingly.*

✱ A. I. R. 1940 Madras 697

BURN AND LAKSHMANA RAO JJ.

Penubala Muni Krishnayya — Petitioner.

v.

Penubala Akulamma — Respondent.

Criminal Revn. Case No. 966 and Cri. Revn. Petn. No. 913 of 1939, Decided on 24th January 1940, to revise order of Sub-divisional Magistrate, Chandragiri Division, D/- 29th October 1939.

✱ Criminal P. C. (1898), S. 488 (3)—Magistrate passing sentence of imprisonment under S. 488 (3)—Accused filing insolvency petition and obtaining protection order — Magistrate cannot cancel sentence—Accused is not person under imprisonment in execution of decree for payment of money within meaning of S. 23, Provincial Insolvency Act.

It is not possible for a Magistrate who has passed a sentence of imprisonment under S. 488 (3) to cancel the sentence merely because the Insolvency Court has issued an order of protection in consequence of the accused's insolvency petition filed subsequent to the passing of the aforesaid sentence. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23, Provincial Insolvency Act, that a person who has been sentenced under S. 488 (3) is under "imprisonment in execution of the decree of any Court for the payment of money": *A I R 1938 All 253; A I R 1929 Lah 32; A I R 1933 Rang 138 and A I R 1930 Bom 144, Rel. on; 5 Cal 536 and A I R 1924 Cal 230, Disting.; A I R 1936 Mad 793, Expl. and Disting.* [P 698 C 2]

N. Rangachari — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Burn J.—This is an application to revise the order passed by the learned Sub-divisional Magistrate of Chandragiri on 29th October 1939, on an application made to him on 28th October 1939, on behalf of the petitioner. The petitioner is the husband of a woman named Akkulamma in whose favour the learned Joint Magistrate passed an order in M. C. No. 104 of 1938 on 7th February 1939, directing this petitioner to pay his wife Rs. 3-8-0 per mensem as maintenance under S. 488, Criminal P. C. The petitioner did not pay in accordance with that order. Before she could enforce the order, the petitioner filed a suit, O. S. No. 128 of 1939, in the Court of the District Munsif of Tirupati and obtained an interim injunction restraining his wife from enforcing the order for maintenance. The injunction was in force until 21st July 1939. On that date, the interim injunction was vacated and the petitioner's wife, on 24th July 1939, applied to the Joint Magistrate to direct this petitioner to pay Rs. 17-8-0 being the arrears for five months. The learned Joint Magistrate issued a distress warrant and as the money was not realized, he gave notice to the petitioner who appeared before him. The Magistrate found that he had without sufficient cause failed to pay the money due to his wife under the maintenance order. The Magistrate therefore sentenced him to suffer rigorous imprisonment for one month or until the amount of the arrears should sooner be paid. This order was passed on 23rd October 1939. On 24th October, the petitioner filed an insolvency petition in the Court of the District Munsif and obtained from him an order for his release under S. 23 (1), Provincial Insolvency Act. The District Munsif communicated a copy of this order to the Joint Magistrate with a letter dated 25th October and the petitioner made an application on 28th October for his release. The learned Joint Magistrate dismissed his application for release and this revision petition has consequently been brought.

The contention on behalf of the petitioner is that the protection order passed by the Insolvency Court is a decision of a competent Civil Court within the meaning of S. 489 (2), Criminal P. C., in consequence of which the Joint Magistrate is compelled to cancel the sentence of imprisonment passed upon this petitioner. There is no authority for this contention. Learned counsel for the petitioner has referred us to the cases reported in 5 Cal 536[1] and 50 Cal 867.[2] But we do not think that they have any application. In the earlier case there was no sentence of imprisonment passed at all. In the second case, the protection order had been issued before the sentence of imprisonment was passed, and after the sentence of imprisonment was passed, an adjudication order had been passed and the protection order continued until discharge.

---

[1] Tokee Bibi v. Abdool Khan, (1880) 5 Cal 536=5 C L R 458.

[2] Halfhide v. Halfhide, (1924) 11 A I R Cal 230 =81 I C 912=50 Cal 867=25 Cr L J 1088.

Their Lordships of the Calcutta High Court said:

> In our opinion, the fact that he has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that the petitioner is unable to pay his debts. There is also the order of protection. It follows therefore that the petitioner being unable to pay his debts, is not guilty of wilful neglect within the meaning of Section 488, Criminal P. C.

It is noticeable that there was also no finding by the Magistrate of wilful neglect in that case. The terms of S. 488 (3) have since been altered. There is no question now of 'wilful neglect.' The Section reads:

> If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order. . . . . sentence such person . . . . to imprisonment.

This wording shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. Prima facie, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the Insolvency Court. Learned counsel for the petitioner has referred us to the decision of Wadsworth J. reported in 71 M L J 430.[3] That has no bearing upon the point before us. The learned Judge has held that arrears of maintenance payable in respect of magisterial order under S. 488, Criminal P. C., constituted a 'debt or liability provable in insolvency,' within the meaning of S. 46 (3), Presidency Towns Insolvency Act. The learned Judge has not anywhere suggested that a protection order issued by an Insolvency Court would necessarily be conclusive for a Magistrate making an inquiry under S. 488 (3), Criminal P. C. The matter has been dealt very clearly by Allsop J. of the Allahabad High Court in the case reported in I L R (1938) All 486.[4] The learned Judge has said:

> It has also been urged that the mere fact that the applicant has been adjudicated an insolvent shows that he is unable to pay for the maintenance of his wife and that that constitutes sufficient cause for non-payment. Here again I am unable to agree. Learned counsel has suggested that the whole of the insolvent's property vests in the receiver and there is nothing left out of which he can maintain his wife. This argument overlooks the fact that the property of the insolvent which vests in the receiver does not include any property which is exempted by the Civil Procedure Code, from liability to attachment and sale in execution of a decree. Under the provisions of S. 60, Civil P. C., as now enacted the salary to the extent of the first hundred rupees and one half of the remainder of such salary is exempt from such attachment. The applicant would therefore if he is prepared to do work and earn a salary, be in a position to support his wife.

The learned Judge has also pointed out that

> an order passed by a Magistrate under S. 488 (3), Criminal P. C., for the imprisonment of a person who fails to pay a maintenance allowance is a sentence of imprisonment.

That is the word used in the Code itself. The learned public prosecutor has contended with much force that the Magistrate who has passed such a sentence has no power to cancel his own order. Learned counsel for the petitioner has discussed the question whether a proceeding under S. 488 is "a criminal case" or not. But we think that that is not a relevant discussion. It appears to us that the orders referred to in S. 489 (2) which the Magistrate can cancel or vary are orders relating to the amount of maintenance payable. We do not think that it is possible for a Magistrate who has passed a sentence of imprisonment under S. 488 (3) to cancel the sentence merely because the insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23, Provincial Insolvency Act, that a person who has been sentenced under S. 488 (3) is under "imprisonment in execution of the decree of any Court for the payment of money." This view derives support from the decisions in 10 Lah 406,[5] 11 Rang 226[6] and A I R 1930 Bom 144.[7] In the last case, it was held that a wife could make an application for maintenance under S. 488, Criminal P. C., in spite of the fact that she had already obtained a decree in the Civil Court for

---

3. S. Yahia *In re*, (1936) 23 A I R Mad 793=165 I C 297 = 37 Cr L J 1129 = 71 M L J 430 = I L R (1937) Mad 90.
4. Shyama Charan v. Anguri Devi, (1938) 25 A I R All 253=175 I C 235=39 Cr L J 553= I L R (1938) All 486=1938 A L J 225.
5. Mehr Khan v. Mt. Bakat Bhari, (1929) 16 A I R Lah 32=112 I C 218 = 29 Cr L J 1002 =10 Lah 406=30 P L R 549.
6. Maung Tin v. Ma Hmin, (1933) 20 A I R Rang 138=1933 Cr C 728=144 I C 187=34 Cr L J 815=11 Rang 226 (F B).
7. Mahomed Ali Methabai *In re*, (1930) 17 A I R Bom 144=124 I C 127 = 31 Cr L J 609 = 31 Bom L R 1366.

maintenance, payments under which were suspended by her husband who had filed an insolvency petition. Moreover, even discharge of an insolvent does not free him from liability to obey an order under S. 488, Criminal P. C.: *vide* S. 44 (1) (d), Provincial Insolvency Act. For these reasons we think that the order of the learned Magistrate is correct and this revision petition is dismissed. The petitioner must surrender to his bail to serve out the remainder of the period of imprisonment to which he has been sentenced.

C.R.K./G.N. *Revision dismissed.*

A. I. R. 1940 Madras 699

BURN AND LAKSHMANA RAO JJ.

In re *Bangaru Reddi — Accused* Prisoner.

Referred Trial No. 2 and Criminal Appeal No. 7 of 1940, Decided on 5th February 1940, referred by Court of Session, South Arcot Division, D/- 13th December 1939.

Criminal Trial — Confession—Mere fact that accused has given wrong description of way in which he killed deceased is no ground for acquitting him.

The mere fact that the accused in his confession has given a wrong or an incomplete description of the way in which he brought about the deceased's death is not a reason for finding him not guilty. [P 700 C 1]

T. R. Thayagarajan — *for Accused.*

Public Prosecutor — *for the Crown.*

Burn J.—The appellant Bangaru Reddi has been convicted of murder by the learned Sessions Judge of South Arcot and sentenced to death. The case for the prosecution was that on the early morning of 15th September 1939, the appellant killed a woman named Mangathayi Ammal by throttling her. Mangathayi's corpse was found just before daylight on the morning of 15th September when her little daughter, P. W. 5, a child of eight, came in after going outside to answer calls of nature. This child on her return called to her mother and getting no answer she went about the house trying to find her mother and at last her foot came in contact with her mother's head and then she discovered that her mother was motionless. It was found that jewels which Mangathayi was in the habit of wearing had been taken from her body but no one had any idea who the murderer was. Information was given to the Police by the karnam of the village (P. W. 10) who took action in the absence of the Village Munsif. The karnam saw a crowd near the house of P. W. 4 who is the husband of the deceased and when he went there, he saw the corpse of Mangathayi. P. W. 4 himself was not there. He had gone away very early in the morning to Tindivanam. The police came and held the inquest but the panchayatdars could only express the opinion that the woman had been strangled to death by some person unknown.

The evidence against the appellant was furnished almost entirely by himself. He was in the village and was questioned by the police on 16th September and he was arrested on the evening of 17th September at about 7-30 and after he had been arrested, he made a statement about the jewels that were missing from the corpse of the deceased woman and about a pair of brass bangles which, he said, he had taken from the person of the child (P. W. 5). The Inspector (P. W. 12), Sub-Inspector (P. W. 11), the karnam (P. W. 10) and the Village Munsif, Muthumalla Reddiar, were taken by the appellant to the hayrick belonging to his brother-in-law and there from a spot outside the fence on the north, the appellant is said to have produced jewels M. Os. 1 to 5. Of these M. Os. 1 to 4 belonged to Mangathayi which according to her husband were always worn by her. M. O. 5 is the pair of brass bangles which belong to the little girl, P. W. 5. The appellant was sent to the Sub-Magistrate of Tindivanam for remand with a requisition that his confession might be recorded. The Sub-Magistrate received him on 18th September and gave him time for reflection until the 19th and then recorded his confession (Ex. B). In that the appellant has given a very long story about his illicit intrigue with Mangathayi and about the way in which he killed her in the early morning of 15th September. In the Court of the Sub-Magistrate of Gingee who held the preliminary inquiry and also before the learned Sessions Judge, the appellant denied, that he had made any confession at all. He went so far as to tell the Sub-Magistrate of Gingee that he had not even seen the face of the Sub-Magistrate of Tindivanam. He offered no explanation of his conduct in producing the jewels or the statements that he made which led to their discovery. He denied having given any information about the jewels and alleged that the case had been concocted against him by Muthumall Reddy, the village Munsif who, he said, is a person of great influence in Brahmadesam.

No facts were proved from which it could be inferred that Muthumalla Reddy had any enmity against the appellant. There is, in fact, nothing to indicate that anyone had any reason to charge him falsely with this crime. The confession of the accused, although he denied it, was corroborated in important particulars by the evidence of P. W. 4, the husband of the murdered woman, and P.Ws. 8 and 9. P.W. 4 said that his wife had complained to him about the illicit overtures made to her by the appellant. P. W. 8 said that on one occasion some months before, he had accidentally discovered the appellant while he was returning from the house of P. W. 4. P. W. 9 said that he had been informed by the appellant of his visits to Mangathayi and that he had reproached the appellant for his extravagance.

Learned counsel who has appeared for the appellant in this Court has suggested that the confession ought to be entirely rejected because the evidence of the doctor makes it clear that the woman might very well have been killed by strangulation with a piece of rope. The doctor found a continuous ecchymosed mark all round the woman's neck below the thyroid cartilage. Such a mark would not be likely to be produced by strangulation with the fingers and thumbs. In such cases it is generally possible to distinguish marks of the thumbs and fingers separately. This however is not sufficient for acquitting the appellant. The mere fact that he has given a wrong or an incomplete description of the way in which he brought about the woman's death is not a reason for finding him not guilty. The evidence of the doctor was that there were marks of fingers and thumbs on the woman's neck and to that extent his evidence does agree with the confession of the accused. The production of the woman's jewels from the hiding place near his brother-in-law's haystack is also, as the learned Sessions Judge observes, a fact of the greatest possible importance. All the assessors were of opinion that the appellant was guilty. The learned Sessions Judge was undoubtedly right in agreeing with them and in convicting the appellant for the murder of Mangathayi. Confirming the conviction for murder and the sentence of death, we dismiss this appeal.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 700

HORWILL J.

M. Venkata Rao — Appellant.

v.

B. Subba Rao and another — Respondents.

City Civil Court Appeal No. 51 of 1939, Decided on 11th December 1939, against decree of City Civil Court, Madras (Addl.), D/- 18th August 1939.

Landlord and Tenant — Estoppel continues after termination of tenancy unless possession is given up — S. 43, Presidency Small Cause Courts Act, does not modify aforesaid rule— S. 46 of aforesaid Act has no application.

The ordinary rule is that a tenant must deliver possession before he can dispute his landlord's title and that that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. S. 43, Presidency Small Cause Courts Act, does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. S. 46 of that Act has no application : *A I R 1925 Mad 143, Expl. and Approved.* [P 701 C 1, 2]

T. V. Muthukrishna Aiyer and T. V. Bhagawat — *for Appellant.*

M. S. Venkatarama Aiyer — *for Respondents.*

Judgment. — The Sri Parthasarathi Temple, Triplicane, leased the suit land to defendant 1, defendant 1 sub-leased it to defendant 2, and defendant 2 to the plaintiff. At the termination of the period of tenancy, defendant 2 brought proceedings under Chap. 7, Presidency Small Cause Courts Act, to recover possession from the plaintiff. An order was passed under S. 43 in defendant 2's favour, and the plaintiff thereupon filed this suit under S. 47. He raised very many pleas and they are set out in the five issues. Inter alia, the plaintiff alleged that defendant 2 agreed to allow the plaintiff to remain in possession for three years which, he said, was the period of the lease of defendant 1 from the temple and defendant 2 from defendant 1. After the plaint was filed the temple obtained an order under S. 43, Presidency Small Cause Courts Act, against defendant 1. The plaintiff thereupon obtained permission to amend his plaint and add another ground that the period of tenancy having determined, defendant 2 had no right to possession. The plaintiff's suit was dismissed and hence this appeal.

The only point argued in appeal was whether defendant 2 could retain possession in view of the fact that the period of her own tenancy had terminated. As already pointed out, one of the plaintiff's contentions was that the period of tenancy was for three years and that he too was entitled to remain in possession for three years. His present contention is therefore inconsistent with one of his main contentions in the amended plaint. It is however said that the matter has now been determined by an order under S. 43 in proceedings between the temple and defendant 1 and that that finding is final and binding until defendant 1 has had it set aside in the City Civil Court under S. 47. Such a suit was filed by defendant 1 and that suit is still pending. The ordinary rule is admitted to be that a tenant must deliver possession before he can dispute his landlord's title and that that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. A number of cases are quoted by Mulla in his 'Transfer of Property Act,' as holding that the estoppel continues after termination of the tenancy unless possession is given up. Halsbury, in Vol. 13 at p. 506, says :

> But, if the tenant came into possession under a lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title; it has however been held that it is not necessary that he should actually go out of possession. . . . . . .and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him.

The only case quoted by the learned advocate for the plaintiff in appeal is 79 I C 881,[1] which was a case in which the Government had granted tree patta to a certain person who had sub-leased his rights to a tenant. The Government issued a notice to the pattadar which amounted to an eviction and Wallace J. held, in the words of another case he quoted, 63 I C 754,[2] 'that there was the equivalent of eviction.' If the tenant has been evicted and he is put into possession by the person who evicts him, then his possession is not referred back to his original lessor and so the estoppel would not operate as it would if he had not been evicted. So it is seen that even in 79 I C 881[1] it was considered that eviction or something equivalent to it must have taken place before the lessee can deny the title of the lessor.

The learned advocate for the plaintiff has relied on the wording of Ss. 43 and 46, Presidency Small Cause Courts Act. S. 43 merely lays down the procedure to be adopted by the Court in applications for recovery of possession of property. If the occupant has proved that the tenancy has been determined and that his lessor had no right to possession, then it is sufficient cause, for the purpose of that Section, why the Court should not pass an order for possession. The Section does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. S. 46 of that Act has no application as far as I can see ; for the very question under consideration is whether defendant 2 is entitled to possession. It is further argued that a decision under S. 43 is, in the absence of a decree of a Civil Court varying it, final and that therefore the tenancy must be deemed to have been determined. I have already held that even if that were the case, defendant 2 would still be entitled to retain possession until he is ousted by regular proceedings ; but in view of the fact that a suit is still pending in the City Civil Court in which the right of defendant 1 and therefore of defendant 2 to remain in possession is being agitated and in view of the plaintiff's own case that his tenancy and defendant 2's tenancy are for three years, I do not consider that it can be assumed that the tenancy has terminated. In any event therefore whether on the facts or in law, the appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 701

HORWILL J.

Arumilli Surayya — Appellant.

v.

Pinisetti Venkataramanamma and others — Respondents.

Second Appeal No. 1116 of 1936, Decided on 12th December 1939, against decree of Sub-Judge, Amalapuram, in A. S. No. 50 of 1935.

(a) Transfer of Property Act (1882), S. 100 —S. 100 does not apply to auction sale.

Section 100 does not apply to auction sales because a transfer within the meaning of the T. P. Act does not include an auction sale. There is another reason for not applying S. 100. The position of a purchaser at an execution sale is the same as that of a judgment-debtor; his position is somewhat different from that of a purchaser at a private treaty. Execution purchasers purchase subject to all the changes and encumbrances—legal and equitable—which would bind the debtors: *A I R 1937 Cal 129, Rel. on.* [P 702 C 2]

(b) Transfer of Property Act (1882), S. 100, Proviso—Simple mortgagee cannot be said to have property in his hands.

---

[1] Ramaswami Thevan v. Alaga Pillai, (1925) 12 A I R Mad 143=79 I C 881.

[2] Ram Chandra v. Pramatha Natha, (1922) 9 A I R Cal 237=63 I C 754=35 C L J 146.

A simple mortgagee, cannot by any stretch of the imagination be considered to have the property in his hands within the meaning of proviso to S. 100. [P 703 C 1]

G. Lakshmanna and G. Chandrasekhara Sastri — *for Appellant.*

V. Parthasarathy — *for Respondents.*

Judgment.—The plaintiff brought this suit for maintenance and sought to enforce it against the suit property over which she had a charge. The appellant was impleaded because he was in possession, he having purchased the property in a suit for sale brought by himself on a mortgage. He failed in the trial Court on the ground that he was not a bona fide purchaser with notice and he preferred an appeal which was dismissed on the ground that even if he did not have notice of the charge, his right would be subject to it because the charge was prior to the sale. The question whether a sale without notice would be subject to a prior charge is not free from doubt. As the law stands at present, S. 100, T. P. Act, makes it clear that no charge shall be enforced against any property in the hands of a purchaser to whom such property has been transferred for consideration and without notice of the charge; but the charge in the present case was prior to the amendment of S. 100, which introduced the clause above quoted. The learned Subordinate Judge relied on a decision of Sadasiva Ayyar and Spencer JJ. in 36 M L J 618,[1] but that case can be distinguished in that Sadasiva Aiyar J. was of opinion that the document then under consideration was something more than a mere charge and amounted to an anomalous mortgage. 47 M L J 622[2] at p. 639, the other case relied on by the learned Subordinate Judge, contains a reference to the decision in 36 M L J 618,[1] but there was no discussion of it as it seemed to be unnecessary for the decision of that case. Even 66 M L J 566,[3] relied on by the learned advocate for the appellant, does not really discuss this point. However, 1939 A L J 849,[4] which has been quoted in another connexion, says that S. 100, T. P. Act, has retrospective effect. If that is so, then there would be no doubt that a purchaser without notice would not be bound by a prior charge.

The appellant however did not come into possession by means of a private sale, but by purchasing in court auction the property which was subject to his own mortgage. In a similar case reported in 1939 A L J 849,[4] it was held that S. 100, T. P. Act, does not apply to auction sales. Two reasons were given. S. 2 (d), T. P. Act, says that the Act does not apply to cases of transfer by operation of law, save in certain cases with which we are not here concerned. The second reason is that having regard to the definition of "transfer" in S. 5, T. P. Act, it is clear that a transfer within the meaning of the Act does not include an auction sale; for a transfer is defined as an act by which a living person conveys property to one or more other living persons. Property that passes to an auction-purchaser is not conveyed to him by the judgment-debtor. Both these reasons seem valid. There is another reason for not applying S. 100, viz. that what is sold in a court sale is the right, title and interest of the judgment debtor; so that the auction-purchaser is in no better position than the judgment-debtor himself, and he is therefore subject to the same equities as the judgment-debtor was. In a private sale without notice, on the other hand, the purchaser is not subject to equities at all. I L R (1937) 1 Cal 203[5] says:

> The position of a purchaser at an execution sale is the same as that of a judgment-debtor; his position is somewhat different from that of a purchaser at a private treaty. Execution purchasers purchase subject to all the charges and encumbrances—legal and equitable—which would bind the debtors.

This principle has been laid down in Halsbury's Laws of England, Vol. 13, p. 95, para. 87, where it is said:

> Ordinarily, an assignee takes subject to all equities to which the assignor was subject: and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity. But if he is a purchaser for value without notice, the equity cannot be asserted against him. Trustees in bankruptcy and judgment or execution creditors take only what was vested in the bankrupt or debtor; hence they do not rank as purchasers but take subject to prior equities.

The learned advocate for the appellant argues that if he cannot rely on his sale, he can fall back on his mortgage. I doubt whether he can; but even if he could, S. 100 would not help him, for the proviso says:

---

[1] Srinivasaraghava Iyengar v. Ranganatha Iyengar, (1919) 6 A I R Mad 528=51 I C 963 =36 M L J 618.

[2] Mollayya Padayachi v. Krishnaswami Ayyar, (1925) 12 A I R Mad 95=85 I C 855=47 M L J 622.

[3] Aravamudhu Iyengar v. Abhiramavalli Ayah, (1934) 21 A I R Mad 353=150 I C 930=66 M L J 566.

[4] Indra Narain v. Mohammad Ismail, (1939) 26 A I R All 687=185 I C 597=I L R (1939) All 885=1939 A L J 849.

[5] Creet v. Ganga Ram Gool Raj, (1937) 24 A I R Cal 129=170 I C 214=I L R (1937) 1 Cal 203 =64 C L J 280.

No charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

If the appellant is treated as a simple mortgagee, he cannot by any stretch of the imagination be considered to have the property in his hands. The appeal therefore fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 703

WADSWORTH J.

K. Sambasiva Chettiar — Appellant.

v.

Secretary of State and others — Respondents.

Appeal No. 339 of 1937, Decided on 4th September 1939, against order of Sub-Judge, Chingleput, D/- 19th January 1937.

(a) Civil P. C. (1908), O. 40, R. 1—Application by Collector under O. 40, R. 1 for directing receiver in mortgage suit to pay money due by mortgagor to Government — Order directing receiver to pay falls under O. 40, R. 1 and is appealable.

Where in a mortgage suit a receiver is appointed and an application is made by the Collector under O. 40, R. 1 praying the Court to direct the receiver to pay the amount due by the mortgagor to Government, an order by the Court directing receiver to pay aforesaid amount falls under O. 40, R. 1 and is therefore appealable. [P 703 C 2]

(b) Mortgage—Receiver appointed in suit on simple mortgage—Mortgagee has no charge on rents and profits of mortgaged property — He cannot have preferential claim against Crown.

Where in a mortgage suit a receiver is appointed there is no charge in favour of the mortgagee on the rents and profits of the mortgaged property in possession of the receiver. The mortgagee is merely in the position of a simple creditor in whose favour the Court recognises an equity over other simple creditors. Therefore the ordinary rule that a debt due to the Crown has preference over all other unsecured debts must be enforced. The mortgagee cannot have a preferential claim as against the Crown, whose claim is paramount: *A I R 1938 Mad 360 ; A I R 1934 Rang 8 and A I R 1936 Rang 290, Rel. on ; A I R 1931 Mad 626 ; A I R 1933 Mad 570 (F B) and A I R 1939 Mad 402, Expl.* [P 704 C 1, 2]

S. Ramachandra Aiyer — *for Appellant.*

B. Sitarama Rao, Government Pleader — *for Respondents.*

Judgment.—This appeal arises out of an order giving directions to the receiver appointed at the instance of the plaintiff in a suit on a simple mortgage to pay to the Collector a sum of money due by the mortgagor by way of the value of labour known as kudimaramath for which the mortgagor was obliged to pay under the Madras Compulsory Labour Act. The amount due from the mortgagor in respect of kudimaramath had accrued due before the appointment of the receiver. The Collector was, of course, not a party to the suit on the mortgage and he filed an application under O. 40, R. 1, Civil P. C., praying the Court to pay the money due to the Government out of the amount in deposit or to direct the receiver to pay it. A preliminary objection was taken that no appeal lies. It is contended that this is not in fact an order to the receiver under O. 40, R. 1 but a mere order under S. 151 for payment out of Court at the instance of the Government. The answer to this contention is that the Collector's application was framed under O. 40, R. 1 and that in fact the payment was directed by means of an order to the receiver which clearly falls under O. 40, R. 1 and is therefore appealable.

The question therefore is whether the debt due to the Crown is entitled to priority over the debt due to the mortgagee in respect of the amount recoverable from the income of the mortgaged property. The appellant contends that the appointment of a receiver in a suit on a simple mortgage creates what is practically a charge in favour of the mortgagee for the rents and profits of the land. He relies on certain observations in 54 Mad 565,[1] on a passage in the judgment of Ramesam J. in the Full Bench ruling in 56 Mad 915[2] and on the observations of Madhavan Nair J. in I L R (1939) Mad 496.[3] It is true that there are in these judgments phrases which give some colour to the theory that when a receiver has been appointed the right of the mortgagee to a preferential lien over the rents in respect of his mortgage debt to the extent to which it is not covered by the hypotheca, is based on the theory that the rents are regarded as being added to the security for the mortgage debt. But it seems to me that this view is clearly erroneous and that it was not in fact the basis of the decisions in the three cases above referred to.

In India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The true nature of the proceeding is that the Court creates a machinery whereby the mortgagor is prevented from dissipating the funds which would normally be used to defray the interest on the mortgage, the object of the machinery being simply to prevent the mortgagor from profiting by the law's delays. The receiver collects the rents in the first instance for the benefit of the mortgagee against the contingency of the hypotheca being insufficient. If the hypotheca satisfies the mortgage debt then the receiver holds the rents for the mortgagor. The theory that these rents are charged in favour of the mortgagee seems to have arisen out of the difficulty of finding a legal basis for the rule that the mortgagee at whose instance a receiver has been appointed is entitled to priority as against the simple creditors of the mortgagor in claiming the funds in the hands of the receiver, should the hypotheca fail to satisfy his debt. The true basis of this rule is not, I think, that there is any charge in favour of the mortgagee but that the Court gives preference to the mortgagee over the simple creditors in respect of those moneys merely by way of justice and equity in order to ensure that the mortgagee shall not be damnified by the protraction of the suit. The decision in 14 Rang 292[4] lays it down that the preferential claim of the mortgagee to the profits in the hands of the receiver is not based on any substantive rights to those profits which the terms of the mortgage do not warrant, but is merely granted by way of an equitable relief to the mortgagee against the consequences of the delay in enforcing his legal remedy. If it is conceded that a mortgagee has no charge over the rents in the hands of the receiver, it is difficult to see how he can have a preferential claim as against the Crown. His preferential claim as against the simple creditors has been recognized, but not, so far as I am aware, on any other grounds than as an equity which is recognized in his favour as a diligent creditor trying to enforce his legal remedy. As against all the unsecured creditors the claim of the crown is paramount: I L R (1938) Mad 744.[5]

---

[1] Maharajah of Pithapuram v. Gokuldoss Goverdhandoss, (1931) 18 A I R Mad 626 = 133 I C 504=54 Mad 565=61 M L J 111.

[2] Paramasivan Pillai v. Ramaswami Chettiar, (1933) 20 A I R Mad 570 = 145 I C 449 = 56 Mad 915=65 M L J 222 (F B).

[3] Khader Mohideen Sahib v. Nagu Bai, (1939) 26 A I R Mad 402=186 I C 279=I L R (1939) Mad 496=(1939) 1 M L J 730.

The lower Court has relied on a decision in 11 Rang 467,[6] which at p. 474 quotes with approval an unreported decision of the Rangoon High Court to the effect that a receiver appointed in a mortgage suit can be directed at the instance of the Crown to pay out of the rents and profits collected from the mortgaged land income-tax due by the mortgagor. One might be chary of treating a brief summary of an unreported decision as an authority in the absence of the full text of the judgment, but I am of opinion that the decision which appears to have been given in that case is based on correct principles. If there is no charge in favour of the mortgagee and if the mortgagee is merely in the position of a simple creditor in whose favour the Court recognises an equity over other simple creditors, there is no reason why the ordinary rule that a debt due to the Crown has preference over all other unsecured debts should not be enforced in this case. The circumstances of the present case give an additional weight to the claim of the Crown. It is true that money due from a ryot who has defaulted in his duty to perform the customary labour for the protection of the irrigation source of his land is not charged on the land, though it may be recovered as an arrear of land revenue. At the same time the payment of these dues is a legitimate expense which the holder of the land ought to incur for the protection of the land. And although in the present case the amount became payable before the receiver was appointed it is in my opinion a legitimate expense which the receiver should pay as an incident of his management of the property, quite apart from the fact that it is also a debt due to the Crown and so entitled to priority; whichever way therefore one regards this claim, it is one which must be preferred to the claim of the mortgagee. I therefore dismiss the appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

---

[4] Ally Ramzan v. Balthazar & Son Ltd., (1936) 23 AIR Rang 290=163 IC 850=14 Rang 292.

[5] Manikkam Chettiar v. Income-tax Officer, Madura, (1938) 25 A I R Mad 360 = 174 I C 423=I L R (1938) Mad 744 = (1938) 1 M L J 351 (F B).

[6] Soniram Rameshwar v. Mary Pinto, (1934) 21 A I R Rang 8=147 I C 1014 = 11 Rang 467.

A. I. R. 1940 Madras 705

WADSWORTH J.

Rama Moopan — Appellant.

v.

Mutha Moopan — Respondent.

Second Appeal No. 119 of 1936, Decided on 25th April 1939, from decree of Sub-Judge, Coimbatore, in A. S. No. 62 of 1935.

Madras Abkari Act (1 of 1886), Rules under, General Sales Notification, R. 27—*B*, after bidding for shop at auction but before issue of licence entering into partnership with *A* — *A* and *B* thereby agreeing to become joint owners sharing profit and loss — Partnership is illegal being opposed to R. 27.

Where after *B* has successfully bid for a shop at the auction but before the sale has been confirmed and the licence has been issued, *B*, for the purpose of financing the business, enters into a partnership with *A*, whereby *A* and *B* shall be joint owners of the business, sharing the profit and loss, *B* being responsible for the actual management of the shop, such partnership necessarily implies a transfer which is opposed to R. 27 of the Sales Notification and is therefore illegal: *AIR 1935 Mad 440 (F B), Expl. and Foll.; A I R 1936 Mad 557, Dissent.* [P 706 C 1; P 707 C 1]

C. Padmanabha Iyengar and R. Ramamurthi Ayyar — *for Appellant.*

K. V. Ramachandra Iyer — *for Respondent.*

Judgment. — This appeal arises out of a contract connected with a toddy shop lease. The plaintiff, who is appellant here, bases his suit on allegations that he along with the defendant and one Senniandi entered into an agreement that one or more shops should be taken in auction in 1932-33, that the defendant having experience should manage all the affairs relating to the sale and maintain the accounts, that he should render account to his partners, who should obey his directions and that out of the profits each partner should get a share proportionate to their investments. It is alleged that the plaintiff subscribed Rs. 400, Senniandi Rs. 200 and the defendant Rs. 500 and the defendant held the money. In pursuance of this agreement the defendant took a shop in auction and the licence was obtained in his name and the shop was run in partnership. Shortly afterwards Senniandi withdrew and on the date when he withdrew, 2nd November 1932, the plaintiff signed a memorandum of the agreement in the shop account. The plaint alleges that the defendant had failed to account for the profits and that in accordance with the terms of the agreement the plaintiff is entitled to the return of his capital and the fixed sum of Rs. 100 specified in the agreement or alternatively to an account of the profits of the business. The written statement of the defendant alleges that the defendant took the shop in auction for himself only, that there had been no definite partnership agreement before the sale, that the partnership came into being a month after the sale and that the agreement was that the plaintiff himself should manage the shop and keep the accounts. The defendant pleads ignorance of the memorandum of 2nd November 1932 and alleges that the partnership is illegal being opposed to the Abkari Rules. The trial Court decreed the suit. The learned Subordinate Judge has held that the partnership is illegal as being opposed to R. 27 of the Sales Notification. He has also found that the date of the partnership agreement must have been either the date of the actual auction or shortly thereafter, that both the plaintiff and the defendant took part in the management of the shop, that the plaintiff must be held responsible for the suppression of accounts and that the partnership ended in a loss. He therefore dismissed the plaintiff's suit. The important question is whether the partnership, the existence of which both sides admit, was illegal. R. 27 of the General Sales Notification says:

> No privilege of supply or vend shall be sold, transferred or subrented without the Collector's previous permission.

It is common ground in this case that the bid at the auction and the licence granted in pursuance thereof were both in the name of the defendant alone, that the Collector's permission for a transfer was not obtained and that the capital with which the shop was run was provided by three partners, the plaintiff, defendant and Senniandi, who after a while withdrew. The finding of fact by the Subordinate Judge as to the date of the partnership agreement binds me in second appeal. I may observe that to my mind it makes no difference whether the partnership agreement was entered into before the bid at the auction or after the bid at the auction, provided that the bid was not made in the names of the partners as and for the partnership. I am aware that this view is somewhat at variance with that expressed in certain cases to which I shall refer. But the position seems to me to be this. When there is a partnership for running a toddy shop capital is required substantially for two main purposes. One is to make the deposit of advance rentals required by the Government and the other is to make the advances necessary to the owners of the tree and the tappers who are to supply the toddy.

There are, I think, four likely ways in which persons may be associated for the purpose of financing such a trade. There is the simple case in which *A* and *B* form a partnership, take a shop at auction in their joint names, get a joint licence and run the shop jointly. Provided that the revenue authorities have no objection to the joint licence, there is nothing objectionable in such a partnership. Secondly, there is the case in which *B* purchases the right to a licence in auction with funds supplied by *A*, agreeing to return to *A* the money advanced together with interest or a fixed share of the profits, *A* having no proprietary right in the business and no concern therein except the remuneration for the advance which he has made. In such a case *A* is not a partner, but a mere financier and there is no question of any transfer of a right to vend. Then there is the case in which *A* and *B* agree together that *B* shall bid for a shop and get a licence in his name but work it for the partnership of *A* and *B* who shall be joint proprietors of the shop and shall share profit and loss. It seems to me that in such a case even though the partnership be formed before the auction, the agreement necessarily implies a transfer of an interest in the right to vend from *B* to whom it has been granted by the Collector to the partnership of *A* and *B* and I cannot myself see how the fact that the partnership was formed before the bid for the shop makes any difference; for that which *B* gets is what has been granted to him and the proprietary right vests in the person to whom the grantor makes the grant; and if the right so vested by virtue of a private agreement becomes the property of two persons in partnership, there must necessarily be a transfer from the grantee to the partnership.

Fourthly, there is the still stronger case with which we are now concerned, in which after *B* has successfully bid for a shop at the auction, but before the sale has been confirmed and the licence has been issued, *B*, for the purpose of financing the business, enters into a partnership with *A*, whereby *A* and *B* shall be joint owners of the business, sharing the profit and loss, *B* being responsible for the actual management of the shop. Here again it seems to me to be apparent that the Government makes a grant of the right to vend to an approved bidder *B* and to nobody else. This right to vend rests only in the person to whom the Government makes the grant. In order that the partnership shall become the proprietor of the business, the main asset of which is this licence, there must necessarily be an unauthorized transfer which is obviously opposed to R. 27 of the Sales Notification.

On the findings in the present case it must be held that the defendant made the bid on his own account and that the Government granted the licence to the defendant personally. Before this licence had been granted the defendant had entered into a partnership with the plaintiff and another, and though the precise terms of that partnership may be to some extent in doubt, I do not think there can be any doubt that it was a partnership conferring upon the partners a right to proportionate shares in the profit and the liability to proportionate shares in the loss and a proprietary right in the assets of the business. It is argued that from the terms of Ex. A the memorandum executed by the plaintiff and Senniandi nearly a month after the licence had been issued, it must be inferred that the defendant was solely in management of the shop. It seems to me that this memorandum does indicate that the defendant was in charge of the shop and remunerated by the partnership for his work therein. At the same time the memorandum clearly indicates that the other partners had duties which are not stated and it also clearly indicates that they were joint proprietors of the business. They could only become proprietors of the main asset of the business, namely, the licence by means of a transfer which is illegal.

The matter seems to me to be entirely covered by the decision of the Full Bench in 58 Mad 727,[1] which was also a case in which the partnership agreement was made after the auction and before the issue of the licence. There the learned Chief Justice points out that though it is not illegal to form a partnership with the idea at a future date to get an abkari licence in the names of all the partners, it is illegal if a person who has successfully bid at an auction contracts that the licence which he hopes subsequently to obtain shall be made the asset of a partnership which is formed to finance the business, without the permission of the Collector. My attention has been drawn to the decision of Venkataramana Rao J. in 70 M L J 691,[2] wherein it was held that when there is a partnership formed before the date of the grant of a licence to sell toddy and there is no proof that any person not mentioned in the licence actually interfered in the business of the toddy shop the partnership is not illegal. With the greatest respect to the learned Judge, I find myself unable to agree with the reasoning of this decision, nor to understand the way in which the Full Bench decision just referred to has been distinguished.

---

[1] Rama Naidu v. Seetharamayya, (1935) 22 A I R Mad 440=155 I C 544=58 Mad 727 = 68 M L J 570 (F B).

The learned Judge states the Full Bench decision is only authority for the position that where a partnership is entered into subsequent to the grant of the licence it would be illegal. This seems to me to be a misreading of the facts which formed the basis of the Full Bench decision. It appears from p. 733 of the Full Bench decision that the auction in that case was held on 30th July 1927. The promissory note issued in connexion with the partnership agreement is dated 17th August 1927 and the licence was issued on 1st October 1927. So it is clearly a case of a partnership agreement entered into after the auction and before the licence. Moreover I am of opinion that the reasoning of the Full Bench covers even the case of partnership agreement anterior to the bid. If the bid is in the name of one individual with the intention that the licence shall be granted to that individual and the licence is granted to that individual, even if he has by an anterior agreement undertaken that the licence shall be the property of a partnership, there must be a transfer of the ownership of the licence in order to fulfil the terms of the partnership. We are, however, in the present case not actually concerned in view of the findings of the Court below with a partnership agreement anterior to the auction. In the view that I take, the partnership agreement which is contemporaneous with or subsequent to the auction, contemplating that the proprietary interest in the business carried on by virtue of the licence shall become the property of a partnership, necessarily implies a transfer which is opposed to R. 27 of the Sales Notification and is therefore illegal. I agree with the learned Subordinate Judge and dismiss the appeal with costs. Leave refused.

O.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 707

WADSWORTH J.

Parappil Assya Umma — Appellant.

v.

Paloonteakath Moossa and others — Respondents.

Second Appeal No. 436 of 1935, Decided on 18th April 1939, against decree of Dist. Court, North Malabar, in A. S. No. 276 of 1932.

(a) Civil P. C. (1908), O. 41, Rr. 27 and 29 —Failure of party to examine material witness even though that witness was available is not ordinarily sufficient reason to examine him in appeal.

When an essential piece of evidence, obviously necessary for the proof of a party's case and available to that party, has not been adduced in the trial Court, the Appellate Court will not ordinarily allow the production of the missing evidence in appeal, merely because the trial Court has commented adversely on the failure of the party to prove his case as completely as was obviously necessary: *A I R 1931 P C 143, Rel. on.* [P 709 C 1]

The failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though there may possibly be circumstances in which such a procedure would be justified, as, for instance, if the whole case was in such a muddle that the Judge was unable to pronounce a satisfactory judgment without further material. [P 710 C 1]

(b) Civil P. C. (1908), O. 41, Rr. 27 and 29 —It cannot be said that, in all cases where there is no recorded objection to admission of evidence in appeal, provisions of Rr. 27 and 29 should be ignored.

It is true that when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. But it cannot be said that in all cases where there is no recorded objection to the admission of evidence in appeal under O. 41, R. 27, the provisions of R. 27 and the procedure laid down under that rule and under R. 29 can be treated as of no importance. [P 709 C 1, 2]

P. Govinda Menon—*for Appellant.*

K. Kuttikrishna Menon — *for Respondents.*

Judgment.—This appeal arises out of a suit for maintenance by a Mahomedan wife who is now a widow. The defence was that she was divorced in 1919 by her husband and the evidence was mainly directly to the factum of divorce. There was a remand by the District Judge who first heard the appeal for a decision on the question, "what is the school of law governing the parties" and fresh evidence was allowed on this question. When the case was re-heard by the trial Court both parties agreed that they were governed by the Shafi-Sunni law and the trial Court reiterated the previous finding that there was no divorce. In the course of the judgment he found it necessary to make observations regarding the failure of the defence to examine the Kazi alleged to have received the divorce letter and to have maintained the register of divorces and he observed that Ex. II, a register produced by the Mukri of the mosque, did not appear to be a regular book kept by the Kazi. When the matter came up again in appeal, there was a fresh District Judge who in the course of arguments appears to have decided to permit the defendants to examine the Kazi. On 15th November 1934 the B diary contains the following entry: "Arguments closed for the present. Adjourned to 6th December 1934 to enable the appellants to examine Kadiar." On the same day the defendants presented a petition supported by an affidavit requesting that the Kazi be summoned and examined, the only reasons given being that the Kazi was cited in the lower Court as a witness to prove the fact of divorce, that he did not appear in person and sent certain documents through the Mukri that his evidence was most material and that he could not be examined in the lower Court as he did not appear in person and the evidence on record therefore was to some extent incomplete. It does not appear that any notice of this petition was given to the plaintiff and the order consists of the one word "allowed" written in the handwriting of somebody also, presumably a clerk, and initialled by the learned District Judge. The judgment contains the following reference to the admission of this further evidence in appeal:

---

[2] Rangaswami Pillai v. Narayanaswami Naicken, (1936) 23 A I R Mad 557=162 I C 266= 70 M L J 691.

> In the course of the arguments it became clear that the most material evidence regarding the factum of divorce could be furnished only by the Kazi, to whom the deceased Athermankutti is said to have communicated a notice of the talak. In these circumstances the prayer of the learned Advocate for the appellants that the Kazi should be summoned and examined was granted.

Then later on the learned Judge observed:

> His evidence fills up the serious gaps that existed in the previous evidence produced by the defendants and leaves no room for doubting that Ex. 2 as well as the new registers now marked Exs. 2 (a) and 2 (b) are genuine documents kept under the direction and supervision of the Kazi.

It is contended for the plaintiff, who is the appellant here, that the judgment of the learned District Judge is vitiated by the irregular admission of fresh evidence in appeal contrary to the provisions of O. 41, Rr. 27 to 29, Civil P. C. It is to be noted that the fresh evidence admitted by the learned District Judge consisted not only of the oral evidence of the Kazi but also of two documents, for the admission of which there is no specific prayer or order or any reason given other than the passage from the judgment just quoted. O. 41, R. 27 provides for the admission in appeal of documents wrongly rejected by the trial Court —a provision which has no application here — and also provides that further evidence may be admitted if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. R. 29 provides that where additional evidence is directed or allowed to be taken the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the point so specified. These provisions have been the subject of many decisions, one of the most authoritative being the case in 10 Pat 654[1] where the Judicial Committee lays down the principles which should guide an Appellate Court in admitting or refusing to admit fresh evidence in appeal. Their Lordships point that such evidence can be admitted under cl. (1) (b) of R. 27 only when the Appellate Court requires it or finds it needful. It is also pointed out that the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. They add that the power so conferred ought to be very sparingly exercised and that one essential requirement is that the new evidence should have a direct and important bearing on a main issue in the case; and they observe that whenever the Appellate Court adopts the procedure laid down under R. 27 it is bound to record its reasons for so doing and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

It is, I think, well established that additional evidence can only be admitted in appeal when the Appellate Court itself finds a necessity for the admission of such evidence in order to pronounce a satisfactory judgment and that the power embodied in O. 41, R. 27 is not a power to give to one party an opportunity to fill up the gaps of a badly prepared case. Prima facie when an essential piece of evidence, obviously necessary for the proof of a party's case and available to that party, has not been adduced in the trial Court, the Appellate Court will not ordinarily allow the production of the missing evidence in appeal, merely because the trial Court has commented adversly on the failure of the party to prove his case as completely as was obviously necessary. If the Court finds that certain missing evidence is necessary to enable it to pronounce judgment, the Court should record an order to that effect and should specify the points to which the evidence is to be confined. The question whether any omission by the Appellate Court to record its reasons and to provide materials showing that the additional evidence is admitted for proper reasons, will vitiate the judgment, must depend to some extent on the circumstances of the case. It is, I think, established that when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. So much can be inferred from the observations of the Privy Council in 36 Cal 833[2] at p. 839. Mr. Kuttikrishna Menon on the strength of one sentence in the same passage has advanced the contention that when there is no objection to the admission of fresh evidence in appeal, the correctness of the admission of that evidence and the regularity of the proceedings admitting it are not matters which can, in Second Appeal, form a ground for reversing the judgment based on that evidence. The passage in the judgment of the Privy Council on which reliance is placed consists of this :

---

[1] Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

> It is objected secondly that the admission of the account books on appeal was irregular, but there is nothing to show that the admission was objected to at the time.

The judgment contains no further discussion of this point and though the introductory matter of the report contains extracts from the judgment of the High Court under appeal, it is not clear what were the account books to which their Lordships refer or what were the circumstances in which those account books came to be admitted. It seems to me impossible to treat this brief observation as authority for a rule that in all cases where there is no recorded objection to the admission of evidence in appeal under O. 41, R. 27 the provisions of R. 27 and the procedure laid down under that rule and under R. 29 can be treated as of no importance. The position on the facts in the present case is that there is no proof either that there was or was not any objection to the admission of this evidence. The probability seems to me from the record in the B diary and the way in which the order on the petition was prepared that the learned District Judge must himself have expressed the opinion in the course of the argument that fresh evidence should be admitted. In such circumstances it may well be that the counsel for the plaintiff may have considered that no opportunity for objection remained. Now it seems to me that the absence of objection can only be regarded as a factor of importance when in the circumstances it appears to have been equivalent to a consent. In the present case though doubtless the plaintiff's counsel may have been aware that the learned District Judge had expressed an intention to admit the evidence of the Kazi, we do not know whether this intention was expressed after an objection had been heard and considered or whether no opportunity for objection was allowed. It cannot, I think, be inferred that there was anything in the nature of an acquiescence in or a consent to the taking of further evidence. With reference to the admission of the two additional documents, there is no indication that this was contemplated at the time when the learned Judge permitted the examination of the Kazi. The probability seems to me to be that these two documents went into the record as incidental to the examination of the witness.

Now if the judgment had embodied a statement of the reasons for admitting this additional evidence sufficient to indicate that the learned Judge had applied his mind to the law on the subject and with reference to that law had come to the conclusion that this additional evidence ought to be admitted under the terms of O. 41, R. 27 (1) (b), it might be contended that the failure to make any contemporaneous record of the reasons for admitting the evidence or of the points to which the evidence was to be confined, though irregular, was not a sufficient ground for rejecting that evidence or reversing the judgment based upon it. But I cannot find any such materials in the judgment of the learned District Judge. The reason which he gives for admitting the evidence of the Kazi is that the Kazi is a most material witness and that his evidence fills up the gaps in the case. The fact that the Kazi was a material witness must have struck anyone responsible for the preparation of the defendants' case and it would appear that there was no practical difficulty about getting the evidence of the Kazi who lives quite near the Court.

---

[2] Jagarnath Pershad v. Hanuman Pershad, (1909) 36 Cal 833=3 IC 465=36 IA 221 (PC).

I am of opinion that the failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though there may possibly be circumstances in which such a procedure would be justified, as, for instance, if the whole case was in such a muddle that the Judge was unable to pronounce a satisfactory judgment without further materials. But it does not seem to me to be right to allow a party to abstain from producing evidence which is obviously necessary, in the hope that if adverse comment is made upon the absence of this evidence, the deficiency can be supplied in appeal. To my mind it is essential to insist that ordinarily a party should prove his case in the trial Court and that it is only in exceptional circumstances for which R. 27 provides that the Court may, if it finds further evidence necessary, permit that evidence to be adduced in appeal. I am therefore of opinion that the evidence of the Kazi and the two exhibits, namely Exs. 2 (a) and 2 (b), proved through him were wrongly admitted. As the judgment of the learned District Judge has been largely influenced by that evidence, the appeal must be allowed and remanded for fresh disposal by the learned District Judge on the materials available excluding this additional evidence. Costs throughout will abide by the result. Leave to appeal is refused.

O.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 710

BURN AND MOCKETT JJ.

In re Kattameedi Chenna Reddi and another — Prisoners.

Referred Trial No. 114 and Criminal Appeals Nos. 469 and 470 of 1939, Decided on 7th November 1939.

(a) Criminal Trial—Evidence — Medical evidence from text book showing time of death by reference to blisters on dead body—Value of.

Medical evidence from text books showing the time of death from appearance of blisters on the dead body is not of value unless it is exhaustive with regard to all possible circumstances. [P 711 C 1]

(b) Evidence Act (1872), S. 27 — Duty of police recording statement of accused.

The duty of the police, if they desire to record a statement of the accused, is to record it as given and to leave it to the Court to decide what evidence is admissible: *AIR 1939 Mad 15, Ref.* [P 714 C 1]

(c) Evidence Act (1872), S. 27 — It is first statement of accused that leads to discovery of fact if fact is discovered.

It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered : *A I R 1937 Mad 618 (F B), Ref.* [P 714 C 2]

(d) Criminal Trial—Evidence—Identification —Value of.

It is not illogical to say that the evidence of identification by itself might be unreliable, but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. Hence, when a man is identified as being one of the persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is reasonable to hold that he was concerned in the murder in the absence of any explanation. [P 715 C 2; P 716 C 1]

(e) Criminal Trial — Murder — Sentence — Youth itself is not reason for not passing death sentence.

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder. [P 716 C 2]

C. Narasimhachariar and M. Ranganatha Sastri — *for Accused.*

Public Prosecutor — *for the Crown.*

Mockett J. — Accused 1 and 2 together with one Guddi Peeran were charged before the learned Sessions Judge of Cuddappah with the murder on 12th March 1939 of a woman Golla Nagamma. Guddi Peeran who was accused 3 was acquitted ; accused 1 and 2 were convicted and sentenced to death and they now appeal. The plan Ex. P indicates roughly the scene of Nagamma's death. She lives at Venkatapuram which is 2½ miles from Prodattur. On the 12th March, some time before midday, she was alive. P. W. 3, her husband, said that she gave him his food before he left for Prodattur, and P. W. 2, her sister, was with her in her house on that morning. Some time after noon she was found dead, having been throttled. There is no doubt whatever that she met her death at about midday on the 12th. No cross-examination was addressed to her sister, P. W. 2, or to her husband, P. W. 3, to suggest that the deceased had in fact met her death long before noon on the 12th, even so early as late on the previous night. This aspect requires a passing reference because the Lady Sub-Assistant Surgeon, relying largely on statements in text-books, was inclined to say that from the appearance of blisters on the body death must have taken place from 22 to 35 hours prior to her examination which was at 7 A. M. on the 13th. Even 22 hours before 7 A. M. when blisters were seen on the body would mean, if the doctor's premises are correct, that the woman was alive in the early hours of the 12th; and 36 hours before would mean that she met her death on the 11th.

Theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. This body had been left in a March sun from about noon to sundown on the 12th, if the prosecution story is correct, and all night in the open air. The text books do not deal with circumstances such as these, but ordinary experience shows that in those circumstances decomposition sets in with great rapidity. It is notorious that bodies are burnt or buried in this country within a few hours of death. We should require the clearest possible evidence of the time when blisters appear under circumstances such as those before us in order to prefer the deductions based on such theories to the clearest evidence of the fact that this woman was alive late in the morning of the 12th. There is no question in our minds that she met her death at about noon on that day. It is clear also from the medical evidence that she was strangled. P. W. 2, Sayamma, claims to have witnessed Nagamma's death. She bears out P. W. 3, the husband, who says that he had gone to Prodattur on the morning of the 12th for work. P. W. 2's story proceeds as follows: The deceased was wearing, as was her custom, on her body gold katlu, gold kantini gundulu, gold thalakulu, gold rettakadiyam, gold bendu kammalu, gold upper ear-rings and silver kala kadiyalu. P. W. 2 took the buffaloes out leaving her sister in the house. She grazed the buffaloes, brought them back, collected the buffalo dung and stacked it. A little before noon she returned home and told her sister that she had stacked the collected buffalo dung near the palmyrah tope. The deceased left, bidding P. W. 2 to follow after she had her food. When she left the deceased was wearing the jewels mentioned.

After her meal P. W. 2 went to the scene and states that she saw accused 1 "accompanied by two strangers" throttling her sister. Her conduct was then just what one would expect of a little girl, namely she became afraid and ran home and reported the matter to her aunt and three other persons who have not been examined. There is however ample evidence on the record that this little girl at once reported to her aunt and told her what she had seen. P. W. 6, Chinna Bali, bears out the latter part of P. W. 2's statement. He says that P. W. 2 came crying and told P. W. 5 that accused 1 and two strangers were throttling and killing her sister. It is convenient to mention here that the examination-in-chief in this case does not appear to have been very satisfactory. The statement of P. W. 2 that she saw the accused accompanied by two strangers throttling her sister was obviously not an adequate recording of her evidence; but it is plain beyond doubt that she at once reported to her aunt in the hearing of others that all three were throttling her sister deceased, and no cross-examination was directed to suggest that the two strangers were not taking part.

It is obvious from the learned Judge's judgment who after all recorded the evidence that in the words of his judgment "there she (P. W. 2) saw the three accused in the act of throttling the deceased." P. W. 6 and others went to the scene and P. W. 6, at the request of P. W. 2, went to Prodattur to tell P. W. 3 and he found P. W. 3, told him and brought him back to the village. P. W. 2 identified two of the jewels — kantini guntulu and bendu kammalu —after the accused's arrest. She says she was able to identify the bendu kammalu especially because there was a dent on one side of it due to her niece (the deceased's daughter) treading on it. There remained on the body the gold thalukulu, gold upper earrings and the silver kala kadiyalu and the other jewels were missing. It does not seem to us that any cross-examination was addressed to P. W. 2 to suggest that her identification of the jewels was faulty. It may be said that the cross-examination in the case of accused 1 was especially directed to suggest that she was swearing falsely owing to enmity against accused 1 and naturally her identification of accused 2 and 3 was questioned. It should be stated here that there was material on the record brought out by the defence suggesting that accused 1 had previously been involved in a case of theft, for it appears, according to Ex. 6, that the deceased had given information regarding this to the authorities and that as a result the village elders ordered the accused to pay Rs. 80 to Kondayya, the man from whom the jewels had been stolen.

The defence relies on this incident to suggest that it was for this reason that accused 1 has been implicated in this case. This was put directly to P. W. 3 in cross-examination. P. W. 3 received the news at about 4 P. M. from P. W. 6 — it may be stated that some of the times are vague in this case — and he (P. W. 3) returned at once to Venkatapuram. He sent P. W. 11 to fetch the village munsif who resides in Prodattur. P. W. 3 has been much criticised. His conduct is said to be remarkable. Why did he not when he received the news at Prodattur at once complain in Prodattur? And why did he go first to his village? The answer to all this is that it is unsafe to say what any man might or might not do on receiving the news that his wife had been strangled. It is at least safe to say that there is nothing remarkable in his at once going to where the body of his wife lay. The village munsif states that he was informed (and it must have been at about 5 o'clock) by P. W. 5 whereupon he proceeded to the spot and examined P. W. 3 at the scene. He states that he recorded P. W. 3's statement but did not take his thumb impression. The reports Exs. D and D-1 were sent to the Sub-Magistrate and the police. That by the police was received at 10-20 P. M. and by the Sub-Magistrate at 1 A. M. P. W. 3 stated in his evidence that he gave a dhava — or complaint — to the village munsif and that it was attested by five persons including P. W. 11, but the village munsif states that no written complaint was given and P. W. 11 states he knows nothing about this dhava. On this the defence build the theory that a written dhava was given stating probably that persons other than the accused had committed the murder or that persons unknown had done it, that it has been destroyed after it was decided to foist this case on accused 1.

We entirely reject this theory. Exs. D and D-1 were sent by 8 in the evening. They are consistent with the prosecution case as they name accused 1 and mentioned two strangers and give in detail the stolen jewels and that P. W. 2 saw what happened. It is extremely unlikely that the village munsif was participating in the concoction of a false case. The evidence for the prosecution of many different people had been consistent throughout that this little girl at once identified accused 1 together with two strangers as the murderers. The real question in this case is whether the identification of P. W. 2 and that of other witnesses to whom reference will be made taken with further evidence relating to dealings with these jewels by the accused, is sufficient as a whole to bring home the guilt for this crime. We accept the position that P. W. 2 reported in the manner she says she reported. We think there is no ground for supporting that this is a foisted case. It is quite possible that P. W. 3 has confused the statement he made to the Magistrate with the dhava. It must be remembered that at the time he must have been suffering from great mental distress and his memory may not be accurate. But we think the evidence of the munsif P. W. 13 entirely disposes of a wholly concocted case. There is no cross-examination addressed to him, a munsif of 23 years standing on which it can be said that he was a party, as he must presumably have been, to such a conspiracy.

The criticism that before sending his report he preferred to go to the spot does not, in our view, affect his credibility in any manner whatever. The report of the murder was second hand hearsay and there was nothing unreasonable under the circumstances in his deciding to verify the fact. That P. W. 2 immediately reported that she had seen accused 1 and two strangers murdering the deceased is borne out by P. Ws. 4, 5 and 6. P. W. 2 is the only eyewitness who claims to have witnessed the murder, but other witnesses say they saw accused 1 and two strangers near by at or about the time. Those witnesses are P. Ws. 7, 8, 9 and 10, all villagers of Venkatapuram. They all claim to have seen the accused and two strangers in the neighbourhood of the scene of the crime shortly after about midday. P. W. 7 was in his mango tope. Accused 1 and two strangers, according to him, were going towards Prodattur coming from the west. Nagamma was murdered a little away to the west of this mango tope. At 1 P. M. the witness went home and learnt from P. Ws. 4 and 6 what had happened, whereupon the witness stated that accused 1 and two strangers had been seen by him going towards Prodattur. P. W. 4 was not asked whether P. W. 7 spoke to him and therefore, P. W.

7's statement to P. W. 4 should not have been admitted in evidence. This witness also claims to identify the jewels of the deceased. The witness states that he identified the three accused at an identification parade. It may be mentioned that this witness together with the other Venkatapuram witnesses was examined on the morning of the 13th of March. The identification of the accused and of the jewels by this witness was attacked by the defence.

As to the jewels, neither by the prosecution nor by the defence was the question as to how he was able to identify the jewels fully investigated. P. W. 8 was looking at his buffaloes in the neighbourhood and he tells the same story. Here again, the inadequacy of the examination-in-chief is apparent. This witness was allowed to give the effect of conversations between him and the villagers on his return, but the villagers were not asked about those conversations. P. W. 9 had gone to plough up the onions in his field. He too states that he saw the accused in Kalamalla Venka shown on the plan. He describes how they were occupied. P. W. 10 says he was grazing goats and actually saw accused 1 and two strangers. The evidence of these witnesses can be dealt with together. On the assumption that they are giving honest evidence, it is difficult to criticize the identification of accused 1 who belonged to the same village, but their identification of accused 2 and 3 is naturally vulnerable because they were strangers. The identification parade was held on 17th March in the morning. The conventional mahazar, Ex. Q was taken and signed by P. Ws. 21 and 22. This identification parade was attacked as identification parades invariably are. P. W. 21 says that the identifying witnesses had no opportunity to see accused 2 and 3 before identifying them when they were mixed up with about 40 persons. In cross-examination he said that the lock-up doors provided with iron bars had no shutters and that persons inside the lock up can be seen from the verandah. Apparently a number of persons interested in the case had come to Prodattur on the 16th and at that time accused 2 and 3 were in the lock up. The learned Judge on this says:

> It is seen from the evidence of P. W. 21 that persons from Venkatapuram had ample opportunities to see accused 2 and 3 in the police lock up. No reliance can therefore be placed on the evidence of the identification.

It seems to us that that finding is not wholly justified, and does not accurately represent the evidence of P. W. 21. It would appear that, if his view is to be accepted, the only lock up in which persons intended for identification can be safely put is one without any bars or windows, which would hardly be possible in the climate of Madras. It does not follow that, because the witnesses might have seen the accused, they did in fact see them. However, the learned Judge took the view that the identification of accused 3 was unsatisfactory in the absence of further evidence and acquitted accused 3. Reviewing the evidence so far as it stands, the position is that P. W. 2 claims to have seen the murder and she at once reported it to her aunt. P. Ws. 7 to 10 claim to have seen the accused in the neighbourhood of the scene of murder at about the time of the murder. So far as accused 3 was concerned, that is all the evidence, and the learned Sessions Judge thought that that evidence was insufficient to convict accused 3. There was however in the case of accused 1 and 2 further evidence. It is obvious that, if that evidence was accepted, the evidence of P. W. 2 must obviously be true and it is probable that the evidence of P. Ws. 7 to 10 was also true although, if they were untruthfully reinforcing the case, it does not follow that the evidence of P. W. 2 is untrue.

It will be remembered that two of the jewels missing from the body of the deceased woman were katta kadiyam and bendu kammadu, both of gold. P. W. 18, a shroff in Prodattur town, says that accused 1 came to his shop at about 3 o'clock on 12th March giving the name of Ganga Reddi and sold the above jewels for which he was paid Rs. 59-1-0 and his thumb impression taken in the account book. Ex. F is the entry in the book and Ex. F-1 is the thumb impression. It is not denied that this thumb impression is that of accused 1. P. W. 18 says he melted the katlu and kadayam but retained the kammalu and that he sold the gold of the katlu and kadayam to one Venkatasami who was not examined. The police four days later came with panchayatdars. Accused 1 pointed out P. W. 18 to the police and at the request of the police P. W. 18 produced the kammalu, M. O. 2. The date of Ex. F appears at the top of the page above another entry. It is mistakenly written as Sunday, 6th Bahula when it should be Sunday, 7th Bahula. The correct date is the 6th, being 11th of March, but an examination of the account book shows that this mistake is a continuation of the same mistake which has been made earlier in the book and no significance can be attached to it.

This witness was vehemently attacked by the defence and the reasons for the attack may best be stated by the accused's answer to his evidence. It is a complete denial that he ever went to the shop. He states that the thumb impression was obtained from him under pressure at the police station by the police who had taken the book of P. W. 18 for the purpose. The kammalu M. O. 2 is stated not to be that of the deceased at all but one bought from D. W. 1, a Prodattur shroff, who said that he himself sold this jewel to P. W. 18 on the 15th. It is a fact that Ex. 23, P. W. 1's book, shows a sale of bendu kammalu, corresponding precisely in weight to M. O. 2. It must be remembered that M. O. 2 was identified by P. W. 2 because it had a dent caused by a child treading on it. P. W. 3 also identified it. It has in fact got such a dent. It appears, and it is obviously a fact, that the accused made a statement to the police which might well be admissible under S. 27, Evidence Act, and the statement was admitted by the Magistrate. The statement was made in the presence of panchayatdars, but it is obvious that this was not the first statement that had been made. A statement had been made to the police which P. W. 20 had thought it wise to get repeated in the presence of panchayatdars.

It is obvious that the statement cannot be complete. It is remotely improbable that the accused said simply, "I and accused 2 and 3 removed the jewels from the person of the deceased" without any sort of initial narrative as to how he came to be where the deceased was, or whether the woman was alive or dead at the time. This is an example of the mutilation of a statement made by the accused person, due apparently to the Circle Inspector supposing that it was his duty to decide what evidence was admissible and what was not. The duty of the police, if they desire to record a statement, is to record it as given and to leave it to the Court to decide what evidence is admissible. In 1938 M W N 1118[1] this Court had condemned the practice of police officers giving not statements made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars. Such statements have been held to be inadmissible. The result of the handling of this statement by the police is that what probably was a simple and admissible statement under S. 27 must, in our opinion, be ruled out entirely for reasons which may be re-stated as follows: (1) that the statement is obviously incomplete and (2) that obviously what was stated by the accused was a repetition of something that he had previously said to a police officer. It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered.

The attention of the trial Judge may usefully be directed to the Full Bench decision of this High Court in I L R (1937) Mad 695.[2] Excluding any statement by the first accused, there remains the fact, if true, that he pointed out P. W. 18 to the police and that P. W. 18 stated that on the afternoon of the murder the accused sold to him M. O. 2 said to be the property of the deceased. It is most important to remember, when considering whether this story can be accepted, that on 15th March, the date of Ex. 23, the police had no idea that the first accused was supposed to have sold the kammalu to P. W. 18 because it was not until the next day, the 16th, that he was brought to Prodattur having been arrested at Thumulur and on that day took the police to P. W. 18. It is therefore incredible that the police should be attempting to identify the accused with a jewel procured from D. W. 1 on 15th March when they did not know until the 16th of any connexion between P. W. 18 and the accused. Evidence of this is based largely on the book of D. W. 1 and it is unquestionably remarkable that Kammalu of precisely the same weight as that said to have been taken from the deceased's body is shown to have been sold on the 15th. But it is curious that D. W. 1 was never asked in chief to identify the kammalu at all; he was only asked by the Court. The book of D. W. 1 is not above suspicion. The explanation about the sheet corresponding to Ex. 23 being blank that it was the last day of the financial year is not very convincing. So far as the time of these events is concerned Ex. 23 is the first entry of the day on the 15th and the accused was arrested at 4-30 on that day at Tumulur. The theory of this jewel being foisted must in our opinion be rejected.

---

[1] Public Prosecutor v. Subba Reddi, (1939) 26 A I R Mad 15=180 I C 590=40 Cr L J 433=1938 M W N 1118.

[2] Athappa Goundan v. Emperor, (1937) 24 A I R Mad 618=171 I C 245=38 Cr L J 1027=ILR (1937) Mad 695=(1937) 2 M L J 60 (F B).

The question arises, was M. O. 2 the property of the deceased? Its identification by those who are familiar with it, especially of the description of the dent on the side by P. W. 2, seems to us entirely satisfactory. P. W. 3's identification of both M. O. 1 and M. O. 2 was attacked.

The defence were driven to such criticisms as that P. W. 3 hesitated in his identification of M. O. 1 in the Magistrate's Court, a circumstance satisfactorily explained by him by the statement that he was much overcome with being confronted by his murdered wife's jewels, because that this woman was murdered there is no doubt. Another criticism was that P. W. 3 said that he did not know where his wife got the kammalu from and that she had told him that she bought it. But these criticisms entirely disappear in the face of the fact that the accused took the police to P. W. 18, that there was a kammalu and that in P. W. 18's books was the thumb impression of the accused and that, as will later be shown, accused 2 revealed where M. O. 1 was hidden. The alternative, accepting those facts, is to suppose that the police by some mysterious manner, having heard that a kammalu was in the possession of P. W. 18, thought fit to invent the story that the accused had taken it there, and having invented it obtained by force a thumb impression of the accused in the book of P. W. 18. If the police had descended to this method surely it may be supposed that they would have ascertained the source of the foisted jewel and arranged that that source should be amenable to their wishes as well.

It is impossible for the defence in this case to avoid the argument that, beginning with the villagers and ending with the police, there has been a conspiracy to convict accused 1 of a crime of which at least there is no evidence. The villagers are supposed to have selected him because he had been concerned in a robbery before and therefore he was the likely person to have committed the murder. This is a theory which at least requires consideration, but the learned counsel for defence has been quite unable to suggest any explanation as to why, having selected accused 1 as the victim, the villagers have elected to complicate what would have been a relatively simple case by attaching to him two unidentified strangers. The only explanation suggested was that, as accused 1 was no more than seventeen, it was safer to associate others with him lest it be said that he was physically incapable alone of murdering the deceased. But why two other men should be introduced has never been explained especially as accused 3 was a Mohamedan. The defence have argued, and rightly argued, that the combination of accused 1, a Reddi, with accused 2, a Hindu of totally different caste and accused 3, a Mohamedan, is remarkable and improbable. It is certainly remarkable; but when considering the hypothesis of a carefully thought out false case the introduction of three such different persons as acting together is equally unlikely. Then, so far as the foisting of the jewels is concerned, why should the police, who could quite easily have 'planted' these jewels on the accused in a simple manner, involve themselves in a much more complicated transaction involving the assistance of a bazar shroff?

The evidence against accused 2 consists very largely of his conduct after arrest in relation to a jewel (M. O. 1) identified as the property of the deceased. It is not illogical to say that the evidence of identification by itself might be unreliable, but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When P. Ws. 7 to 10 identified two unknown persons whom they had no particular reason to notice, it is permissible to doubt whether that identification can be trusted, but when those very people are found dealing with the jewels of the murdered person, it is reasonable to hold that they were making no mistake when they picked out the accused as the culprits. Accused 3 has of course been acquitted, but in the case of accused 2 there is evidence of the precise nature which we have indicated. After his arrest accused 2 told P. W. 23, the Sub Inspector, that the kantini gundulu which came to the shares of accused 2 and 3 was concealed by him in the cattle shed of his uncle and that he would show it. Here again his statement is obviously shorn of much of its context, but there is no reason to suppose that any part of a statement made by accused 2 would have assisted the accused's case nor is it suggested that this was the case. Accused 2 thereupon took the police officer and the panchayatdars to his uncle and removed M. O. 1 from under a slab in the cattle shed.

We have been asked to say that what might have happened was that, after the murder, accused 2 in some way became possessed of this jewel and no hostile conclusion can be drawn from the statement. But when a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is, to put it no higher, reasonable to hold that he was concerned in the murder in the absence of any explanation. What explanation has been given by the accused ? Accused 1 completely denied the offence and said that he was at a jathra in Kothapallee, Cuddappah taluk, where he had gone to stay in his maternal uncle's house three days prior to the occurrence, that after the jathra he went to Tummalur to his relation's house where he was arrested, and that his revelation of P. W. 18 and his thumb impression in the witness's book were induced by police coercion. If that is so, he could have called witnesses to establish an impregnable alibi, but no witnesses were called from his maternal uncle's house to say that he was at Kothapallee three days before the murder or from the other relation's house in Tummulur to say that he was there on the day of the murder itself. As to accused 2, he denies entirely that he ever produced the jewel at all or that he even knows (Muganna) Mugavadu at whose house the kantini gundulu was alleged to have been recovered. Here again we see, according to accused 2, that the police chose for the scene of foisting this jewel on accused 2 the house of a stranger. With regard to this jewel it is true that it is of a sort commonly worn by women, but there is nothing in the evidence of identification to suppose that it was not the property of the deceased. In the case of accused 2 we are invited to say that the whole of the evidence against him is false.

This is a remakable case because of the difference in caste and creed of the three accused and we have already noticed the curious fact that the book entry of D. W. 1 purports to deal with a jewel identical with M. O. 2. But in spite of these matters we are satisfied that the inferences of guilt to be drawn from the evidence are overwhelming and we reject entirely the theory that the charge arising from this combination of facts owes its inception to the hasty — for it must have been hasty—agreement among the villagers of Venkatapuram and that the police gladly and enthusiastically co-operated from the moment the matter came into their hands. The learned Sessions Judge was satisfied and we are satisfied that the evidence brought home beyond all reasonable doubt the guilt of this murder to accused 1 and 2. We therefore confirm the convictions. With regard to the sentence, accused 2 is 25 years old and accused 1 is stated to be 17, although before the Court of Session his age was given as 19. In the case of accused 1, as we have frequently had occasion to remark before, youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder, such as this. We think that the sentences of death were rightly passed and we confirm them. The appeals of the accused are dismissed.

C.R.K./D.S. *Appeals dismissed.*

---

* A. I. R. 1940 Madras 716

KRISHNASWAMI AYYANGAR J.

Sait Sogmull Lachiram, Firm, Tenali — Petitioner.

v.

Vallabhaneni Parandhamayya and others — Respondents.

Civil Revn. Petn. No. 49 of 1937, Decided on 5th April 1940, to revise decree of Sub-Judge, Tenali, in S. C. S. No. 600 of 1934.

*** (a) Provincial Insolvency Act (1920), S. 78 (2) — Proof of debt means that kind of proof only which entitles creditor to have his name entered in Schedule and none other.**

Two conditions have to be satisfied, before a party can claim the benefit of the exclusion enacted by S. 78. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. Proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the Schedule and none other. Evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by S. 49, his name cannot be entered in the Schedule; and however true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above. [P 717 C 2 ; P 718 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 78 (2) — S. 78 (2) incorporates principle of S. 14, Limitation Act.

Section 78 (2) was intended to incorporate the principle of S. 14, Limitation Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say a failure to prove for the debt, would deprive a party of the benefit of the Section. [P 719 C 1]

V. Subramaniam — *for Petitioner.*

K. Kameswara Rao and B. S. Ramachandra Rao — *for Respondents.*

Order. — A somewhat interesting question relating to the construction of the proviso to S. 78 (2), Provincial Insolvency Act, 1920, arises for consideration in this revision petition. The petitioner was the plaintiff in a small cause suit in which he sued to recover a sum of Rs. 1000 on foot of a promissory note executed on 10th April 1930 by respondent 1. The other respondents are the undivided sons of respondent 1. The suit was filed on 12th November 1934, that is to say one year seven months and two days after the period of limitation and is therefore prima facie time barred unless the plaintiff could claim the benefit of an exemption. To this end he relies on S. 78 (2), Provincial Insolvency Act, which runs as follows :

> Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-s. (2) of S. 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :
>
> Provided that nothing in this Section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

Respondent 1 had been adjudicated an insolvent on 14th January 1933, by an order which fixed 14th January 1934 as the last day for applying for discharge. The insolvent defaulted to make the application within time, with the result, that the adjudication was annulled under S. 43 on 16th August 1934. It will be seen that if the period which elapsed from the date of the order of adjudication to the date of the order of annulment, namely one year seven months and two days, is excluded the suit would just be in time. The question is whether the petitioner is entitled to have this period excluded. It may be mentioned that he would be entitled to have one more day excluded as 11th November 1934 the day previous to the institution of the suit happened to be a Sunday. If the Section is applicable, there can be no doubt that the suit is in time. The District Munsif dismissed the suit on the ground that S. 78 is not applicable and that the suit is barred by limitation, as the petitioner's debt though one provable under the Act had not been proved in the manner directed by the Act. It is clear on a consideration of the provisions of Ss. 28 and 78 of the Act, that two conditions have to be satisfied, before a party can claim the benefit of the exclusion enacted by the latter Section. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. There can be no doubt that the debt in suit is one provable under the Act. The question is whether the second requisite has been satisfied in this case; in other words whether the debt had been proved under the Act.

The petitioner here was the petitioning creditor on whose petition respondent 1 had been adjudicated insolvent. It is common ground that the promissory note in suit was the debt on which the petitioner successfully founded his right to present the insolvency petition. It may therefore be presumed that proof of the debt was given under S. 24 of the Act, before the adjudication order came to be made. It is also common ground that no proof as required by S. 49 had been made. Mr. Subramaniam appearing for the petitioner has urged that the word "proved" in S. 78 should receive a liberal interpretation, that S. 49 merely indicates one method of proof, which should not be regarded as the only method of proof recognized by the Act. He has relied on a ruling of the Calcutta High Court in A I R 1929 Cal 159,[1] where Ghose and Bose JJ. have expressed the opinion that S. 49 only specifies a simple mode of proof but does not exclude any other mode of proof, and that a debt should be held proved under S. 78, if it had been proved in the course of the proceedings leading to the adjudication of an insolvent. With respect, I find myself wholly unable to accept this interpretation as correct, whether we look at the meaning of the word itself, or the object behind the proviso to S. 78.

Proof of a debt in insolvency is an expression well known to Courts and lawyers, and there can be little doubt that it is the kind of proof that a creditor is called upon to give in order to enable him to obtain a dividend in the rateable distribution of the assets of the insolvent. "Proof" in this connexion has almost become a word of technical import, and is not to be understood as meaning any kind of proof at any stage of a proceeding without reference to the purpose for, and the manner in which it is given. Proof given and accepted in a Civil Court, and not open to challenge there is still open to question when its validity is impugned in an insolvency Court. Proof of a debt for the purpose of Ss. 11 and 24 is merely proof that a person is insolvent and is in the nature of a preliminary step which leads to the Court taking up the administration of an insolvent's estate, but proof in insolvency is proof adduced after the Court has taken up the administration and in order to enable it to make a proper distribution. Proof under S. 11 is ordinarily in a proceeding between the petitioning creditor and the insolvent, but proof under S. 49, which is proof proper in insolvency, is one to which objection can be taken by the Official Receiver or any of the creditors.

---

[1] Krishnachandra Das v. Jotindra Nath, (1929) 16 A I R Cal 159=114 I C 415=48 C L J 574.

Section 34 defines debts proveable under the Act, and includes all debts and demands except demands in the nature of unliquidated damages arising otherwise than by a contract or a breach of trust. S. 33 calls upon all persons alleging themselves to be creditors in respect of debts provable under the Act to tender proof of their respective debts by producing evidence of the amount and particulars thereof, and then the Court is directed by order to determine the persons who have proved themselves to be creditors, and the amount of their debts, so that it may be enabled to frame the all important Schedule which is to form the basis of the distribution of the realized assets in dividends, subject, of course, to the provisions of Ss. 56, 62, 63 and 64. To no person whose name is not included in the Schedule can a dividend be paid. S. 61 (5) provides that subject to the provisions of the Act, all debts entered in the Schedule shall be paid rateably, and S. 64 relating to the final dividend makes it clear that the property of the insolvent is to be divided among the creditors entered in the Schedule only, and without regard to the claims of any other persons.

I feel no doubt whatever that proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the Schedule and none other. The opposite construction is in my judgment entirely opposed to the fundamental scheme of the Act. It follows that evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by S. 49, his name cannot be entered in the Schedule; and however true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above. The decision of this Court in 58 M L J 170,[2] proceeded on the special circumstances that a decree for the debt had been obtained, after adjudication against the insolvent and the Official Receiver, and the learned Judges while holding that the debt must be taken to have been proved within S. 78 by the decree being obtained, expressly guarded themselves against being understood as laying down a general rule as regards the meaning of the word 'proved.'

It is to be observed that S. 78 was newly introduced into the present Act, in view of the Full Bench decision of this Court in 41 Mad 169[3] that the general provisions of the Limitation Act could not be held applicable to proceedings under the old Act, viz. 3 of 1907. In 42 Mad 319[4] a Division Bench of this Court held that the provisions of S. 15, Limitation Act, could not be invoked so as to secure an exclusion of the time during which an insolvency might be pending, inasmuch as an order of adjudication did not amount to an absolute injunction or stay, but only made it necessary that leave of Court should be obtained before a suit could be filed. The position would be different if leave had been asked for and refused as in that case the creditor would be precluded from pursuing his remedy by suit against the debtor until the adjudication is annulled. It was to meet this situation, that S. 78 was inserted in the new Act. This Section and the amended S. 29, Limitation Act, have tended to remedy the hardship arising out of the Full Bench decision to which reference has been made.

---

[2] Ramalinga Iyer Firm v. Rayalu Ayyar Nagasami Iyer, (1930) 17 A I R Mad 356=122 I C 341=53 Mad 243=58 M L J 170.

[3] Lingayya v. Chinna Narayana, (1918) 5 A I R Mad 213=44 I C 805=41 Mad 169=33 M L J 566 (F B).

[4] Ramaswami Pillai v. Govindasami Naicker, (1919) 6 A I R Mad 656 = 49 I C 625 = 36 M L J 104=42 Mad 319.

The question which arises for consideration here is somewhat different from the question of the applicability of the general provisions of the Limitation Act to a special Act such as the Insolvency Act is, though it does appear to me that the intention behind S. 78 was not to extend the Limitation Act but rather to exclude it. In my judgment, S. 78 (2) was intended to incorporate the principle of S. 14, Limitation Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. The Section withholds help to a person who has not shown due diligence, as where he obtains leave of Court under S. 28 (2) but omits to take action. Similarly, it insists that the creditor should so far as the Act permits, prosecute his claim to recover the whole or portion of the debt, by tendering a proof under S. 49, by which he will be deemed to have proved the debt as held in 57 Mad 767.[5] Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say a failure to prove for the debt, would deprive a party of the benefit of the Section. From what has been said, the petition fails as neither S. 78 (2), Provincial Insolvency Act, nor S. 14, Limitation Act, can avail a party in respect of a debt provable but not proved under the Act. The civil revision petition is accordingly dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

---

[5] Lakshmi Bai v. Rukmaji Rao, (1934) 21 A I R Mad 465 = 151 I C 284 = 57 Mad 767 = 67 M L J 45.

A. I. R. 1940 Madras 719

HORWILL J.

Bava C. Gopalaswami Mudaliar — Appellant.

v.

Annadana Kattalai of Sri Tyagarajaswami, Temple, Tiruvarur by trustee Vaithilinga Pandarasannadhi and another — Respondents.

Second Appeal No. 809 of 1936, Decided on 12th January 1940, against decree of Sub-Judge, Tiruvarur, in A. S. No. 18 of 1935.

(a) Trust — Trustee of temple notwithstanding scheme prohibiting borrowing, borrowing money—Creditor lending it with knowledge of prohibition cannot be compensated for what he has advanced even if money is applied for purposes of temple.

Where the scheme of a temple prohibits the trustee to borrow money and the trustee inspite of the prohibition borrows money, he commits a breach of trust and the creditor advancing money with knowledge of this cannot therefore be heard to say that he was enabling the trustee to perform his duty to the trust. He is therefore not entitled to be compensated for what he has supplied: *(1854) 4 De G M & G 19 and (1860) 54 E R 664, Disting.* [P 721 C 1]

(b) Trust—Principle that creditor advancing money to trust for purposes of trust cannot be defeated by contention that duties could have been performed on less elaborate scale does not apply where trustee is acting contrary to trust.

The principle that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale is true only where a trustee acts in the discharge of his duties as trustee. That principle cannot be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. [P 721 C 2; P 722 C 1]

(c) Contract Act (1872), S. 65 — S. 65 does not apply to contracts deliberately entered into by persons knowing such contracts to be invalid.

Section 65 does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. [P 722 C 1]

K. Rajah Aiyar and R. Sundaralingam— *for Appellant.*

B. S. Ramachandra Rao and K. Kameswara Rao — *for Respondents.*

Judgment. — The appellant brought a suit on two promissory notes for amounts advanced to the Annadhana Kattalai for the necessary performance of the duties imposed on the trust. Defendant 1 was the trustee of the kattalai and defendant 2 was the receiver of the kattalai property, who has since been replaced by the executive officer of the temple. It appears from the plaint that the money was not advanced direct to the kattalai. The plaintiff, who had received a power of attorney from the trustee, was managing the kattalai on defendant 1's behalf, receiving income from the property, and making purchases; and the sum claimed is that admitted by defendant 1 to be due to the plaintiff on account of provisions and other necessaries supplied to the kattalai in excess of the income. The defendants contended that some of the alleged items of expenditure were not true; but it was found that the plaintiff had properly accounted for the money mentioned in the promissory notes and that it was properly expended on the temple. Defendant 2 raised another plea and that was that defendant 1 had no power to borrow money, that the plaintiff knew of it, and that he was not therefore entitled to recover any of the money, even though it might have been true that he advanced it. The District Munsif of Tiruvarur found both points against defendant 2. In appeal, the Subordinate Judge of Tiruvarur agreed with the District Munsif that the plaintiff had properly accounted for all the money advanced; but he held that the scheme which had been framed for the temple by the High Court absolutely prohibited such an advance being made. He therefore found himself constrained to allow the appeal and dismissed the suit.

The attention of the Courts below seems to have been focussed on S. 23 of the scheme, which is to this effect: "All borrowing from and all lending on interest to the funds of the trust is absolutely prohibited." The rest of the Section deals with the punishments to be inflicted in case of a disobedience of this injunction. It has to be noticed that the word "borrowing" is followed by "from" which shows that the prohibition is against borrowing from the funds of the trust. That was not done here; but the Section also prohibits lending on interest to the funds of the trust. If the plaintiff, as the terms of his promissory note suggest, had lent money on interest to the trust—even though it was for necessary purposes —I think such a loan would have fallen within the scope of the prohibition under S. 23. But I do not think that S. 23 as it stands meant to work a prohibition of the supplying of articles for the carrying on of the services of the kattalai. Nevertheless, from a reading of the scheme as a whole, there can be no doubt that the purpose of the scheme is that the trustees should not be left in possession of any money at all. As soon as they collect money, they have to deposit it with the treasurer of the temple, they have to submit a budget to the Board of Control three months before the beginning of each year, and they can only spend money in accordance with the budget as accepted. They are then allowed to draw on the amount standing to their credit in the accounts kept by the treasurer for each kattalai and they may not exceed the budget allotment. There can also be no doubt, on a general reading of the scheme, that it was directly against the principle of the scheme that the trustees of the kattalai should try to circumvent certain Sections of the scheme by taking supplies from a person and contracting some liability on behalf of the trust. That this disobedience of the scheme was not accidental has been proved by the defendant; and the lower Appellate Court has found very clearly that defendant 1 deliberately ignored the scheme. He says in para. 13 of his judgment:

> It would appear that notwithstanding the scheme, defendant 1 as trustee of Annadana Kattalai, was never in the habit of submitting his budget to the treasurer. He himself continued to manage the properties of the Annadana Kattalai as though his powers had not been in any way curtailed or restricted. In consequence of the defiant attitude of defendant 1 it became necessary for the Board of Control to apply for the appointment of a receiver for the purpose of collecting the income of the properties of the Annadhana Kattalai and remitting the same to the treasurer.

The plaintiff was also aware of the prohibition and he knew that defendant 1 was disobeying the terms of the scheme. He had attended the meetings of the Board of Control and he knew that the temple and the kattalais were being managed under S. 3 of the scheme. Although a trustee may not have power to incur debts, yet if a person supplies articles which are necessary for carrying on the services under the trust, then he is entitled to be reimbursed. Two English cases have been quoted. In (1854) 4 De G M and G 19 = 43 E R 415,[1] the directors of a coal-mining company had no powers of raising money except by certain restricted means. They however during the course of the management of some mines in Germany found that they had no money to pay the wages of the miners. If the wages had not been paid, the mines, under the law of the country, would have been closed down and the property of the company would have been lost. It was held that as they had acted beyond their powers as directors and agents in borrowing money, the creditors who had advanced money in order that the miners might be paid, would not be able to have recourse against the company under the Companies Act. Nevertheless, the directors were not merely agents but were trustees of the property of which they were in management; and as trustees they were bound to take all reasonable steps to prevent the property of the company from being wasted. They were therefore not only permitted but bound to borrow money to pay the miners' wages and thus save the property of the company which would otherwise have been lost. In Troup's case, (1860) 29 Beav 353 = 54 E R 664,[2] a somewhat similar case, where directors had no borrowing powers, it was laid down that,

---

[1] Ex parte Chippendale, (1854) 4 De G M & G 19=2 W R 547=23 L T (O S) 200=102 R R 7=43 E R 415.

> where the directors of a company have no power to borrow money, the repayment of money borrowed cannot be enforced by the lender against the company. Yet if the money has been bona fide applied to the purposes of the company, the bona fide lender is entitled to payment as against the company.

The learned advocate for the appellant has also referred to the principle laid down in the leading case (1903) 1 K B 772[3] that where a corporation asked a contractor to perform certain works which were necessary for the carrying out of the duties of the corporation, the corporation could not afterwards refuse to pay the contractor for the work he had done, merely because the contract had not been sealed as required by law and so was void. The principle of *quantum meruit* was applied and it was held that the corporation were not entitled to rely on this fact. It was found that there was an implied contract to reimburse the contractor for any work done by him which was necessary to be done and was required by the corporation to be done. Clearly, (1854) 4 De G M & G 19,[1] and (1860) 29 Beav 353,[2] would not apply to a case where a trustee, far from acting in the interests of the trust and for the trust, acted expressly against the rules which had been laid down for his conduct. In borrowing this money, the trustee committed a breach of trust and the plaintiff knew it. The plaintiff cannot therefore be heard to say that he was enabling the trustee to perform his duty to the trust and was therefore entitled to be compensated for what he has supplied.

With regard to the application of the principle of *quantum meruit*, it may of course be true that if there was no money left to the credit of this particular kattalai and certain services were absolutely necessary, then the plaintiff would be entitled to receive compensation for such money spent as was absolutely necessary. But we do not know what expenditure would have been absolutely necessary in such extreme cases. The plaintiff did not plead this, and the attention of the Courts below and of the parties was not directed to this aspect of the question ; and so we have no material on which to come to a decision as to what expenditure by the trustee, if any, was absolutely necessary. The learned District Munsif, whose judgment is generally followed by that of the Subordinate Judge, says in para. 7 of his judgment :

> So then there is clear proof in this case that as a matter of fact the plaintiff advanced several sums of money as found in the accounts, Exs. A and B, for the supply of articles absolutely necessary for the purpose of the trust in connexion with the daily puja, abhishekam, naivedyam, etc.

He draws this conclusion from certain findings of his in para. 6 of his judgment which he gives in the words used by the clerk of the receiver :

> Until the receiver took charge from plaintiff all the kalapujas were being done properly, all the functions of the annadhana and abhisheka kattalais having been regularly and properly done.

I cannot see how it follows from this that the supply of the articles by the plaintiff was absolutely necessary for the purpose of the trust. A distinction must be drawn between what is necessary for a full and proper conduct of the services, that is what is desirable, and what is absolutely necessary when there are no funds available to meet the full expenses or where the rules prohibit the spending of money unauthorizedly. All these various duties could have been performed on a less elaborate scale; and if defendant 1 had done his duty and had applied to the treasurer for money and the matter had been referred to the Board of Control, the Board would probably have supplied a smaller amount of money which would have permitted the carrying out of these services on a smaller scale. The learned advocate for the appellant has sought to get over this difficulty by quoting the Privy Council decision, 54 I A 228= 50 Mad 497[4] which is to the effect that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale. That is true only where a trustee acts in the discharge of his duties as trustee. That principle could not be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. In such a case both the trustee and the creditor know that the money ought not to be spent.

---

[2] In re Electric Telegraph Co. of Ireland, (1860) 29 Beav 353=54 E R 664=7 Jur (N S) 901= 9 W R 878=131 R R 612.

[3] Lawford v. Billericay Rural District Council, (1903) 1 K B 772=72 L J K B 554 = 88 L T 317=51 W R 630=67 J P 245=1 L G R 535 =19 T L R 822.

[4] Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar, (1927) 14 A I R P C 181=101 I C 545=54 I A 228 = 50 Mad 497 (P C).

It has been pointed out that this contract has to be viewed in the light of the express words used in S. 65, Contract Act, and not by the principles laid down in certain English cases which are less liberal. But the language used in S. 65 shows that it does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. Moreover, it is difficult to see how in this case there ever was a contract—void or otherwise—with the trust. The so-called contract was nothing more than a dishonest device of the plaintiff and defendant 1 to defeat the scheme. In making this promise to pay, defendent 1 cannot be said to have been acting for the trust; and the plaintiff knew it. It follows from what has been said above that the plaintiff is not entitled to recover from the trust the amount claimed by him on the suit pronotes. There is no equitable principle that can be invoked by him which will enable the Court to grant a decree. If he had raised a plea of *quantum meruit* and suitable evidence had been let in, it is just possible that he might have succeeded in obtaining a decree for some part of the sum he advanced; but it is not necessary for me to express any opinion on this point. It is contended that a decree should be given against defendant 1; but defendant 1 did not execute the pronote in his personal capacity, but only as trustee of the institution. A petition has been put in to amend the plaint so that the plaintiff may be given some relief against defendant 1, but even if the amendment were made, the plaintiff could not, for reasons given, be given a decree against defendant 1. The appeal is dismissed with costs of respondent 2.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 722

PANDRANG ROW AND HORWILL JJ.

V. S. Narasimha Ayyar — Appellant.

v.

Allu Krishna Ayyar and others — Respondents.

Appeal No. 15 of 1937, Decided on 1st April 1940.

Tort—Negligence—Articles liable to spontaneous combustion stored in house—It is duty of occupant to keep efficient watchmen on guard and to have reasonable fire equipment ready at hand.

Where a house is being used as a dyeing factory and large quantities of chemicals and mordanted yarn, that is yarn in the process of being dyed, are stored in different parts of the building these articles being liable to spontaneous combustion it is the duty of the person in occupation to have efficient watchmen to guard against spontaneous combustion and to have all reasonable fire equipment ready at hand. [P 722 C 2; P 723 C 1]

S. Nagaraja Ayer and J. R. Alwar Naidu — *for Appellant.*

V. Minakshisundaram and O. V. Baluswami — *for Respondents.*

Pandrang Row J.—The short point that arises in this appeal is whether there was negligence on the part of the appellant which caused the fire on 12th October 1925 which burnt down in part the house belonging to the plaintiffs and in the occupation of the defendants. There can be no doubt—and the fact is indeed admitted—that the house was being used as a dyeing factory and that large quantities of chemicals and mordanted yarn, that is yarn in the process of being dyed, were being stored in different parts of the building. It is clear from the evidence that these articles are liable to spontaneous combustion, and in particular the mordanted yarn. The case of the defendants was that there were watchmen employed to guard against fire and that the usual precautions were taken. The evidence, however, adduced in support of this contention was disbelieved by the Court below and after going through the evidence we see no reason to come to a different conclusion. Only one of the two watchmen was examined as a witness, namely Krishna Ayyar, and he admits that for some time before the fire was observed, he and his fellow-watchman were "dozing" near the gate. Secondly the evidence adduced as regards buckets of water being kept handy to extinguish fire is not worthy of credit and it has been rejected by the Court below which heard it. In fact, the learned Subordinate Judge is not satisfied at all that any watchman was at the premises during the night in question. It is also clearly established that, beyond making a belated call for a fire engine, no real steps were taken by any one interested in the premises to put out the fire. It is certainly noteworthy that while the factory had insured its own goods against fire, it made no attempt to insure the building itself against fire. It must, however, be said that there is no satisfactory evidence in support of the suggestion that the fire was deliberately started.

We might assume for the purpose of this case that the fire was accidental, but the question is whether the accident was due to negligence on the part of the defendant and his servants. On this point, having regard to the nature and quantity of the material stored in the premises, it was clearly the duty of the person in occupation to take special care and precaution against fire and it is clear that no such precautions were taken. It is admitted in the evidence that no attempt was made to rescue anything from the fire, and apparently no attempt was made even to get water from the well hard by. This is a case to which the maxim of *res ipsa loquitar* would apply, having regard to the circumstances of the case. The duty of the person in occupation was clear, having regard to the nature and quantity of the material stored in the premises, namely to have efficient watchmen to guard against spontaneous combustion and to have all reasonable fire equipment ready at hand. In this particular case, there is very good reason to doubt whether any watchmen were actually guarding the premises that night; and even if they did, they were admittedly negligent in the sense that they were sleeping when they ought to have been awake. As regards fire extinguishing appliances, there is no satisfactory evidence that any of them were supplied or were at hand. Even the telephone which could have been used for summoning the fire brigade in time was in a room which was locked and the key was not with the watchmen. On the whole therefore we see no reason to differ from the finding of the Court below that the fire in question was due to negligence on the part of the person in occupation. There is no objection taken to the quantum of damages awarded by the Court below.

An attempt was made to argue that the amount of damages for use and occupation awarded for the period subsequent to the fire ought to be reduced. But no such plea appears to have been raised in the Court below or in the grounds of appeal. We are therefore unable to allow it to be raised for the first time in appeal. It follows that this appeal must fail and it is hereby dismissed with costs of respondents 1 to 4. The appellant must pay the court-fee payable on the memorandum of appeal.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 723

LAKSHMANA RAO J.

P. Gopalachari — Petitioner.

v.

Corporation of Madras — Respondent.

Criminal Revn. Case No. 958 and Petn. No. 908 of 1938, Decided on 20th July 1939, to revise judgment of Third Presidency Magistrate, Egmore, Madras, in M. No. 1380 of 1938.

Madras City Municipal Act (4 of 1919), Ss. 357 (1) and 218—Notice under S. 218 specifying neither particulars of work to be carried out nor fixing time limit — Conviction under S. 357 (1) cannot be sustained.

Where the particulars of the work to be carried out by a person are not specified in the notice issued to him under S. 218 nor is it proved that the time within which the work is to be carried out was specified in the aforesaid notice a conviction under S. 357 (1) for failure to comply with the aforesaid notice cannot be sustained. [P 732 C 2]

V. Rajagopala Mudaliar — *for Petitioner.*

A. Suryanarayanayya — *for Respondent.*

K. V. Ramaseshan — *for the Crown.*

Order.—The evidence justifies the conclusion of the Magistrate that the street in question is a private street, but particulars of the work to be carried out by the petitioner were not specified in the notice issued to him under S. 218, City Municipal Act, nor was it proved that the time within which the work is to be carried out was specified in the notice served on him. The time was not specified in Ex. E, the copy of the notice on which his acknowledgment for service of notice was obtained, and Ex. E-1, the office copy of the notice which was produced and marked in evidence just before delivery of judgment does not by itself prove that any time was specified in the notice served on the petitioner. The Supervisor (P. W. 1) does not say that to his knowledge the time was specified in the copy served on the petitioner, and it follows that the conviction under S. 357, cl. (1), City Municipal Act, for failure to comply with a notice under S. 218 cannot be sustained. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

A. I. R. 1940 Madras 724

WADSWORTH J.

Ramakrishna Reddy and another — Appellants.

v.

Official Receiver, Bellary and another — Respondents.

Appeal No. 484 of 1937, Decided on 8th September 1939, against order of Dist. Court, Bellary, D/- 28th September 1934.

Provincial Insolvency Act (1920), S. 37—Court cannot modify its own vesting order passed under S. 37—Its power is confined only to giving directions for carrying out intention of that order.

Where the Court has passed a particular vesting order under S. 37 restricted in a specific way as by prescribing that the property is to be held for the satisfaction of one particular debt only, it does not retain the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets by directing payment towards other debts. The Court has no jurisdiction to alter its own order under S. 37 merely because it is said to have worked hardship on some of the creditors. Its powers in respect of that order must be taken to be confined to the power to give such directions as are necessary to carry out its intention: *A I R 1935 Mad 826 (F B), Rel. on; A I R 1934 Lah 468 and A I R 1938 Mad 752, Not approved.* [P 724 C 2; P 725 C 1, 2]

V. S. Narasimhachar — *for Appellants.*

T. M. Venugopala Mudaliar — *for Respondents.*

Judgment.—This appeal arises out of the dismissal of an application for modifying an order passed under S. 37, Provincial Insolvency Act, vesting the properties of the quondam insolvent, whose adjudication has been annulled. The facts are rather unusual. The insolvent was in jail as the result of a criminal conviction and he died in jail without applying for his discharge. His minor son applied for the annulment of the adjudication basing the application on two grounds: (1) that no application had been made for discharge within time allowed and (2) that the debts had all been satisfied. The records show that notice was ordered to a vakil, apparently appearing for the only active creditor, and a report was called for from the Official Receiver. Thereafter the District Judge passed an order annulling the adjudication under S. 43 and directing that the property should vest with the receiver until payment of the debt of Lakshmipathi—presumably the active creditor. This order was passed on 13th November 1931. In 1934 the present appellants who represent two other creditors applied to the receiver for directions to pay them dividends out of the estate. Their applications were rejected. Thereupon the application which gives rise to this appeal was filed on 3rd September 1934 praying for the modification of the order under S. 37, so that the properties might vest in the Official Receiver until all the unpaid creditors had been paid under the insolvency law. The ground upon which this relief was sought was an averment that there had been a fraud by the insolvent's son in giving notice only to one creditor and that he had taken advantage of the fraud to mortgage the properties and thereby cheat the other creditors. On this application the order of the learned District Judge was:

> I cannot do this. The insolvency has been annulled. I have no jurisdiction over the estate except in accordance with that order.

At the time of this decision the ruling of the Full Bench of this High Court in 58 Mad 908[1] was not yet available. What the Full Bench decides is that when on an annulment under S. 43 coupled with a vesting order under S. 37 the receiver holds charge of the properties, he continues to be subject to such directions of the Court with regard to the realization and disposal of the properties as the Court may give in accordance with the principles and policy of the Insolvency Act. It was also held that the power to control the receiver should be exercised in the interests of the whole body of creditors and that the receiver under S. 37 had only such powers as were necessarily implied by the vesting order. It is contended that the effect of this ruling is to enable the Court to pass a fresh order directing the receiver to hold the properties, not merely for the satisfaction of the debt of the one creditor specified in the order, but for the satisfaction of the debts of all the creditors. I cannot accept this contention. It seems to me that the decision of the Full Bench clearly contemplates that the Official Receiver shall act under the directions of the Court which directions shall be for the purpose of carrying out the intention of the vesting order in administering the properties according to the principles of the Act. In the present case the vesting order explicitly prescribes that the property is to be held for the satisfaction of one particular debt only. It is not possible to contend that the order leaves it open for the Court to direct payments towards other debts, for that contention has already been canvassed by the present appellants and they have failed. As I read the decision of the Full Bench it provides no basis for the view that when the Court has passed a particular vesting order restricted in a specific way, it retains the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets. To my mind that cannot be done under the provisions of the Insolvency Act.

---

[1] Veerayya v. Srinivasa Rao, (1935) 22 A I R Mad 826=158 I C 1060=58 Mad 908=69 M L J 364 (F B).

My attention has been drawn to the case in 15 Lah 698,[2] which has been followed by a single Judge of this Court in (1938) 1 M L J 824.[3] This decision deals with the position when the insolvency Court in annulling an adjudication by inadvertence omits to make a vesting order. It was held that in the interests of justice the Court can rectify its error. The power of the Court is put on two grounds, (1) its inherent jurisdiction and (2) its power of review. With very great respect it seems to me that there are difficulties in using the theory of the Court's inherent jurisdiction to rectify errors, so as to justify the divesting of property which under the provisions of the statute has already vested in the insolvent. But, provided that the matter can be brought within the purview of O. 47, Civil P. C., there is, so far as I am aware, no difficulty about the correction of the error by way of review.

It is suggested that the learned District Judge instead of holding that he had no jurisdiction to modify the present order should have treated the application as one for review and considered it on its merits. No doubt had a review application been presented on proper grounds and within the prescribed period of three months, the learned District Judge would have had jurisdiction to make such modification in his order as were justified in the circumstances. But the fact remains that the present application is not a review application; it does not purport to be a review application; it is not based on grounds such as would support a review application; and it is filed nearly three years after the order complained of without any application to excuse the delay so as to save limitation. In such circumstances I do not think that the learned District Judge can be blamed for treating the application as one claiming a right to get an apparently erroneous vesting order modified and a fresh vesting order passed merely because it has prejudiced the interests of certain parties whose views are alleged not to have been put before the District Judge at the time when the original order was passed. To my mind the learned District Judge had no jurisdiction to alter his own order merely because it is said to have worked hardship on some of the creditors. His powers in respect of that order must be taken to be confined to the power to give such directions as are necessary to carry out its intention. The application, in the form in which it was presented being one which the District Judge had no jurisdiction to grant and not having been framed as an application for review, I do not see how the learned District Judge could have treated it as an application for review and assumed that the applicants would have some way of getting round the difficulties in respect of limitation and have given them an opportunity for re-drafting their application and filing a further application to excuse the delay. The order rejecting the application was to my mind a correct order and I dismiss the appeal. No order as to costs as respondent 2 who alone objected has died and no legal representative has been put in his place.

C.R.K./G.N. *Appeal dismissed.*

---

* A. I. R. 1940 Madras 725

PATANJALI SASTRI J.

Thatathil Nayippatiyil Raman Adiyoty — Appellant.

v.

Chirikandoth Kunnath Kaitheri Kannan Nambiar and another — Respondents.

Second Appeal No. 453 of 1936, Decided on 31st August 1939, against decree of Dist. Court, North Malabar, in A. S. No. 101 of 1935.

*** Civil P.C. (1908), O. 21, R. 89 and S. 144 — Person bound by decree making deposit under O. 21, R. 89 to set aside sale in execution of that decree — Decree set aside in suit brought for that purpose—Person making payment is entitled to refund.**

The right to recover the money paid to raise an attachment or to set aside a sale does not depend upon any conditions annexed to such payments when made, but arises out of the compulsion of law involved in such cases. It is a statutory right under S. 72, Contract Act. If a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, R. 89 to have a sale of his property held in execution set aside the payment must be regarded as involuntary payment and his claim for restitution made either under S. 144, Civil P. C., or under the general law after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is sustainable : *Case law discussed.* [P 726 C 2 ; P 727 C 1; P 728 C 1 ; P 730 C 1]

---

[2] Balla Mal v. Mt. Fatima Bibi, (1934) 21 A I R Lah 468=153 I C 993=15 Lah 698=36 P L R 499.

[3] Baluswami Naidu v. Official Receiver, Madura, (1938) 25 A I R Mad 752=179 I C 564=(1938) 1 M L J 824.

O. T. G. Nambiar — *for Appellant.*

C. S. Krishnamurthi Iyer — *for Respondents.*

Judgment.—This is an appeal by defendant 1 against the decree of the lower Court directing him to refund a sum of Rs. 423-15-6 with interest to respondent 1. The facts giving rise to the appeal may be briefly stated. The respondents form a tavazhi tarvad of which respondent 2 is the karnavan. The appellant sued respondent 2 in O. S. No. 912 of 1926 in the District Munsif's Court at Kuthuparamba and obtained a decree for payment of money against him personally and as karnavan. In execution of that decree, certain properties belonging to the tavazhi were attached and brought to sale. Respondent 1 who was then a minor instituted through his next friend O. S. No. 843 of 1927 in the same Court for a declaration that the decree obtained by the appellant against respondent 2 as karnavan in O. S. No. 912 of 1926 referred to above was a fraudulent and collusive decree based upon debts which were not real but had been fictitiously put forward and therefore not binding on the tavazhi tarwad. Pending this suit, respondent 1 applied for a temporary injunction restraining the appellant from proceeding with the execution of the decree in O. S. No. 912 of 1926 against the properties of the tavazhi. But the injunction was refused and an appeal against such refusal also failed. The properties of the tavazhi were then sold in execution in December 1927 and the proceedings were adjourned to January 1928 for confirmation of the sale.

In the meantime respondent 1 with a view to avert such confirmation and avoid further complications, applied under O. 21, R. 89, Civil P. C., to set aside the sale, depositing the amount as required by the rule for payment to the decree-holder and the auction-purchaser, and the sale was accordingly set aside. On the very next day, he applied to the Court for issue of an order withholding payment to the decree-holder of the amount deposited until his suit, O. S. No. 843 of 1927, was decided. This application however was rejected and the amount due under the decree in O. S. No. 912 of 1926 was paid to the appellant in March 1928. Respondent 1's suit, O. S. No. 843 of 1927, was dismissed by the trial Court in August 1929, but was decreed on appeal in March 1931, the Appellate Court having found that the decree in O. S. No. 912 of 1926 was vitiated by fraud and collusion and based upon debts which were not real but fictitious. Thereupon, respondent 1 applied under S. 144, Civil P. C., for restitution of the amount deposited by him into Court and paid to the appellant. Though the Court finally dealing with that petition found that respondent 1 was entitled to a refund in the circumstances of the case, it dismissed the petition on the technical ground that the remedy by application under S. 144, of the Code is available only to a person who is actually a party to the decree which has been varied or reversed, and that respondent 1's only remedy was to sue for the refund of the amount. Hence this suit.

Both the Courts below have decreed the plaintiffs' claim on the ground that the payment made by respondent 1 was, in the circumstances of the case, one made under compulsion of law and the decree in O. S. No. 912 of 1926 having been set aside as not binding on the tavazhi tarvad, respondent 1 was entitled to restitution of the amount which had been wrongfully recovered by the appellant under colour of that decree. From the facts of the case stated above, it will be manifest that the payment was made under force of execution while the decree in O. S. No. 912 of 1926 was still outstanding against the tavazhi tarvad. It was obviously made to avert the confirmation of the sale which had just then taken place and to avoid further complications. Respondent 1 had taken various steps to prevent the attachment and sale of the properties which he has now succeeded in establishing that the appellant had no right to proceed against. After all such attempts failed, he applied under O. 21 R. 89, for setting aside the sale and in the affidavit in support of his application, he referred in detail to all the steps which he had been taking though unsuccessfully for preventing the properties from being brought to sale in execution of the decree in O. S. No. 912 of 1926 which he said he was suing to set aside as a collusive decree, and wound up by stating that the application was filed and the deposit made for averting the completion of the sale. In these circumstances, there can be no pretence for saying that the payment by respondent 1 was voluntary, and it would be a clear case, in my opinion, for awarding relief to respondent 1 under S. 72, Contract Act.

But the appellant's learned counsel has contended before me that having regard to certain decisions of this and other High Courts on the nature and scope of an application under O. 21, R. 89, Civil P. C., the payment by respondent 1 which was made under that provision must be regarded as a voluntary payment which he is not entitled to recover from the appellant. The contention is somewhat startling, for it is difficult to see why a payment which all the circumstances of the case clearly establish to have been made under compulsion of law should, by reason merely of the provision of law which allowed such payment to be made, be deemed to have become a voluntary payment. If the payment had been made after the attachment but before the sale of the properties, it is clear that it would be an involuntary payment which the appellant would be bound to refund in the events that have happened: *see* 40 Cal 598.[1] But as the payment was made at a later stage of the execution to set aside a sale of the properties, the payment, it is contended, must be regarded as voluntary. This would be the extraordinary result if the contention of the appellant's learned counsel were correct, but, it is urged, that such is the effect of certain decisions, some of them said to be binding upon me, which have therefore to be now examined.

The line of cases relied on by the learned counsel starts with 45 Bom 1094.[2] There in execution of a mortgage decree the mortgaged properties were sold and purchased by the decree-holder himself. A third party claiming the property to be his and not the judgment-debtor's paid the requisite amount into Court and got the sale set aside under O. 21, R. 89 and the amount was paid to the decree-holder. The persons who paid the money, later brought a suit for the refund of the amount paid alleging that the properties sold belonged to him and the question arose whether it was a voluntary payment. Macleod C. J. and Shah J. held that it was and so could not be recovered. I may say at once that if the facts of the present case were similar, I should have respectfully declined to follow that decision. The gist of the reasoning was this: If the plaintiff had no interest in the property sold but was still allowed to pay the necessary sums into Court for getting the sale set aside under R. 89, he would clearly be a volunteer. Now, what is ordinarily sold at an execution sale is the right, title and interest, if any, of the judgment-debtor in the property and not the property itself. If the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, he must equally be regarded as a volunteer. The learned Chief Justice observes:

> If the true owner allows the attachment to continue, and the property to be sold as belonging to the judgment-debtor, he can treat the sale as a nullity and resist the auction-purchaser. There is no necessity for him to get rid of the sale of what in his opinion does not exist. The attachment of the property itself is a different matter, that may seriously inconvenience him, but if he is the true owner the sale of a non-existent interest in it does not affect him. If he pays in money to get that sale set aside it can only be treated as a voluntary payment.

The learned Judges however recognize that if the property was sold there might be a difficulty in distinguishing between a payment made under protest to get rid of an attachment and a payment made under protest to get a sale after attachment set aside, conceding, of course, that in the former case the payment would be involuntary according to the decision of the Privy Council in 40 Cal 598.[1] With all due respect, I find it difficult to appreciate this reasoning. It is no doubt the right, title and interest of the judgment-debtor, if any, in the property that is brought to sale. But what is brought to sale is what has been attached (O. 21, R. 64), so that there is no distinction in this respect between an attachment and a sale. If therefore a Court sale of a property cannot affect the true owner's title thereto, neither can an attachment by Court affect it and payments to avert both must be equally voluntary. The fact is, however, that both attachment and sale purport to affect the property proceeded against, so far as the provisions of the Civil Procedure Code in that behalf are concerned (*see* Ss. 60, 65, O. 21, Rr. 54, 64, 66 and 94 and Forms Nos. 24, 27, 29 and 38 of Appendix E to Sch. 1, Civil P. C.) and the familiar expression "right, title and interest of the judgment-debtor" does not occur in any of these provisions but (so far I have been able to trace its origin) was used by Sir James Colvile in the judgment of the Privy Council in pointing out the difference between a sale by private contract and a sheriff's sale under a *fifa* in 5 I A 116[3] at pp. 125 and 127. It seems to me therefore that if the attachment of property in execution of a decree obtained against a third party is wrongful interference with the true owner's right and a payment to avert it must be regarded as involuntary, the same result must follow where the attached property is sold and payment is made to avert such sale. Referring to the terms of O. 21, R. 89, the learned Chief Justice observes :

---

[1] Kanhaya Lal v. National Bank of India Ltd., (1913) 40 Cal 598=18 I C 949=40 I A 56=17 C L J 478=17 C W N 541 (P C).

[2] Narayana v. Amgauda, (1921) 8 A I R Bom 169=62 I C 104=45 Bom 1094=23 Bom L R 455.

> But I think it was also intended that once the property had been sold the price paid by the purchasers should be available for the decree-holder, leaving it to the purchaser to make what he could out of his purchase, and that if the sale was set aside by payment into Court under R. 89, the money should go to the decree-holder in execution of whose decree the property was sold . . . . If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so.

It seems to me however that this can have no bearing upon the question whether the payment was involuntary and recoverable as such. It may be that the payment into Court should be unconditional for a sale to be set aside under O. 21, R. 89, but so has it to be for an attachment to be withdrawn under O. 21, R. 55. The truth is that the right to recover the money paid to raise an attachment or to set aside a sale does not depend upon any conditions annexed to such payments when made, but arises out of the compulsion of law involved in such cases. In this country, it is a "statutory right" under S. 72, Contract Act : *see* 4 Lah 284.[4] The learned Chief Justice then refers to the various remedies available under the Civil Procedure Code to the true owner whose property has been wrongfully attached and sold in execution and observes that if such owner, "to suit his own convenience," gets the sale set aside by depositing the required amount in Court under O. 21, R. 89 unconditionally, there is no reason why such payment should not be considered to be voluntary. But this line of reasoning, one should have thought, was finally disposed of by their Lordships of the Privy Council in 40 Cal 598[1] where they made these memorable observations :

> A wrongful interference (that is by attachment) with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion.

I have dealt with this decision of the Bombay High Court at some length as it is the first of its kind, the later cases having mostly adopted its reasoning and followed it. It is however worthy of note that in 57 Bom 601,[5] another Bench of that Court while following the above case remarked :

> If the matter were res integra, it might have been possible to hold that the plaintiffs are entitled to recover back the amount under S. 72, Contract Act. The action of the plaintiffs would not be a voluntary payment of the debts of the other defendants 2 to 6 who were liable, but it was a payment made to save their property and get it back from the mortgagee decree-holder who had wrongly allowed it to be sold in execution of the mortgage decree.

The decision of the Patna High Court in 7 Pat 30[6] followed 45 Bom 1094[2] does not call for any additional comment. Turning now to Madras decisions on the point, there is the judgment of Venkatasubba Rao J. sitting alone in 53 Mad 943.[7] The learned Judge also followed the decisions in 45 Bom 1094[2] and 7 Pat 30[6] already referred to. Referring to O. 21, R. 89, he observed :

> Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property ; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The Section would be frustrated if the person paying money under it is permitted to do so under protest. Cl. 2 of R. 89 enacts :
>
> 'Where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.'
>
> This shows that the proceedings referred to are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this Section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-

---

[3] Dorab Ally Khan v. Executors of Khojah Moheeoodeen, (1878) 3 Cal 806=5 I A 116=2 C L R 529=3 Suther 519=3 Sar 818 (P C).

[4] Kanhaya Lal v. National Bank of India Ltd., (1923) 10 A I R P C 114 = 75 I C 7=50 I A 162=4 Lah 284 (P C).

[5] Shankerrao Keshavrao v. Vadhilal Mulchand, (1933) 20 A I R Bom 239 = 148 I C 74 = 57 Bom 601=35 Bom L R 462.

[6] Raghu Ram v. Deokali Pande, (1928) 15 A I R Pat 193=115 I C 193=7 Pat 30.

[7] Kummakutty v. Neelakandan Nambudri. (1930) 17 A I R Mad 921=128 I C 509=53 Mad 943 =59 M L J 893.

debtor pays the amount specified, he pays it unconditionally.

These observations are rather widely expressed and if they were intended to convey the meaning that once a judgment-debtor pays the amount to set aside the sale under O. 21, R. 89 he must be deemed to have made the payment voluntarily even though he has preferred an appeal from the decree in question, and will be disentitled to a restitution of the amount if the decree is set aside on such appeal, I must respectfully dissent from them, but that this was not the learned Judge's meaning would seem to be clear from his later decision in (1938) 1 M L J 829.[8] That was a case where a decree-holder after obtaining satisfaction of his decree which was not however certified to the Court, executed it again and brought certain properties as belonging to the judgment-debtor to sale. A transferee from the judgment-debtor applied under O. 21, R. 89 to set aside the sale making the statutory deposit and afterwards brought a suit to recover from the decree-holder the amount paid to him. The learned Judge sitting with Abdur Rahman J. held that :

> A person making a payment to rid himself of unlawful interference with his property can recover the money back and this principle is applicable to a payment under O. 21, R. 89, Civil P. C. The right in such a case does not rest upon justice and equity founded on the English analogy but is a statutory right expressed in terms of S. 72, Contract Act. (Headnote).

Dealing with the decision in 53 Mad 943[7] he observed :

> In the former case, it has been held that O. 21, R. 89 is inconsistent with the notion that payment can be made either under protest or coupled with conditions. True, but the whole judgment proceeds upon the footing, first that there was a subsisting decree, that is, subsisting in fact, and secondly, there was a decree-holder, one who really answered that description. . . . . O. 21, R. 89, assumes the existence of the decree and of a decree-holder, and where the very foundation is gone, namely a subsisting decree, it would be futile to contend that the decisions which refer to unconditional payment can apply.

These observations clearly show that the learned Judge never intended his decision in 53 Mad 943[7] to be understood as barring the claim of a judgment-debtor to restitution after the decree is varied or reversed in appeal or the similar claim of a person in the position of respondent 1 here who gets a decree purporting to affect his property set aside in a regular suit brought for the purpose. For in either case it can be said with equal justification that there was no "subsisting decree" nor anyone really answering to the description of a decree-holder.

The learned counsel for the appellant then referred me to the decision of a Full Bench of this Court in 58 Mad 972[9] where the observations contained in 45 Bom 1094,[2] 53 Mad 943[7] and 7 Pat 30,[6] to the effect that a deposit under O. 21, R. 89 must be unconditional were applied to a case to whose facts, if I may say so, they were properly applicable. A mortgagee from a judgment-debtor claimed and established that he had priority over the rights of a decree-holder auction-purchaser of the property and applied for the return of the amount which he had deposited under O. 21, R. 89 for getting rid of the sale. The amount was still in Court and was also claimed by the decree-holder whose purchase had been set aside, and the question arose as to who was entitled to the payment of the deposit. The Full Bench held that an applicant under O. 21, R. 89 could not attach any condition to the deposit required to be made under that provision, nor could the Court accept such deposit subject to any condition. In this view the learned Judges directed the deposit to be paid out to the decree-holder, as it had been expressly put into Court for that purpose. It will be observed that the Full Bench was not concerned with a suit to recover money paid under coercion or a claim by way of restitution as to which, as I have already indicated, different considerations will arise. There may be observations here and there which may perhaps appear to have a bearing on the question whether a payment made for purposes of O. 21, R. 89 should be regarded as voluntary or involuntary, but they must be regarded as obiter and not as concluding the question before me.

The learned counsel for the respondents has relied upon the decisions of the Privy Council in 12 M I A 65,[10] 7 Cal 648,[11] 40 Cal 598,[1] 4 Lah 284[4] and on 34 M L W 399[12] decided by a Division Bench of this Court. These decisions clearly establish that a payment made by a person interested in the property to have the property released from a wrongful attachment or to stave off a wrongful sale of the property must be regarded as an involuntary payment and can be recovered by the person making the payment. As I have already observed, the entire circumstances of the present case unmistakably point to the payment in question having been made by respondent 1 under force of execution of the decree in O. S. No. 912 of 1926 which has since been set aside at his instance. Indeed, the learned counsel for the appellant did not seriously contend that apart from O. 21, R. 89, the payment could be deemed to be voluntary on the facts of this case. He took his stand solely upon the provisions of O. 21, R. 89 as establishing the voluntary character of the payment. In other words the argument was however involuntary in fact and in truth a payment may be found to be as disclosed either by the express terms or by the circumstances in which it is made, if it is made for the purposes of O. 21, R. 89, the latter provision imports a species of estoppel which prevents the person making the payment from recovering it as one made under coercion. As I have said before, this contention is somewhat startling, though some of the decisions already referred to seem to lend some support to it, but I do not regard them as binding precedents.

---

[8] Pappu Reddiar v. Pichu Iyer, (1938) 25 A I R Mad 493=179 I C 717=(1938) 1 M L J 829.

[9] Krishna Iyer v. Arunachalam Chettiar, (1935) 22 A I R Mad 842=158 I C 207=58 Mad 972 =69 M L J 349 (F B).

[10] Fatima Khattoon Chowdrain v. Mahamed Jan Chowdry, (1867-69) 12 M I A 65=10 WR 29 = 1 Beng L R 21 = 2 Suther 145 = 2 Sar 380 (P C).

[11] Dulichand v. Ramkishen Singh, (1881) 7 Cal 648=8 I A 93=3 Suther 734=4 Sar 245 (PC).

[12] Kotla Satyam v. Thammanna Perraju, (1931) 18 A I R Mad 753=135 IC 24=34 MLW 399.

And it is worthy of note that none of these decisions goes the length of holding that if a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, R. 89 to have a sale of his property held in execution set aside, his claim for restitution made either under S. 144, Civil P. C., or under the general law after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is unsustainable. Respondent 1's claim in this case is also essentially one for restitution and I can see nothing in reason or in law to bar his claim. The appeal therefore fails and is dismissed with costs. Leave granted.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 730

PANDRANG ROW J.

Pothera Kallur Veettil Narayanan Nambiar — Petitioner.

v.

Pothera Kallur Veettil Kunhathayi Amma and others — Respondents.

Civil Revn. No. 1168 of 1937, Decided on 29th March 1940, to revise order of Dist. Munsif, Taliparamba, D/- 17th December 1936.

Surety—Surety for proper administration of tarwad affairs by karnavan cannot release himself of his own free will.

A surety for the proper administration of tarwad affairs and properties by the karnavan is not entitled to be discharged from the bond of his own sweet will, but must obtain leave of the Court : *A I R 1926 P C 32, Rel. on; A I R 1932 All 262 and AIR 1939 Cal 737, Ref.* [P 730 C 2; P 731 C 1]

A. Atchuthan Nambiar— *for Petitioner.*

M. Govindan Nambiar and C. Govindan— *for Respondents.*

Order.—This petition raises the question whether the petitioner, who was a surety for the proper administration of tarwad affairs and properties by the karnavan, is entitled to be discharged from the bond for the reason given by him. The petitioner is a junior member of the tarwad, who of his own accord stood surety and executed the bond for Rs. 2000. It is not pretended that he executed this bond owing to any mistake of fact or misrepresentation or in circumstances of the like nature. The reason given by him is that he is not prepared to continue to remain bound and that he wants to dispose of some of his properties. Here in this Court the learned counsel on his behalf adds another reason, namely that he has lost faith in his karnavan. In effect it comes to this: the petitioner wants to be released because he wants to be released and does not like to remain bound.

It is well settled now that in the case of a bond like this a surety cannot release himself or discharge himself from the bond of his own sweet will, but must obtain leave of the Court. *See* 1926 M W N 493[1] in which their Lordships of the Judicial Committee saw no reason for differing from the conclusion arrived at by the High Court of Calcutta to this effect, namely that a surety could not free himself from his liability without the consent of the Court. Reference may also be made in this connexion to 54 All 293[2] and I L R (1939) 2 Cal 1.[3] In the Allahabad case it is pointed out that leave of the Court could be given for good cause, but no attempt is made to indicate exactly what "good cause" would be. Naturally, it would depend on the circumstances of each case, and it would not be easy to define "good cause" in a perfectly satisfactory way. In this case, as observed already, there is no cause shown except that the petitioner has changed his mind. That obviously cannot be regarded as good cause, because it would mean that he could free himself from his liability without leave of the Court, the leave of the Court becoming a pure formality. The lower Court has gone as far as possible to meet the wishes of the petitioner by saying that he would be released if he finds other satisfactory security. His present contention practically amounts to this: that he must be allowed to free himself of his own sweet will. This is exactly what he cannot do, as has been held in 1926 M W N 493.[1] The petition therefore must be dismissed with costs of respondents 1 and 2.

---

[1] Mahomed Ali Mamojee v. Howeson Brothers, (1926) 13 A I R P C 32 = 98 I C 506 = 1926 M W N 493 (P C).

C.R.K./D.S. *Petition dismissed.*

---

[2] National Guarantee and Suretyship Association v. Prayag Deb Banerji, (1932) 19 A I R All 262=140 I C 127=54 All 293=1932 A L J 140.

[3] In the goods of Nani Lal Das, (1939) 26 A I R Cal 737=185 I C 431=ILR (1939) 2 Cal 1.

A. I. R. 1940 Madras 731

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Municipal Council, Adoni—Appellant.

v.

G. V. C. Babu Naidu—Respondent.

Letters Patent Appeal No. 82 of 1938, Decided on 28th November 1939, against judgment of Wadsworth J., *Reported in A I R 1939 Mad 177.*

Madras District Municipalities Act (5 of 1920), S. 93 (1) — Licensed arrack distillery owner at *A* maintaining depot for sale of arrack at *B* through agent—Agent at *B* contracting on behalf of principal and selling arrack at *B* — Principal must be deemed to be carrying on business at *B* within meaning of S. 93 (1) : *(1938) 2 M L J 1035=A I R 1939 Mad 177=181 I C 911, Reversed.*

Where the licensed owner of an arrack distillery at one place under the terms of his licence maintains depots for the sale of arrack at various places the depots being in charge of his agents who enter into contracts for the sale of arrack on behalf of their master who makes profits on those transactions the principal must be deemed to be carrying on business at those various places within the meaning of S. 93 (1) as he sells arrack there. The fact that the prices charged by the principal owner are fixed by the Government does not make his transactions any the less sales nor does the fact that his only customers at places where depots are maintained are licensed retail dealers alter the character of his transactions. The fact that his agent is required to pay into the treasury at the close of a day's business the moneys which he has received for the arrack sold that day, has no bearing on the question and the same is to be said with regard to the keeping of accounts at the principal place. It will be quite different if all the contracts for the supply of arrack were made at the principal place and goods were merely delivered at the various places through the agents: *(1938) 2 M L J 1035=A I R 1939 Mad 177=181 I C 911*, **Reversed;** *(1896) A C 325; A I R 1919 Mad 209; 33 Mad 82 and A I R 1933 Mad 496, Disting.* [P 731 C 2; P 732 C 1, 2]

M. S. Ramachandra Rao—*for Appellant.*

P. Chandra Reddy—*for Respondent.*

Leach C. J. — The appellant is entitled to succeed. The appeal arises out of a suit filed by the respondent in the Court of the District Munsif of Bellary for a declaration that the appellant council had acted illegally in requiring him to pay profession tax in respect of the three half years ending with 31st March 1931, 30th September 1931 and 31st March 1932 and for an injunction restraining the appellant from levying the tax. The District Munsif held that the respondent was liable to the tax except in respect of the half-year which ended with 31st March 1931. He was of the opinion that the respondent was not liable in respect of that half-year because the notice of demand had not been given within the required period. The respondent appealed to the District Judge of Bellary in respect of the reliefs which had been refused him and the appellant filed a memorandum of objections challenging the correctness of the District Munsif's decision that the respondent was not liable to pay the tax in respect of the first of the three half years. The respondent's appeal failed and the appellant's memorandum of objections was accepted. The result was that the District Judge dismissed the suit with costs. The respondent then filed a second appeal which was heard by Wadsworth J. who allowed it. The learned Judge held that the respondent was not liable for the payment of the profession tax because in his opinion the respondent was not carrying on business at Adoni.

The facts are these. The respondent is a licensed distiller and owns an arrack distillery at Bellary. Under the terms of his license he is required to maintain depots for the sale of arrack at various places in the Bellary District. One of these places is

Adoni. The depot at Adoni is in charge of an agent of the respondent and he sells arrack to licensed retail dealers. The price is fixed by the Government and the sales are restricted to licensed retail vendors. The money received in respect of arrack sold at the Adoni depot is paid by the respondent's agent into the treasury the same evening. The question which arises is whether in these circumstances the respondent transacts business in Adoni within the meaning of S. 93 (1), Madras District Municipalities Act, 1920. The Section gives a municipal council the right to levy profession tax on a person who transacts business within the municipality for not less than sixty days in any half year. S. 94-A says that if a person employs a servant or agent to represent him for the purpose of transacting business in a municipality the person shall be deemed to transact business there and the servant or agent shall be liable for the profession tax whether or not he has power to make binding contracts on behalf of his employer. Wadsworth J. held that the respondent was not carrying on business within the municipal area of Adoni and his reasons may be gathered from the following passage in his judgment:

> It is true that the depot keeper at Adoni has authority to deliver goods in return for cash and I suppose that on the narrowest view it might be said that every time he delivered liquor in return for cash there is an executed contract of sale. But his control over the trade is in fact purely mechanical. The price is fixed elsewhere, the vendee must be only certain licensed persons, the money is paid straight into an account in the treasury and all these accounts from which profits can be ascertained and with the help of which control can be exercised are maintained in Bellary.

The learnad Judge here disregards the essential factor that the respondent's agent in charge of the Adoni depot enters into contracts for the sale of arrack on behalf of his master who makes profits on these transactions. A person who sells goods in a particular place must be deemed to be carrying on business in that place and the respondent sells arrack at Adoni. The fact that the prices which he charges are fixed by the Government does not make his transactions any the less sales; nor does the fact that the respondent's only customers at Adoni are licensed retail dealers alter the character of his transactions. The fact that the respondent's agent is required to pay into the treasury at the close of a day's business the moneys which he has received for the arrack sold that day has no bearing on the question and the same is to be said with regard to the keeping of accounts at Bellary. The respondent sells arrack at Adoni and therefore is carrying on business at Adoni within the meaning of S. 93 of the Act. It would be a different matter if all contracts for the supply of arrack were made in Bellary and goods were merely deliverved in Adoni through an agent, but that is not the position.

In the course of his judgment the learned Judge referred to 1896 A C 325,[1] 42 Mad 455,[2] 33 Mad 82[3] and 38 M L W 226.[4] None of these cases lends support to the opinion which he has expressed. The case in 1896 A C 325[1] had reference to a French firm which sold wine through a commission agent in London. The agent obtained orders from persons in England for the firm's wine which was sold to the customers as it lay in the firm's cellar at Reims. The customer paid the cost of packing and carriage and took all the risk. Therefore the delivery to him took place in France. The question was whether the French firm was exercising a trade in the United Kingdom and it was held that it was not. In 42 Mad 455,[2] the question was whether a shipping company which had an agent in Madras and a sub-agent at Cocanada was liable to be taxed at Cocanada as a firm transacting business there. The shipping company earned profits by carriage of goods by sea and in the course of its business loaded and unloaded goods at Cocanada. Its head office was at Glasgow, but its principal agent in the Madras Presidency had his office at Madras. The sub-agent at Cocanada had no power to enter into contracts with shippers. This could only be done by the agent at Madras. The company was assessed by the Municipality of Cocanada to tax under S. 53, District Municipalities Act (4 of 1884) for exercising its trade and carrying on business in Cocanada. It was held that the company was not liable for the tax as it was not transacting business in Cocanada. The difference between that case and the present case is that the sub-agent at Cocanada had no authority to enter into contracts on behalf of the company's clients and

---

1. Grainger and Son v. Gough, (1896) A C 325= 65 L J Q B 410=74 L T 435=44 W R 561 = 60 J P 692.
2. Municipal Council of Cocanada v. 'Clan' Line Steamers Ltd., (1919) 6 A I R Mad 209 = 51 I C 692 = 42 Mad 455 = 36 M L J 226.
3. Meera Rowther v. President of the Corporation of Madras, (1910) 33 Mad 82=5 I C 744.
4. Eastern Distilleries and Sugar Factories Ltd. v. Municipal Council, Negapatam, (1933) 20 A I R Mad 496=144 I C 486=38 M L W 226.

no contracts were entered into there. All the contracts were entered into in Madras. In the present case, the contracts are entered into in Adoni and the goods are supplied there: 33 Mad 82[3] was a similar case. A firm had its place of business in Tinnevelly, but kept an agent in Madras for the purpose of purchasing piecegoods for despatch to Tinnevelly where they were sold. It was held that the firm was not liable to profession tax in Madras. The case in 38 M L W 226[4] has no bearing at all on the question under discussion. The question there was whether the company had an office at Negapatam and the decision turned on the meaning to be attached to the word "office" in R. 16 of Sch. 4, Madras Municipalities Act, 1920. That question does not arise here.

After we had intimated that we could not accept the decision of the learned Judge on the question whether the respondent was carrying on business in Adoni an attempt was made to support the judgment on the ground that there had been irregularities in the demands in respect of the three half-years. The alleged irregularities formed no part of the case set forth in the plaint and no issue was framed on the question. The District Munsif did allow the question of the validity of the demand for the first half-year to be raised, but the District Judge reversed his decision on the ground that this contention had not formed part of the respondent's case and the appellant had not had notice of it in time to meet it. It is said that if the council had had notice, it would have been in a position to show that on the facts the contention could not be maintained. We consider that the District Judge adopted the right attitude in refusing to allow the matter to be raised. It follows that we are not prepared to allow it to be raised in this Letters Patent Appeal. The appeal will be allowed and the respondent's suit dismissed with costs here and in the Courts below.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 733

SOMAYYA J.

P. S. AR. AR. Arunachalam Chettiar by agent Sivaraman Chettiar — Appellant.

v.

Official Receiver, Coimbatore—Respondent.

Appeal No. 99 of 1935, Decided on 27th April 1939, against appellate order of Dist. Court, Coimbatore, D/- 22nd October 1934.

(a) Insolvency—Official Receiver — Position of, with regard to ordinary Civil Courts — Receiver is suitor only and must follow proper form and procedure.

The Official Receiver so far as the suits in the ordinary Civil Courts are concerned is a suitor and a suitor only. He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter affidavit he ought to do it in the proper form. [P 735 C 2]

(b) Provincial Insolvency Act (1920), S. 4—Interpretation—Official Receiver party to proceedings in Civil Court as representative of estate—Decision against receiver — Adverse decision cannot be re-opened by application under S. 4 — Proper remedy is by way of appeal.

It is left to the discretion of the Court to entertain a petition under S. 4. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under S. 4. The procedure under S. 4 is only a substitute for a regular suit. The prior judgments against an insolvent are liable to be re-opened in the insolvency Court at the instance of the Official Receiver only in cases in which before insolvency, judgments were obtained against debtor and they are sought to be re-opened on the debtor's adjudication to see whether they were binding on the Official Receiver as representing the general body of creditors. But where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate, he is not entitled to re-open an adverse decision in an application under S. 4. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. [P 736 C 1]

(c) Civil P. C. (1908), O. 21, R. 57—Receiver's application under S. 52, Provincial Insolvency Act—Executing Court stopping sale and striking off execution petition—Dismissal is not for decree-holder's default—Attachment does not cease.

Where in consequence of the Official Receiver's application under S. 52, Provincial Insolvency Act, the executing Court stops a sale in execution of a decree and strikes off the execution application, the dismissal cannot be said to be due to default of the decree-holder and therefore the attachment of property before judgment does not cease. [P 737 C 1]

A. C. Sampath Ayyangar—*for Appellant.*

K. V. Ramachandra Ayyar — *for Respondent.*

Judgment.—The appellant in this second appeal is a creditor who filed O. S. No. 1375 of 1926 on the file of the District Munsif of Tirupur against one Konappa Naicken and his four sons. Konappa Naicken was defendant 1 and his sons were defendants 2 to 5. An application for attachment before judgment was ordered on 14th October 1926 and the attachment was duly effected. The suit was decreed on 7th June 1927. Thereafter the father, defendant 1, filed

I. P. No. 157 of 1927 on 14th July 1927 and he was adjudicated on 24th September 1927. The decree-holder applied for execution of his decree in E. P. No. 2226 of 1929 on 1st July 1929. By that date the father was dead and the sons alone were added as parties; and the Official Receiver who had been appointed in I. P. No. 157 of 1927 was not made a party. Before this execution application came on for final orders, the Official Receiver sold the entire property including the son's shares on 6th February 1930 and there was a sum of Rs. 2510 representing the net sale proceeds of those properties. On 17th June 1930, the Official Receiver wrote to the District Munsif of Tirupur who was executing the decree passed by him in O. S. No. 1375 of 1926 informing him that the father had been adjudicated insolvent and requesting that the sale which was to be held the next day or the day after be stopped under S. 52, Provincial Insolvency Act. There was also an application filed by the Official Receiver for that purpose in E. A. No. 814 of 1930. On this an order was passed : "Sale stopped. Receiver will take possession." On 20th June 1930 the District Munsif passed an order on the execution Application No. 2226 of 1929. The order was:

> Sale stopped as per order on E. A. No. 814 of 1930, a petition by the Official Receiver, Coimbatore, under S. 52 of Act 5 of 1920. This petition is struck off.

Then the decree-holder filed Application No. 1743 of 1931 in the District Munsif's Court requesting the Court to direct the Official Receiver to send four-fifths of the amounts realized by him representing the four shares of the sons of Konappa on the ground that they were not adjudicated insolvents, that their share of the sale proceeds cannot be dealt with by the Official Receiver and that the decree-holder was entitled to proceed against the same and have it credited towards his decree. Notice of this application was issued to the Official Receiver. He sent a letter which may be treated as a counteraffidavit, which according to the respondent contained information that the proceeds had already been distributed by him under orders of the Insolvency Court and that therefore the amount cannot be sent over. Not being satisfied with this statement the District Munsif adjourned the matter for arguments first to 25th September, then to the 30th, heard arguments and reserved orders. On 8th October he made an order that the Official Receiver was not entitled to deal with the shares of the four sons in the amount realized by him by sale of the properties that it was only the father's share that could be so dealt with by the Official Receiver and made an order directing the Official Receiver to send amount representing the four-fifths share of the sons to his Court. The District Munsif referred to a decision of this Court reported in AIR 1931 Mad 118[1] in support of his order. After this order was passed the Official Receiver approached the Insolvency Court for directions as to what he should do and it is said that the Insolvency Court asked him to write to the District Munsif requesting him to direct the decree-holder to go to the Insolvency Court to have it decided by that Court whether he was entitled to the amount in question. The decree-holder evidently did not respect this advice. He took the course of moving the District Munsif to commit the Official Receiver for contempt for disobedience of the order of 8th October 1931 and filed E. A. No. 1748 of 1932. Having come to know of this the application out of which this appeal arises was filed in the Insolvency Court on 15th March 1933 under Ss. 4 and 5, Provincial Insolvency Act. In this application the Official Receiver asked the Court to adjudicate upon the question whether the decree-holder is entitled to the sum representing the four-fifths share of the insolvent's sons. The creditor filed a counteraffidavit stating amongst other things :

> Further, the Official Receiver being a party to the execution proceedings is bound by the orders passed in execution. If the Official Receiver felt aggrieved his remedy was by way of appeal. It is respectfully submitted that the Insolvency Court is not entitled to vary or modify orders duly passed against the Official Receiver as a party.

It should be mentioned here that the Official Receiver in para. 7 of his petition referred to the Application No. 1743 of 1931 and to the order of the District Munsif's Court that the money should be sent to that Court. It is this order that he complains about in his petition and in answer to this the decree-holder replied in para. 8 of the counteraffidavit. The learned Subordinate Judge held that the Official Receiver is entitled to the declaration that the sale proceeds of the sons' shares of the insolvent are liable to be distributed among the creditors and granted the application of the Official Receiver. On appeal the District Judge confirmed this order. Hence this appeal by the creditor.

---

[1] **Official Receiver, Coimbatore v. Arunachalam Chettiar, (1931) 18 A I R Mad 118 = 130 I C 479.**

It is urged by learned counsel for the respondent that when the father's properties were sold on 6th February 1930 the Official Receiver took the permission of the Insolvency Court and distributed the amount among the creditors, that the decree-holder approached the Insolvency Court at a later stage with a request that he should be paid a sum of Rs. 500 and odd which represented the costs of his suit and execution and that on that application the Insolvency Court made an order as prayed for by the decree-holder. It is said that at the time the decree-holder did not tell the Insolvency Court that he was entitled to four-fifths share of the sons and that there was an implied representation in the petition and in the affidavit that the balance after deducting Rs. 500 and odd claimed by him may be distributed by the Official Receiver among all the creditors. It is therefore urged that the creditor is now estopped from claiming the four-fifths share he not having put forward this objection in the Insolvency Court at the time when he wanted preferential payment in respect of Rs. 500 and odd which represented the costs of his suit and execution as provided by S. 52, Provincial Insolvency Act.

I propose to deal first with the question whether the order of the District Munsif in E. P. No. 1743 of 1931, dated 8th October 1931 is liable to be called in question in the insolvency Court as was done in this case. Though the Subordinate Judge raised the question of the Insolvency Court's jurisdiction to entertain this application as point No. 5 he simply referred to S. 4 of the Act but did not deal with the question whether the order on I. A. No. 1743 of 1931 of the District Munsif's Court, Tirupur, had not become final and conclusive. The District Judge did not deal with this question at all. It will be seen that the District Munsif was acting perfectly within his jurisdiction when he was executing his decree in O. S. No. 1375 of 1926. In the course of that execution an application was made to him in E. P. No. 1743 of 1931 to send for certain moneys representing four-fifths share of the sons who were defendants 2 to 5 from the Official Receiver. The prayer was that the Official Receiver should be directed to deposit to the credit of that suit the sum representing the shares of the four sons, defendants 2 to 5. Notice of this application was ordered to the Official Receiver who was made a party to that application. Presumably as the learned Advocate for the respondent tells me, the Official Receiver mentioned all that had taken place before in the letter which he sent to the District Munsif and urged that the conduct of the creditor was such that he was not entitled to an order that the four-fifths share of the sale proceeds should be paid to the credit of his suit by the Official Receiver. It will be noticed that on receiving this letter which the Official Receiver sent when notice of this application went to him, the District Munsif was not satisfied with the position urged by the Official Receiver and therefore posted the matter for arguments. It was adjourned two or three times, arguments were heard and orders were reserved and the order was passed on 8th October 1931. The Official Receiver in the first place had no right to write a letter to the District Munsif when he got the notice on E. P. No. 1743 of 1931 asking him to show cause why he should not be directed to pay the four-fifths share of defendants 2 to 5 into Court.

The Official Receiver so far as the ordinary Civil Courts are concerned is a suitor and a suitor only. He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter-affidavit he ought to do it in the proper form. So far as suits in the ordinary Courts are concerned, he is in no better position than an ordinary suitor. We may take it that in this case he probably thought that the letter would take the place of the counter affidavit. When after arguments were heard and the District Munsif passed the order on 8th October 1931 it was his duty to take up the matter in appeal in the regular course if he was dissatisfied with the order. He did not do it, there was no appeal and the order became final. I do not see what right he had to go to the insolvency Court for directions; if he sought advice and such advice was given and that advice turns out to be wrong, he has himself to thank. In this case the application was filed under Ss. 4 and 5, Provincial Insolvency Act. The procedure under S. 4 of the Act is only a substitute for a regular suit. When the Insolvency Court feels that the matter might be speedily adjudicated upon by the Insolvency Court itself, the Court has jurisdiction to deal with the matter relating to title and other questions referred to in S. 4 of the Act. It is obvious that it is left to the discretion of the Court to entertain a petition under S. 4 of the Act, which is a substitute for the ordinary proceeding in a Civil Court. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under S. 4, Provincial Insolvency Act. In that proceeding he would be bound by the same rules and by the same conditions by which he would be bound if he had agitated the matter in a regular suit. If in this case the Official Receiver had filed an ordinary suit in Civil Court objecting to the order of the District Munsif in E. P. No. 1743 of 1931 he would have been immediately met with the plea that his remedy was to take up the matter in appeal and not to file a separate suit. I do not see how he can escape that effect by approaching the Insolvency Court under S. 4 of the Act.

My attention has been drawn by learned counsel for the respondent to the fact that prior judgments against an insolvent are liable to be reopened in the insolvency Court at the instance of the Official Receiver in certain circumstances. That is no doubt true, but they are cases in which before insolvency, judgments were obtained against debtor and they are sought to be reopened on the debtor's adjudication to see whether they were binding on the Official Receiver as representing the general body of creditors. But where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate, he is not entitled to reopen an adverse decision in an application under S. 4, Provincial Insolvency Act. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. I therefore hold that the order on E. P. No. 1743 of 1931, dated 8th October 1931, was conclusive and that the Insolvency Court cannot go behind that order and entertain an application of this kind.

As regards the conduct of the decree-holder in approaching the Insolvency Court on which much stress was placed by the respondent it will be noticed that in the application which he filed for being paid the sum of Rs. 500 odd in the first instance, there is no express mention made that the rest of it may be distributed among the creditors. He only said that until the sum of Rs. 500 was paid the distribution should be held up. He did not receive any dividend in the Insolvency Court. He only got Rs. 500 odd which the Court adjudged he was entitled to in preference to other creditors. So far as the initial order of the Insolvency Court to distribute the moneys to the various creditors is concerned, I do not see how it is binding on the creditor because it is not alleged that it was passed after notice to him.

Then as regards the order that was passed on the creditor's application for preferential payment of Rs. 500 odd, which is I. A. No. 372 of 1931, the order says:

> I therefore direct the Official Receiver to pay the petitioner the amount of his charges and declare a dividend on the balance alone and distribute the same.

This order does not mean that he was authorized to distribute in any manner which is not warranted by law. No adjudication was made that the creditor was not entitled to any portion of the balance. Further, all these questions ought to have been brought before the District Munsif in E. P. No. 1743 of 1931 and Mr. K. V. Ramachandra Ayyar, the learned advocate for the respondent, tells me that they were brought to the notice of the District Munsif in the letter which the Official Receiver wrote in reply to the notice of the said application. It is presumably after being appraised of this situation that the District Munsif felt some difficulty and posted the matter for arguments. The District Munsif's attention was evidently directed to the decision of this Court in A I R 1931 Mad 118,[1] and the District Munsif rightly or wrongly passed the order that he did on 8th October 1931. If the District Munsif's order was wrong that should have been corrected in appeal. The Subordinate Judge and the District Judge say that the attachment effected in execution of the appellant's decree ceased when on 20th June 1930, the District Munsif struck off the execution petition. What happened was that on the Official Receiver's letter appraising the executing Court that defendant 1 had been adjudged an insolvent and that the sale advertised should be stopped as per S. 52, Provincial Insolvency Act, the District Munsif passed the order on 17th June 1930, "Letter of Official Receiver. Sale stopped. Receiver will take possession." This was passed on Official Receiver's application I. A. No. 814 of 1930. Then the execution petition was taken up on 20th June 1930. On that day the Court said:

> Sale stopped as per order on E. A. No. 814 of 1930, a petition by the Official Receiver, Coimbatore, under S. 52 of Act 5 of 1920. This petition is struck off.

This is held to be a dismissal of the execution petition for default of the decree-holder on the ground that the decree-holder did not implead the Official Receiver as representing defendant 1 and that the attachment ceased. If the Official Receiver was not made a party, it was only a ground for dismissing the execution petition against defendant 1 or against Official Receiver as representing defendant 1, but not for dismissing the entire execution petition against defendants 2 to 4 as well. The District Munsif himself did not purport to dismiss or to strike off the execution petition on that ground. He did so on the stated ground that on E. A. No. 814 of 1930, the sale had been stopped. It is not open to the Courts now to find that the execution petition was dismissed for default of the decree-holder when in fact the executing Court gave another reason in its order striking off the execution petition. As pointed above there was no default of the decree-holder as regards defendants 2 to 5; and the execution petition might well have proceeded against them. Further, this again is a point that should have been urged in E. A. No. 1743 of 1931 before the executing Court. Whether the Official Receiver's sale was a valid sale of the sons' interest as well, whether the creditor was bound by prior orders of the Insolvency Court or of the executing Court and whether he was estopped from claiming the relief which he sought in E. A. No. 1743 of 1931 are all matters which should have been urged in that application. And if the executing Court passed an order adverse to the Official Receiver, the matter should have been rectified on appeal.

The question was expressly raised in the counter-affidavit of the appellant and he urged that in view of the District Munsif's order on E. A. No. 1743 of 1931 which had become final, the Insolvency Court had no jurisdiction to entertain the petition. The Subordinate Judge raised the question of jurisdiction, presumably on para. 8 of the appellant's counter-affidavit. Having raised the question, he did not at all deal with this question whether the Official Receiver was not bound by the order on E. A. No. 1743 of 1931. The District Judge also does not deal with this question. I reverse the decisions of both the lower Courts and dismiss the petition with costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 737

VARADACHARIAR AND GENTLE JJ.

Sri Vuppalapaty Venkatappala Narasimharaju Garu—Appellant.

v.

Official Receiver, East Godavari, Rajahmundry and another—Respdts.

Appeal No. 299 of 1935 and Civil Misc. Petn. No. 1155 of 1939, Decided on 20th February 1939, against decree of Sub-Judge, Coconada, in O. S. No. 108 of 1933.

Contract Act (1872), S. 63 — Remission by person on verge of insolvency without consideration is inoperative as against Official Receiver according to S. 53, Provincial Insolvency Act.

It is true that under S. 63, Contract Act, it is open to a promisee to remit his claim in whole or in part even without consideration. But when a person, who is on the verge of insolvency, purports to make a remission, the validity of that transaction as against the Official Receiver cannot be determined merely with reference to S. 63, Contract Act. If the remission was one without consideration, it will obviously be inoperative as against the Official Receiver according to the principle of S. 53, Provincial Insolvency Act. [P 738 C 1, 2]

T. Satyanarayanan—*for Appellant.*

B. V. Subramaniam—*for Respondents.*

Varadachariar J. — This appeal arises out of a suit instituted by the Official Receiver, East Godavari, as receiver of the estate of defendant 2, for the recovery of money due from defendant 1 to defendant 2 under a promissory note Ex. A, dated 20th February 1931. This note was executed in settlement of prior accounts between the parties and was for a sum of Rs. 4338-12-6 and it provided for payment of compound interest at 12 annas per cent. per month with annual rests. Defendant 1 admitted execution of the note but pleaded that he was not liable for interest; he also relied upon a letter, Ex. I dated 2nd March 1931, said to have been given to him by defendant 2, as amounting to a remission or discharge of the suit debt to the extent of Rs. 3500. Issues (ii) and (iii) related to the truth of the letter, Ex. 1 and its effect as against the Official Receiver. The learned Subordinate Judge allowed defendant 1's objection as to interest to some extent. On issues (ii) and (iii) he found against defendant 1, holding that Ex. I was not executed on the date that it bears but must have been got up later, i. e., after defendant 2 had been adjudicated insolvent. He was also of the opinion that even if Ex. I was true and binding it could not bind the Official Receiver. He accordingly passed a decree substantially in the plaintiff's favour; and against that decree defendant 1 has appealed.

The sequence of dates and events is no doubt calculated to raise considerable suspicion against Ex. I. The accounts were settled and the suit promissory note was executed only on 20th February 1931. On 5th March, defendant 2 was obliged to execute a trust deed in favour of his creditors. On 9th March, the Imperial Bank from which he had borrowed compelled him to execute a mortgage deed for a sum of Rs. 60,000 to secure repayment of his dues. On 17th March, a petition was filed by some of defendant 2's creditors to get him adjudicated insolvent and he was so adjudicated in November 1931. If, in these circumstances, defendant 2 who, in February is said to have gone out of his way to insist upon defendant 1 making himself liable for payment of interest even though there was no such understanding before, is, within ten days after the date of Ex. A, found to give up the greater portion of the claim under that document, it was nothing strange that the learned Subordinate Judge felt inclined to think that Ex. I might, in all probability, have come into existence after defendant 2's creditors took steps to get him adjudicated insolvent. We, however, feel that beyond mere suspicion, there is not enough material to justify a positive conclusion to that effect. Such evidence as there is on the record is to the effect that Ex. I was executed on the date that it bears. The Official Receiver has not thought fit even to examine the insolvent to allow the Court an opportunity of knowing what his version might be. We prefer to leave this matter there, because we have come to the conclusion that even on the assumption that Ex. I was executed on the date that it bears, it does not, in the circumstances, furnish a valid defence to the claim on the suit note.

It is true that under S. 63, Contract Act, it is open to a promisee to remit his claim in whole or in part even without consideration. But when a person, who is on the verge of insolvency, purports to make a remission like that under Ex. I, the validity of that transaction as against the Official Receiver cannot be determined merely with reference to S. 63, Contract Act. If the remission was one without consideration, it will obviously be inoperative as against the Official Receiver according to the principle of S. 53, Provincial Insolvency Act. It has however been contended before us that Ex. I is supported by consideration and that there is nothing on the record to show it was the result of any fraud or collusion to which defendant 1 was a party. The only proof of consideration is what is contained in Ex. I itself. It appears that for some years prior to the suit transaction, defendant 1 has been occasionally standing as surety for defendant 2 in connexion with the loans taken from the Imperial Bank at Coconada. The record does not clearly establish whether the amounts thus borrowed were wholly taken by defendant 2 alone or defendant 1 had any benefit out of these loans. Here again, we have to observe that defendant 1 has sworn that he was only a surety and there is no evidence to the contrary. We are surprised to note that even the books of the insolvent have not been produced in the case. Dealing with the case on the footing that defendant 1 was only a surety, we are, nevertheless, not satisfied that the remission could be said to have been supported by consideration.

The mortgage in favour of the bank was for a sum of over Rs. 50,000. Though only two promissory notes, Exs. II and II-a, have been exhibited in the case as showing defendant 1's connexion with defendant 2's borrowings from the bank, we are not in a position to state what exactly the pre-existing liability of defendant 1 to the bank was as a result of the transactions between the bank on the one hand and defendants 1 and 2 on the other. In the mortgage to the bank (Ex. III) certain other persons also are said to have joined. The record does not enable us to know what the extent of their respective liabilities was. The case has therefore to be decided on the footing that the bank to whom these various persons including defendants 1 and 2 were liable insisted upon their executing a mortgage to secure repayment of the amount due to itself. In effect, this mortgage only secured the pre-existing liability of persons who, whatever their relationship inter se might have been, were equally liable as principals to the bank. We do not see how the joining of defendant 1 in the execution of the mortgage, Ex. III, under these circumstances can be held to amount to consideration in law justifying defendant 2 who was then practically an insolvent, circumstances giving up the greater part of the debt under Ex. A. The result, if Ex. I is to be upheld, would be that the creditors of defendant 2 are deprived of their resort to defendant 2's immovable properties so far as they are given as security under Ex. III and they are also deprived of the benefit of the amount due to defendant 2 under Ex. A. However much one might appreciate defendant 2's gratitude to defendant 1 for help given by him to defendant 2 in his transactions from 1925 as recited in Ex. I, that cannot be held to amount to consideration in law. On this footing, the decree of the lower Court must be confirmed and the appeal dismissed with costs of respondent 1.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1940 Madras 739

VARADACHARIAR AND ABDUR RAHMAN JJ.

Bkottiprolu Seetharamamma — Appellant.

v.

Ramireddi Patta Reddi and another — Respondents.

Appeals Nos. 64 and 65 of 1935, Decided on 22nd November 1938, against decrees of Dist. Court, Kistna at Masulipatam, D/- 10th September 1934.

(a) Vendor and Purchaser—Vendor's title — Mere fact of knowledge on purchaser's part of earlier transactions of vendor will not disentitle purchaser to insist upon proof of vendor's title.

The mere fact of knowledge on the purchaser's part of the earlier transactions of the vendor will not disentitle the purchasers to insist upon proof of the vendor's title unless they had agreed to limit the nature of the enquiry into title or had agreed to accept the title of the vendor such as it was. [P 740 C 2]

(b) Hindu Law—Family settlement—Doctrine of bona fide settlement of disputes cannot be invoked to confer absolute estate on daughter or widow.

It is not sufficient that as a matter of language, the estate conveyed to the daughter or widow under the arrangement among the members of the family is expressed to be an absolute estate. It is only if the parties who entered into this arrangement were entitled to an absolute estate or entitled to confer on the daughter an absolute estate that the arrangement can prevail as against the reversionary heirs to the estate. The doctrine of bona fide settlement of disputes does not apply so as to enable the widow or daughter to enlarge their limited interest into an absolute estate. [P 741 C 1, 2]

(c) Hindu Law—Adoption—Presumption that adoption all along recognized by members and acted upon without question must have been duly authorized cannot be applied where there was no occasion for anybody to dispute adoption.

The presumption that an adoption which has all along been recognized by the members of the family and other relations and which has been acted upon for a long time without question must have been duly authorized, cannot be applied where there was no occasion for any person interested in the estate to dispute the adoption : *A I R 1925 P C 201, Ref.* [P 741 C 2; P 742 C 1]

(d) Vendor and Purchaser — Vendor's title depending on proof of disputed fact — Vendor not proving that fact cannot be held to have made out good title.

When a vendor's title depends not upon a question of law but upon proof of a disputed fact, that fact must be proved and if the vendor does not prove it, he cannot be held to have made out a good title. [P 743 C 1]

*** (e) Specific Relief Act (1877), S. 18 (d) — Vendor's suit for specific performance dismissed for want of good title — Whether purchaser is entitled to costs depends upon his conduct in such suit.**

It cannot be said that the terms of S. 18 (d) deprive the Court of any discretion in the matter of costs if the vendor's suit for specific performance is dismissed on the ground of imperfect title. It is unreasonable to hold that S. 18 (d) of the Act lays down an absolute rule, independent of the conduct of the purchasers as defendants in the course of the specific performance suit. The object of S. 35, Civil P. C., is clearly to enable the Court to award costs in the light of the conduct of the parties in the suit. Where in a suit by vendor for specific performance Court has found that on some points the contentions of the purchasers were not true and that they either had not the whole amount of money required to enable them to complete the contract or for some other reason they decided to resile from the contract, the Court is justified in declining to award costs in their favour, though it dismissed the vendor's suit for specific performance on the ground of defect of title. [P 743 C 1, 2]

(f) Specific Relief Act (1877), S. 18 (d) — Same considerations govern grant of specific performance to vendor and of directing refund of deposit to purchaser.

Practically the same considerations govern the question of the grant of specific performance to the vendor and of directing the refund of the deposit to the purchaser : *A I R 1931 P C 299, Rel. on.* [P 743 C 2]

(g) Specific Relief Act (1877), S. 18 (d) — Interest on deposit.

Prima facie the purchasers are entitled to interest under the terms of S. 18 (d) if there is nothing in their conduct to disentitle them to the same. [P 744 C 1]

P. Satyanarayana Rao — *for Appellant.*

B. Somayya — *for Respondents.*

Varadachariar J.—These appeals arise out of cross suits and as they relate to the same transaction, they may be conveniently dealt with together. A. S. No. 64 arises out of a suit for specific performance instituted by the vendor. A. S. No. 65 arises out of a suit instituted by the intending purchasers for getting refund of the advance paid by them in pursuance of the contract of sale. It will be convenient to refer to the parties by their position in A. S. No. 64. It is common ground that on 20th August 1929, the parties entered into the agreement, Ex. A for the sale and purchase of about 1.31 acres of land for Rs. 10,100 and that the defendants paid Rs. 1000 in cash as advance. The document provided that the sale should be completed before the end of June 1930. For reasons which it is unnecessary to go into now, the transaction was not so completed and there was a revised contract between the parties on 25th July 1930 (Ex. B). The price was reduced by Rs. 1000 and the time for completion was extended to 25th August 1930. Even this contract was not carried out in due course and after protracted correspondence, in the course of which each party blamed the other, the vendor instituted the suit for specific performance on 18th August 1932. The vendees instituted the suit for the refund on 25th July 1933.

In the form which the controversy ultimately assumed, the principal question for decision turned out to be whether the plaintiff was in a position to convey a title free from reasonable doubt. Contentions were also raised as to whether it was open to the defendants to question the nature of the plaintiff's title and whether the defendants had not themselves been guilty of breach of contract. In the suit for the refund of the deposit, questions were raised as to the right of the purchasers to claim refund and as to their right to claim interest. While holding that to a certain extent the purchasers were responsible for the failure of the transaction, the lower Court nevertheless held that they were entitled to insist upon the plaintiff making out a good title and that the plaintiff had failed to do so. In the result, the specific performance suit was dismissed and the purchaser's suit was decreed; but, in the circumstances, the lower Court disallowed the costs of the purchasers and also declined to allow their claim for interest. Against these decrees, appeals have been preferred by the vendor. The purchasers have filed memoranda of objections.

The learned counsel for the appellant attempted to maintain that it was clear from the conduct of the parties that the purchasers had knowledge of the source and the nature of the plaintiff's title as one of them had been connected with an earlier transaction of the plaintiff and the deed of partition Ex. G, under which the plaintiff claimed title had been referred to in the contracts of sale, Exs. A and B. But, as pointed out by the learned District Judge, the mere fact of knowledge on the purchasers' part of these earlier transactions will not disentitle the purchasers to insist upon proof of the vendor's title unless they had agreed to limit the nature of the inquiry into title or had agreed to accept the title of the vendor such as it was. We cannot accede to the contention that the purchasers in this case had agreed to accept whatever title the plaintiff had, even if it was defective. The plaintiff's husband examined as P. W. 1 admitted that the contract was to sell and purchase an absolute title to the property. And the price agreed upon, namely, Rs. 10,100 for the 1.31 acres, clearly shows that the bargain must have been in respect of an absolute estate and not merely for the limited estate of a Hindu daughter in her father's property.

The learned counsel for the appellant next contended that even if the nature of the title that the plaintiff could convey was open to investigation, the title shown by her in this case was free from reasonable doubt. In dealing with this contention, it is necessary to refer to the nature of the title. The plaintiff derived title under an arrangement (evidenced by Ex. G) entered into between the plaintiff, her mother Mangamma and one Ramajogayya who claimed to have been adopted by Mangamma to her husband in January 1894. Mangamma's husband died in June 1893; and the story as now narrated in the evidence is to the effect that on the evening before the day of his death, Mangamma's husband had orally authorized his widow to take a boy in adoption. There is admittedly no deed of adoption, and we are therefore not in a position to say on what authority the adoption purported to be made. Ex. G refers to the fact that in 1895 Ramajogayya filed a suit in the Munsif's Court against Mangamma, for relief on the footing of his adoption but that plaint was returned for presentation to the proper Court, as it was found that the suit was beyond the jurisdiction of the District Munsif's Court. Admittedly the plaint was not afterwards represented; and the evidence shows that between 1895 and 1906, Mangamma continued to deal with her husband's property as if she was the sole owner and in disregard of the rights of the alleged adopted son. It, however, appears that in 1906, when Ramajogayya is said to have attained majority, P. W. 1, the husband of the plaintiff, brought about an amicable settlement of the disputes between the alleged adopted son on the one hand and his adoptive mother and his sister on the other, with a view to avoid future litigation. The substance of the arrangement was that Mangamma and her daughter, the plaintiff, took one-third each in the husband's estate and the remaining one-third was taken by Ramajogayya. The document recites that each of the sharers should take his or her respective share with absolute rights. It is on the terms of this document that the learned counsel for the appellant contends that it makes out an absolute title in the plaintiff free from reasonable doubt. We are unable to agree with this contention.

It is not sufficient that as a matter of language, the estate conveyed to the daughter under the arrangement above set out is expressed to be an absolute estate. It is only if the parties who entered into this arrangement were entitled to an absolute estate or entitled to confer on the plaintiff an absolute estate that the arrangement can prevail as against the reversionary heirs to the estate. The doctrine of bona fide settlement which has been invoked in this connexion cannot help the plaintiff. The utmost that can be said is that Ramajogayya put forward a claim based on an alleged adoption and to that extent there was a bona fide settlement of disputes; in accordance with the decision of the Privy Council, it may be possible to say that the allotment of a share to him as a result of such settlement cannot be questioned by the reversioners. But so far as Mangamma or the plaintiff purported to enlarge their limited interest into an absolute estate by the provisions contained in the document, there is no scope for the application of the rule as to bona fide settlement. The judgment in 43 M L W 464[1] brings out this distinction. The widow may no doubt act as the representative of the estate in settling the claim of the alleged adopted son but she is not acting as representative of the estate in enlarging her own interest. As regards the plaintiff in the present case, she had no "claim" at all to be settled at the date of Ex. G because her mother was then alive. It is only if there is independent proof that the other party to the arrangement had a right to confer upon the widow or on the daughter a larger interest than she would have taken as heir to the last male holder that the arrangement will be effective to give her such higher interest as against those claiming to succeed to the estate as reversionary heirs on her death. The decision above referred to no doubt shows that the mere fact of the female holder having in the first instance claimed only as "heir" does not preclude the possibility of her getting an absolute interest under the arrangement; but the effectiveness of the arrangement to confer such absolute estate will depend not upon the terms of the settlement itself but upon the competency of the other party to the settlement to confer such absolute estate.

We have accordingly to consider whether apart from the terms of Ex. G, there is independent evidence in the case to establish that Ramajogayya was in a position to confer an absolute interest on the plaintiff in one-third of the estate as he purported to do under Ex. G. It is admitted that he could have done so only if his adoption was true in fact and valid in law. The defendants denied the factum as well as the validity of Ramajogayya's adoption. The learned District Judge was of the opinion that the adoption was probably true in fact but he held that it was not valid in law, because the husband's oral authority had not been proved. In the view we take on the question of the validity, it is unnecessary to deal with the question of the factum. The learned counsel for the appellant pressed us to apply to the present case the presumption which their Lordships of the Judicial Committee held to be applicable to ancient adoptions, in 53 M L J 858,[2] namely that an adoption which has all along been recognised by the members of the family and other relations and which has been acted upon for a long time without question must be presumed to have been duly authorised. The circumstances of the present case however make it impossible for us to invoke that presumption here. As Ex. G itself shows the widow who is said to have made the adoption repudiated it and the alleged adopted son was obliged to file a suit to assert his rights. But this suit was not persisted in and though in that suit the widow denied the factum as well as the validity of the adoption, no steps were taken by the adopted son to assert his claim till 1906. It is admitted in the course of the oral evidence that the adopted son never lived with the adoptive mother nor did he enjoy any portion of the adoptive father's estate till 1906. Even the hereditary office which the adoptive father had held during his lifetime, the adopted son was able to get only after 1906 presumably as a result of the settlement under Ex. G. It is true that after the date of Ex. G the adopted son had been in peaceful possession of the one-third share of the estate allotted to him and has dealt with the property as his own. This by itself cannot lead to any inference as to the validity of the adoption. Such conduct obviously rests upon Ex. G itself which was binding as between the parties. The widow Mangamma was alive till after the institution of the present suit; the daughter is still alive and she has sons.

---

[1] Nathu Lal v. Babu Ram, (1936) 23 A I R P C 103=161 I C 33=63 I A 155=43 M L W 464 (P C).

[2] Venkata Seetharamachandra Rao v. Kanchumarthi Raju, (1925) 12 A I R P C 201=89 I C 817 = 53 M L J 858 (P C).

There was thus no occasion for any person interested in the estate to dispute the adoption when the parties to Ex. G had settled their disputes between themselves. The circumstances of this case do not therefore warrant the application of any presumption based on the long course of conduct consistent only with the truth and the validity of the adoption. It is also significant, for what it is worth, that in Ex. G a clause was in terms first inserted recognising the adoption, but for some reason which the parties have not explained that clause was deleted before the document was executed. More significant still is the way in which the case as to authority seems to have been put forward. We do not have on record a copy of the plaint filed by Ramajogayya in 1895. There is accordingly no direct evidence of the case then set forth. But Mangamma who is now supporting the story of adoption stated in cross-examination in this suit that the adoptive son's case was then rested upon consent given by the gnatis and not upon an alleged oral authority of the husband. In the absence of any other evidence on the point, we see no reason to reject this testimony as to the nature of the case then put forward. The present case of oral authority given by the husband is at variance with that case. The oral authority is now sought to be supported by the evidence of three or four witnesses whose evidence the learned trial Judge has declined to accept. We see no reason to differ from him on this point.

It was next pointed out that Ex. G had been attested by a number of respectable people in the village including two of the reversioners, one a presumptive reversioner and the other a remoter reversioner and it was argued that this was a circumstance warranting the inference that to the knowledge of everybody Ramajogayya was the validly adopted son. We do not think that any such inference will be warranted. It may be that persons interested in the family or respectable people of the locality would have been called in to see the disputes between the parties settled and so long as this was done they were not concerned with the relative rights of the parties. On the other hand, there is the fact that several of the attestors to Ex. G have attested documents executed by the widow between 1895 and 1906 whereby she purported to deal with the property in total disregard of the rights of the alleged adopted son.

We may also observe that the circumstances of the plaintiff's father at the time of his death were by no means such as to probabilize the oral authority. He was then a young man of 25 who died leaving a widow aged 18 and the plaintiff who was then an infant and his mother also survived him. It appears from the evidence that he had long been suffering from dropsy. If he was at all of a religious turn of mind or the influence of those around him inclined him in that direction, there was ample opportunity for him to leave written instructions as to the enjoyment of the property and the perpetuation of his lineage by adoption. This is all the more probable in view of the extent of his property and of his position as the holder of an office. No such step having been taken, it seems to us by no means unlikely, in view of his age, that he did not think very seriously of these religious purposes and as he left a daughter it is hardly likely that he would have placed the daughter at the mercy of a son to be adopted without specific directions for her benefit. We must accordingly hold that the plaintiff has failed to prove that Ramajogayya had been validly adopted and was in a position to confer an absolute estate on the plaintiff as he purported to do under Ex. G.

In the above view, it does not seem to us necessary to refer at length to the decisions to which the learned counsel for the appellant drew our attention, as to the test to be applied in determining whether the vendor is able to convey a title free from reasonable doubt. The test is expressly laid down in S. 25 (b), Specific Relief Act, and it will not be safe to attempt to paraphrase it. We may however observe that the observations in (1821) 6 Madd 54,[3] (1870) 10 Eq 449[4] at p. 455 and (1892) 3 Ch 382[5] at p. 392, to which the learned counsel drew our attention, far from supporting him clearly go to show that when a vendor's title depends not upon a question of law but upon proof of a disputed fact, that fact must be proved, and if the vendor does not prove it, he cannot be held to have made out a good title. To the same effect is the rule stated in Williams on Vendor and Purchaser at page 1011 of the 1906 edition. Under the heading "questions of fact" the author concludes the discussion as follows:

> It appears that where there is a real ground of suspicion of some matter which would cause a defect in the legal title to the property sold, the Court may, unless the suspicion be removed by sufficient evidence, pronounce the title to be too doubtful to be forced on the purchaser, or may at least do so if its acceptance would leave him exposed to the reasonable probability of adverse litigation.

Mr. Satyanarayana Rao attempted to bring this case within the authority of the decisions which say that where the circumstances will justify a Court in instructing a jury to draw a presumption in favour of the plaintiff's title, the Court will hold the plaintiff's title to be free from reasonable doubt. And it is with this purpose in view that he relied on the decision in 53 M L J 858[2] as laying down a presumption in favour of the validity of ancient adoption ; but for the reasons which we have already explained, we are unable to hold that any such presumption can be drawn in this case. We accordingly hold that the lower Court was justified in dismissing the suit for specific performance. As regards the memorandum of objections in A. S. No. 64, we see no sufficient ground for interfering with the lower Court's direction as to costs in O. S. No. 68 of 1932. Mr. Somayya contended that the terms of S. 18 (d), Specific Relief Act, deprived the Court of any discretion in the matter of costs if the vendor's suit for specific performance is dismissed on the ground of imperfect title. We are unable to interpret S. 18 (d) in that absolute manner. S. 35, Civil P. C., which provides that the costs of an incident to all suits shall be in the discretion of the Court is no doubt made subject to the provisions of any law for time being in force. But it seems to us unreasonable to hold that S. 18 (d), Specific Relief Act, lays down an absolute rule, independent of the conduct of the purchasers as defendants in the course of the specific performance suit. The object of S. 35, Civil P. C., is clearly to enable the Court to award costs in the light of the conduct of the parties in the suit. In the present case, the learned Subordinate Judge has found that on some points the contentions of the purchasers were not true and that they either had not the whole amount of money required to enable them to complete the contract or for some other reason they decided to resile from the contract. In these circumstances, we think the lower Court was justified in declining to award costs in their favour, though it dismissed the vendor's suit for specific performance on the ground of defect of title.

It follows from the findings above recorded that the purchasers were entitled to the refund of the advance of Rs. 1000 paid by them. Mr. Satyanarayana Rao relied on the observations in (1889) 14 A C 429[6] at p. 433. The speeches delivered in that case clearly show that the House dealt with it as a case in which if a suit for specific performance had been instituted the purchasers would have had no defence to the suit. That is not the position here. On the other hand, it is clear from the observations of the Judicial Committee in 61 M L J 699[7] at p. 702, that practically the same considerations govern the question of the grant of specific performance to the vendor and of directing the refund of the deposit to the purchaser. This is in effect the provision in S. 18 (d), Specific Relief Act. We may also mention that the payment of Rs. 1000 is referred to in Ex. A not even as a deposit but only as advance. The argument sometimes founded on the use of the word "deposit" will not therefore avail in the present case. A. S. No. 65 of 1935 accordingly fails.

In the memorandum of objections filed in this appeal, the purchasers object to the lower Court's disallowance of costs to them and also to the lower Court's disallowance of interest on the sum of Rs. 1000 for the period anterior to the institution of the suit. As regards the costs in the lower Court we are not prepared to interfere with the lower Court's decision but as regards interest, we find no reason given by the learned Subordinate Judge for the disallowance of interest. Prima facie, the purchasers are entitled to interest under the terms of S. 18 (d) and we see nothing in their conduct to disentitle them to the same. We accordingly hold that they are entitled to interest on the sum of Rs. 1000 at 6 per cent. per annum from the date of Ex. B, that is 25th July 1930 to the date of the institution of the suit. To this extent the memorandum of objections is allowed. The direction in the lower Court's decree as to interest from that date will stand. The respondents are entitled to costs in this Court both in A. S. Nos. 64 and 65 but to advocate's fee only in A. S. No. 64. The memorandum of objections in A. S. No. 64 is dismissed; there will be no order as to costs in this or in the memorandum of objections in A. S. No. 65.

---

[3] Emery v. Grocock, (1821) 6 Madd 54 = 22 R R 236.

[4] Mullings v. Trinder, (1870) 10 Eq 449 = 39 L J Ch 833=23 L T 580=18 W R 1186.

[5] Mogridge v. Clapp, (1892) 3 Ch 382=61 L J Ch 534=67 L T 100=40 W R 663.

[6] Soper v. Arnold, (1889) 14 A C 429=59 L J Ch 214=61 L T 702=38 W R 449.

[7] Low & Co. Ltd. v. Jyoti Prasad Singh Deo, (1931) 18 A I R P C 299=135 IC 632=59 Cal 699=58 I A 392=61 M L J 699 (P C).

C.R.K./D.S. *Order accordingly.*

---

* A. I. R. 1940 Madras 744

KING AND LAKSHMANA RAO JJ.

In re Nandivada Ganganna Dhora
Accused — Prisoner.

Referred Trial No. 7 and Criminal Appeal No. 12 of 1940, Decided on 27th February 1940, referred by Sessions Court, Vizagapatam, D/- 15th December 1939.

*** Evidence Act (1872), Ss. 27 and 26 —Accused charged with murder making statement to police promising them to take to place where his co-accused had buried spear — Accused taking police to that place, searching for spear himself but unable to find it — Spear produced by co-accused —Statement does not fall under S. 27 and is inadmissible.**

No doubt it is not necessary that the informant himself should personally recover any property about which he gives information. But when the informant has tried unsuccessfully to recover such property the effect of his information has become completely exhausted. [P 745 C 1]

Where an accused charged with murder has made a statement by which he promised the police to take them to the place where his co-accused had buried the spear with which he had stabbed the deceased and accordingly took the police to a gedda and after he had himself unsuccessfully searched for the spear the co-accused took it out and produced it, the discovery of the spear not being in the essential sense of the word due to the information given by the accused but being due simply and solely to the action of his co-accused, the statement does not fall within S. 27 but within S. 26 and is inadmissible in evidence. [P 744 C 2; P 745 C 1]

P. Basi Reddi — *for Appellant.*

Public Prosecutor — *for the Crown.*

King J. — The appellant was accused 3 in S. C. No. 52 of 1939 before the learned Sessions Judge of Vizagapatam. The three accused in that case were charged with the murder of one Pendyal Ramalingam, Village Munsif of Kondasekharapalli and with the murder of Pantala Appayya, a bandy driver and with causing hurt with a dangerous weapon to two of the witnesses in the case, P. Ws. 14 and 15. The evidence in the case established the fact that the deceased Ramalingam and the two witnesses started in Appayya's bandy from Kondasekharapalli on the night of 20th June last to go to Parvatipur and that they were attacked by three men about halfway on their journey. Ramalingam was killed immediately but Appayya survived until the 22nd when he died in hospital and the two witnesses received minor injuries. The evidence in the case was twofold : firstly, the evidence of identification and secondly, evidence based upon the confession made by the appellant. The evidence of identification was not considered by the learned Sessions Judge sufficiently safe to act upon. He accepted neither the evidence of the two witnesses who were travelling in the bandy nor that of the two other witnesses who say that they saw the three accused near the scene of offence shortly before the offence must have been committed, and in consequence acquitted accused 1 and 2.

The accused were arrested on 24th June and the appellant made a long statement which was recorded as Ex. Y. At the conclusion of that statement the appellant promised the police to take them to the place where accused 1 had buried the spear with which he had stabbed the occupants of the bandy. The next day, 25th June, accused 3 accordingly took the police to a gedda and after he had himself unsuccessfully searched for the spear, accused 1 took it out and produced it. The evidence upon which accused 3 has been convicted by the learned Sessions Judge consists almost entirely of this statement. The statement has been admitted in full as one made under S. 27, Evidence Act. It seems however to us very doubtful whether this is a statement admissible under S. 27 at all. No doubt, in one sense of the word, if the evidence is believed—and we see no reason why it should not be — it was the information given by the appellant which actually led to the fact that the police officer came to this particular gedda. But if the events of that morning be more closely analyzed, it will be seen that the discovery of the spear was not in the essential sense of the word due to the information given by accused 3 but was due simply and solely to the action of accused 1 who according to the prosecution case had himself hidden the spear in that particular spot. No doubt it is not necessary that the informant himself should personally recover any property about which he gives information. But when the informant has tried unsuccessfully to recover such property it must, we think, be conceded that the effect of his information has become completely exhausted. No doubt if one of the police officers themselves or any third party acting on the information of accused 3 had recovered this spear, S. 27 would have been applicable. But, as it is, we are of opinion that this spear was recovered not because of any information given by the appellant, though that may have been the proximate cause of the presence of the party at the gedda, but by the action of accused 1 himself. We would accordingly hold that Ex. Y does not fall within S. 27 but within S. 26 and is inadmissible in evidence. That being so there is no evidence upon which the appellant could possibly be convicted. This appeal must be allowed and the conviction set aside and he will be set unconditionally at liberty.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 745

BURN AND LAKSHMANA RAO JJ.

Public Prosecutor — Appellant.

v.

Ramaswami Nadar — Respondent.

Criminal Appeal No. 686 of 1939, Decided on 5th March 1940, against acquittal by Sess. Judge, Ramnad Division, in S. C. No. 83 of 1939.

Penal Code (1860), S. 300 — Accused chopping at arm or leg with sword and thereby severing arteries — Injured man dying as result —Offence is murder.

An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If a stab with a knife or a dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt, or grievous hurt, with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or to hack at a limb. The person who uses a sword or aruval, chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. [P 746 C 1,2]

Appellant in person.

R. Sadasivam Pillai — *for Respondent.*

Burn J.—This is an appeal by the Provincial Government from the decision of the learned Sessions Judge of Ramnad in S. C. No. 83 of 1939. The respondent Ramaswami Nadar was tried on a charge of murder. The learned Sessions Judge convicted him under S. 326, I. P. C., and sentenced him to rigorous imprisonment for five years. The learned Public Prosecutor contends that the facts established constitute the offence of murder. The respondent did not appeal from his conviction under S. 326, I. P. C. and the learned counsel who has appeared for him in this Court has not attempted to show that the learned Sessions Judge's findings of fact are wrong. The evidence recorded by the learned Sessions Judge showed that there was some enmity between the respondent and one Periana Nadar, arising partly out of gambling with cards and partly out of the association of Periana Nadar with the respondent's wife. On 5th August 1939 about 11-30 A. M. the respondent attacked Periana Nadar with a weapon which is described as "patta knife" or "gin knife." One witness, P. W. 8, says that it was "something like a sword." P. W. 7 says that the blade was about two cubits long. The respondent himself in a confession which he made to the Taluk Magistrate on 10th August described it as a piece of iron bar.

He also used the description 'patta.' With this weapon the respondent inflicted nine wounds on Periana Nadar: (1) an incised wound across the back of the right elbow exposing the bones of the joint; (2) an incised wound on the palm of the right hand; (3) an incised wound on the middle of the right forearm; (4) an incised wound on the back of the left foot (the lower portion, the doctor says, was hanging down); (5) an incised wound over the left heel; (6) an incised wound 4 inches long, 2 inches wide and 2 inches deep across the back of the left knee, cutting all the blood vessels, arteries, veins as well as nerves; (7) the left thumb was cut and was hanging down; (8) the left index finger was split into two, and (9) a contusion on the tip of the left middle finger. The doctor, P. W. 1, who made the post-mortem examination, says that the cut across the back of the knee severed the popliteal arteries and the veins, and he says, "the injuries to such arteries are necessarily fatal." He goes on to say: It is not a fatal or vital part." The learned Sessions Judge appears to have been very gravely misled by this remark. The doctor was simply contradicting himself when he said in one breath that the injury was fatal and in the next that it was not an injury in a fatal or vital part. If the injury is necessarily fatal, it is obvious that the part of the body upon which it has been inflicted is a vital part.

The real question for decision is, what was the respondent trying to do when he inflicted all these injuries upon Periana Nadar, or in other words, what was his intention? The learned Sessions Judge appears to think that his intention was only to maim the man. If by that the learned Sessions Judge means that the respondent was trying to chop off the man's leg, that is possibly correct. But if that be so, the respondent must be held to have intended to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Everybody knows that if a man's leg is severed close below the knee the man must die from loss of blood in a very short time unless some skilful person appears, who can stop the arterial bleeding. The cut described by the doctor as the sixth injury was 4 inches long, 2 inches deep, and gaping 2 inches wide. It is clear that it had cut across practically the whole of the muscular structures of the leg. It is not possible for a person who inflicts an injury like this to say that he did not intend to cut the arteries, or to cause the man to bleed to death.

The case is very different from the frequent cases of stabbing with a knife or dagger. If a man armed with a knife or dagger stabs another in the arm or in the leg, it can generally be urged on his behalf that he was not trying to kill, and that he was not trying to inflict such a bodily injury as is sufficient in the ordinary course of nature to cause death. An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If therefore a stab with a knife or a dagger aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt, or grievous hurt, with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or to hack at a limb. The person who uses a sword or aruval, chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. *See* Illustration (c) to S. 300, I. P. C. Accordingly we set aside the conviction for an offence under S. 326, I. P. C., and the sentence of five years rigorous imprisonment. We convict the respondent for the offence of murder with which he was charged and we sentence him to transportation for life.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 746

LAKSHMANA RAO J.

In re V. Balakrishna Nadar — Petitioner.

Criminal Revn. Case No. 199 and Petn. No. 183 of 1939, Decided on 22nd February 1939, to revise order of the Stationary Sub-Magistrate, Sattur, D/- 14th February 1939.

Criminal Trial — Application by complainant to summon certain order at costs of applicant and necessary to show that defence witnesses were interested in accused held should not be rejected.

A complainant applied to a Magistrate to summon certain order by the Assistant Commissioner of Salt Revenue which was necessary to show that some of the witnesses coming on the side of the accused were interested in the accused. The summons was to issue at the cost of the complainant: *Held* that the application should not be refused. [P 746 C 2; P 747 C 1]

T. M. Kasturi — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts.—The complainant applied to the Second Class Magistrate, Sattur, before whom the case C. C. No. 1006 of 1938 was proceeding, to summon certain order dated 3rd November 1938 passed by the Assistant Commissioner of Salt Revenue, Southern Division, Negapatam, which was necessary to show that some of the witnesses coming on the side of the accused are interested in the accused as they owned jointly with the accused a match factory. The complainant applied for the production of the original order on the ground that his application to the Assistant Commissioner for a certified copy of the said order was refused by the return of the copy stamp papers. The Second Class Magistrate rejected the application for the issue of summons on the ground that the endorsement of the Assistant Commissioner refusing the grant of the certified copy was not filed and against that order of the Subdivisional Magistrate this criminal revision petition is filed.

Order.—The summons is to issue at the cost of the petitioner and the refusal of the Magistrate to send for the document is unsupportable. The order of the Magistrate is therefore set aside and the document will be sent for before proceeding with the case further.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 747

PANDRANG ROW J.

In re Gollakotta Suryanarayanamurthi and another — Petitioners.

Criminal Revn. Case No. 564 and Petn. No. 535 of 1938, Decided on 15th December 1938, to revise the judgment of Court of Session, East Godavari Division, D/- 2nd August 1938.

Penal Code (1860), Ss. 148, 149 and 427 — Site belonging to villagers generally and set apart for public purpose — Villagers demolishing walls built on site by complainant are not guilty of any offence.

Where a site belonged to the villagers generally and had been set apart for public purposes they are entitled as a matter of law to remove the obstruction to the enjoyment of the site, and the mere removal of the walls built on site by the complainant would not amount to a criminal offence. The common object of demolishing the walls cannot in these circumstances be regarded as an unlawful one. [P 747 C 2]

T. M. Kasturi — *for Petitioners.*

K. Venkataraghavachari for Public Prosecutor — *for the Crown.*

Order. — The petitioners in this case are two out of the 28 persons who were charged with a number of offences, namely offences punishable under Ss. 148, 149, 323 and 427 read with S. 114, I. P. C., in connexion with an occurrence which took place at about 8 P. M. on 14th November 1937 in the village of Modekurru. There is no doubt that for some time before the occurrence there was a dispute between the villagers headed by petitioner 1, the village Munsif, and also to some extent by petitioner 2 on the one side and P. W. 1, the complainant on the other, as regards a certain vacant site which had been purchased by the complainant about two years ago. The villagers claimed the site as part of communal land required and used for religious purposes whereas the complainant claimed it to be private land which he had obtained under a sale deed. One or two attempts made by the complainant to build a house on the site proved fruitless on account of the obstruction offered by petitioner 1 and others. Finally, it would appear that the Police Sub-Inspector took a strong line in the matter in favour of the complainant as a result of the instructions given to him by the Deputy Superintendent of Police and he went to the village with a party of constables; in these circumstances the complainant appears to have engaged a large number of coolies and built up the walls in one day to a height of several feet intending to put a roof the very next day. It was in the evening of the day after the walls had thus been hastily built that the occurrence is said to have taken place.

A large number of villagers headed by accused 1 and 2, that is the petitioners are said to have gone to the place and under the orders of the latter the rest of the villagers are said to have pulled down the walls by using crowbars, pick-axes, etc. It is also alleged that the complainant was beaten with a cane or walking stick by accused 1 and 2. There can be no doubt that the complainant had injuries on his person as is seen from the medical evidence and there is no reason to suppose that he did not receive them at the time of the occurrence. The Magistrate who heard the case was of the opinion that the evidence of the prosecution was not reliable so far as 26 out of the 28 accused were concerned and these 26 were discharged and the case was proceeded against only accused 1 and 2. As regards the offences punishable under Ss. 148, 149 and 427, I am of opinion that the convictions cannot stand in the absence of any finding as to the ownership of the site on which the walls were put up. If really it was a site to which the complainant had no individual right, and if the site belonged to the villagers generally and had been set apart for public purposes they were entitled as a matter of law to remove the obstruction to the enjoyment of the site and the mere removal of the walls in those circumstances would not amount to a criminal offence. There is no finding on this question by either of the Courts below. In these circumstances it is impossible to support the convictions under the above Sections. The common object of demolishing the walls cannot, in these circumstances, be regarded as an unlawful one. There is nothing to show that any force or show of force was intended to be displayed as against the complainant or his party. Crowbars and pick-axes were taken only for the purpose of pulling down the walls and not for any other purpose. The offence of rioting therefore has not been made out by the prosecution. In the circumstances it is really difficult to say that the villagers did not honestly believe that they were within their rights in pulling down the walls without doing any injury to the complainant or his friends. The convictions therefore of the petitioners under these Sections are accordingly set aside and they are acquitted of the same.

As regards the convictions under S. 323, I. P. C., namely for causing hurt to the complainant, I see no sufficient reason to doubt the correctness of the convictions. The complainant was, as I have already observed, undoubtedly beaten and injured at the time of the occurrence and according to him it was the two petitioners who beat him. It may be that he is not quite reliable as a witness but on this point there is no reason to upset the concurrent findings of the Courts below that it was the petitioners who caused hurt to him. The convictions are therefore upheld; but the sentences appear to be unnecessarily severe. The hurt was simple and the circumstances did not call for a sentence of imprisonment. The sentence therefore under S. 323, I.P.C., on the petitioners is reduced to a fine of Rs. 50 in the case of each and in default of payment to one month's rigorous imprisonment. Fourteen days' time is given for payment of this fine into Sub-Divisional Magistrate's Court. The petitioners were also ordered to furnish security for keeping the peace but in the view that I have taken of the case this order is not necessary; that order is also set aside and the bonds if executed should be cancelled.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 748

BURN J.

Soundararajappa Mudaliar — Appellant.

v.

Krishna Ayyar (minor) through Raghavendra Rao and another — Respondents.

Second Appeal No. 40 of 1937, Decided on 6th March 1940, against decree of Sub-Judge, Coimbatore, in A. S. No. 134 of 1936.

Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 (1) and 21 — Suit by plaintiff for declaration that defendant's appointment as karnam was illegal and registry of his name as holder of that hereditary office falls under S. 13 (1)—Jurisdiction of Civil Courts is barred under S. 21—Fact that defendant is stranger to plaintiff's family is immaterial.

A suit by the plaintiff claiming to be the nearest heir to the last registered holder of the hereditary office of karnam for a declaration that the defendant's appointment as karnam was illegal and registry of his own name as holder of the office of karnam falls under S. 13 (1). Consequently the jurisdiction of the Civil Courts is barred by S. 21. It makes no difference that the defendant is a stranger to the family of the plaintiff: *A I R 1932 Mad 724, Disting.* [P 748 C 2]

G. Nagarajan — *for Appellant.*

B. Sitarama Rao (Govt. Pleader) and V. C. Viraraghavan—*for Respondents.*

Judgment. — The decisions of the lower Courts are clearly wrong. The suit in this case was one in which the plaintiff claimed two reliefs: (1) a declaration that defendant 1's appointment as karnam of Kondampatti was illegal and (2) registry of his own name as holder of the office of karnam. The office of karnam in Kondampatti is hereditary and the plaintiff's case was based on the allegation that he was the nearest heir to one Krishnamurthi, the last registered office holder. This suit was exactly a suit of the kind described in S. 13 (1), Madras Hereditary Village Offices Act (3 of 1895). Consequently the jurisdiction of the Civil Courts was barred by S. 21 of the Act (3 of 1895). It makes no difference that defendant 1 is a stranger to the family of the plaintiff. The lower Courts have been led astray by the decision in 63 M L J 577.[1] That was a case in which a certain hereditary office had been abolished under S. 6 (1) of the Act. The Section itself provides that where villages are grouped, etc., the hereditary offices in them shall cease to exist and new hereditary offices shall be created. Hence, in such a case, as Ananthakrishna Ayyar J. pointed out, no suit could possibly be filed under S. 13 for any of the new offices. That is the distinction between that case and this. Here a suit can be filed under S. 13 of the Act and such a suit was filed in the Revenue Court and pursued up to the Board of Revenue. I am quite clear that the Civil Courts had no jurisdiction in this case. The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed. The plaintiff (respondent 1) must pay the costs of the appellant (defendant 1) throughout. Leave refused.

---

[1] Ramakrishnayya v. Venkataranga Rao, (1932) 19 A I R Mad 724 = 139 I C 510 = 63 M L J 577 = 56 Mad 134.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 749

ABDUR RAHMAN J.

Katrapati Hanumayamma—Appellant.

v.

Official Receiver, Guntur — Respondent.

Appeal No. 26 of 1937, Decided on 10th February 1939, against appellate order of Dist. Court, Guntur, D/- 14th August 1936.

(a) Provincial Insolvency Act (1920), Ss. 53 and 54—Suit by wife for maintenance — Few days afterwards husband filing application for insolvency — Court creating charge on certain property in favour of wife — Husband adjudicated insolvent—Application by Official Receiver for declaration that charge was not binding on him—Suit by wife few days before presentation of application for insolvency and relation between parties held did not suggest collusion between parties — Charge held took effect on date of suit.

A suit for maintenance was instituted by wife against husband in which suit she also prayed for creation of charge on certain immovable properties. A few days afterwards the husband applied for insolvency and was adjudicated insolvent after the Court had created charge in favour of the wife on one of the properties. The suit by the wife was contested by the husband. The Official Receiver made an application under Ss. 53 and 54 for declaration that the charge created by the Court was not binding on him :

Held that the relationship between the parties could not by itself be a ground for arriving at the decision that any litigation between them must necessarily be held to be collusive. The other fact that the suit by the wife was filed within a few days before the actual presentation of the insolvency petition was not, although suggestive of collusion, enough by itself to arrive at the conclusion that it was filed in consequence of a conspiracy existing between them : *A I R 1928 Lah 738 and A I R 1935 Mad 817, Disting.* [P 750 C 2]

Held further that the maintenance decree creating a charge on a specific immovable property mentioned in the plaint operated to give a charge to the wife not merely from the date of the decree but from the date on which the plaint was presented. Hence, the charge in the wife's favour although ordered subsequently to the presentation of application for insolvency would take effect from the date on which she filed the suit : *A I R 1930 Mad 824, Rel. on.* [P 750 C 1, 2]

(b) Hindu Law — Maintenance — Duty of maintaining wife is on husband which can be enforced by suit *(Obiter)*.

The duty of maintaining a wife is cast by Hindu law on her husband and if he neglects or refuses to maintain his wife, which he is legally bound to do, she would have no option but to have recourse to law : *6 Mad 63, Rel. on.* [P 750 C 2]

(c) Hindu Law — Maintenance — Suit for — Creation of charge while decreeing suit is discretionary matter.

A Court is legally entitled to create a charge in a suit for maintenance but it is a discretionary matter. [P 751 C 1]

(d) Insolvency — Insolvency Court can look into consideration for judgment-debt when suit has not been fought on merit — Same cannot be said where there has been real contest or where decree-holders claim to be mortgagees or charge-holders.

It is quite true that a judgment given by a competent Court is merely prima facie proof of a debt and a Court of Bankruptcy is, particularly when the suit has not been fought on merits, entitled to look into what has been called "the consideration for the judgment debt." The same however cannot be said of a case where there has been a real contest or of cases where decree-holders claim to be mortgagees or charge-holders. In such a case it would be open to the Official Receiver to question a charge or a mortgage by taking appropriate proceedings, but then he would have to show the grounds which would entitle him to have them annulled under Ss. 53 and 54 of the Act: *(1875) 10 Ch A 373, Ref.* [P 752 C 1, 2]

(e) Insolvency—Insolvency Court cannot question form in which decree is passed.

The power of the Court of Bankruptcy to go behind a judgment is a power to inquire into the consideration for and not into the form of the judgment. The judgment is conclusive unless the consideration can be questioned: *(1904) 1 K B 572, Rel. on.* [P 753 C 1]

(f) Provincial Insolvency Act (1920), S. 53— S. 53 applies even to transfers in invitum.

Section 53 applies not only to voluntary alienations but also to transfer in invitum : *A I R 1931 Mad 597, Rel. on.* [P 753 C 2]

(g) Hindu Law—Maintenance—Suit by wife for maintenance mentioning certain items of properties on which she claimed charge—Fact that Court declares charge on one item would not justify conclusion that property did not form subject-matter of suit.

Where in a suit by wife for maintenance the wife has mentioned certain items of properties on which she claimed a charge in the schedule attached to the plaint the fact that the Court declared it in regard to one property only would not justify the contention that the property did not form the subject-matter of the suit : *A I R 1936 Mad 84, Rel. on.* [P 754 C 1]

V. Suryanarayana — *for Appellant.*

N. Rama Rao and B. V. Ramanarasu — *for Respondent.*

Judgment. — This is an appeal from an order of the learned District Judge of Guntur reversing an order passed by the Additional Subordinate Judge of that place and holding that the charge created in the appellant's favour was not binding on the Official Receiver. A suit for maintenance was instituted by the appellant on 28th September 1932 in the District Munsif's Court at Guntur in which she had also prayed for the creation of a charge on certain immovable properties belonging to her husband Venkatanarayana (O. S. No. 463 of 1932). This was decreed on 20th March 1933 but the charge was created by the Court only over one item of the property. Venkatanarayana had in the meantime applied for insolvency (I. P. No. 158 of 1932). This petition was presented on 11th October 1932 although he was not adjudicated until 9th September 1933. A year later, the Official Receiver made an application to the Subordinate Judge, Guntur, under Ss. 4, 53 and 54, Provincial Insolvency Act, asking for a declaration that the charge created by the District Munsif in the appellant's favour in O. S. No. 463 of 1932 was not binding on him (I. A. No. 1563 of 1934). This prayer was based on the allegations that the suit was not contested by the insolvent and that he had collusively suffered the decree to be passed against himself with intent to defeat, delay and defraud his creditors. Reliance was placed by the Official Receiver also on the fact that the petition for insolvency was pending at the time when the charge was ordered to be created and it was therefore urged that the appellant would not be entitled to claim protection under S. 55, Provincial Insolvency Act.

It was stated on behalf of the appellant on the other hand that her relations with her husband had been strained and that she had been living separately from her husband for more than 15 years. She also alleged that the petition for insolvency was presented by Vekatanarayana to defeat her rights after a defence had been filed by him in the civil suit and he found the plaintiff's claim to be unanswerable. It was also urged that inasmuch as the suit on behalf of the appellant was instituted before the insolvency petition was filed, the charge created by the Court in her favour would remain unaffected by the order of adjudication passed after the decree had been obtained by her. The learned Subordinate Judge, who heard the application, was of opinion that there was no evidence to show that any collusion existed between the appellant and her husband, Venkatanarayana, and since the suit was contested by the latter, the decree could not be held to have been suffered by him with intent to defeat, delay and defraud his creditors. He also held that the Court was justified in passing the decree creating a charge in the appellant's favour and that the insolvency proceedings were subject to the Civil Court's decree. The Official Receiver's objection was therefore turned down. This order was appealed against, and the learned District Judge held that

> the maintenance decree passed by the District Munsif and the charge for it created by him, are in effect, a farce to defeat and delay the general body of creditors.

He was also of opinion that the suit for maintenance, though seemingly a contested suit, was really "an ex parte suit" and that the District Munsif's observation, made while rejecting an application presented by certain creditors who had applied to be impleaded as parties that the suit was being hotly contested, was incorrect. The Official Receiver's appeal was therefore accepted. This has given rise to the present appeal. It may be noted that the Official Receiver did not, in his application, attack the portion of the decree passed by the District Munsif granting maintenance to the appellant at the rate of Rs. 96 per annum and yet a perusal of the learned District Judge's judgment would show that even that portion of the decree was held by him to be void against the Official Receiver. How in the absence of any evidence on the record the learned District Judge came to the conclusion that any collusion existed between the appellant and her husband, it is not easy to see unless he was influenced by the fact that the suit was between the husband and the wife and that it was filed a fortnight before the actual presentation of the insolvency petition. The duty of maintaining a wife is cast by Hindu law on her husband, 6 Mad 83,[1] and if he neglects or refuses to maintain his wife, which he is legally bound to do, she would have no option but to have recourse to law. The relationship between the parties could not by itself be a ground for arriving at the decision that any litigation between them must necessarily be held to be collusive. The other fact that the suit by the appellant was filed within a few days before the actual presentation of the insolvency petition is not, although suggestive of collusion, enough by itself to arrive at the conclusion that it was filed in consequence of a conspiracy existing between them. It may well have been, as suggested in the appellant's reply to the petition, that the petition for insolvency was itself prompted by the knowledge of the institution of the suit for maintenance.

There are other facts however which lead to an inference that the suit for maintenance was not collusive but that of a bona fide character. That it was contested admits of no doubt. The record shows that it was. If the husband wished to contest the suit earnestly he had to disclose the debts which he owed. This was a very material fact which Venkatanarayana had to plead in order to bring down the rate of maintenance, if granted by the Court, to as low a figure as possible. He did so, and the Court was apparently influenced by the plea. The fact cannot be overlooked that while passing a decree for maintenance, the creation of a charge rests with the Court. It is a discretionary matter and the discretion need not at all have been exercised in the appellant's favour. Had a charge been created on his property by the husband either directly or indirectly or had he even given his consent to its creation by a third person or even by the Court the matter might have assumed a different aspect. But when the question of creating a charge depends entirely on the discretion of the Court, it cannot be reasonably contended that any charge created by the Court was in consequence of a collusion existing between the parties to the suit. Moreover, the exercise of a judicial discretion by the Court can also be inferred from the fact that while a charge was being claimed by the appellant in respect of four properties mentioned in the schedule attached to the plaint, the Court did not accede to that prayer but ordered the charge to be limited to one item only. The proposition that a Court is legally entitled to create a charge in a suit for maintenance is well recognized and was not contested before me. It is this fact which distinguishes, in my mind, cases such as A I R 1928 Lah 738[2] and 58 Mad 1032,[3] cited by the learned counsel for the respondent.

---

[1] Mahalakshmamma Garu v. Venkataratnamma Garu, (1883) 6 Mad 83.

In the first case, the insolvent and his creditor had agreed to refer their dispute in regard to certain money to an arbitration after a petition for the adjudication of the debtor had been presented to the Court. The arbitrator did not only rest content with passing a decree in the creditor's favour but ordered it to be a charge on some of the debtor's property. The petition for insolvency was followed by an order of adjudication. It is therefore clear that the charge created in the creditor's favour could not have been held to be valid both on the ground that the matter was referred to arbitration while the insolvency application was pending against the debtor and for the reason that the arbitrator did not have the power to create a charge unless it was either authorized or suffered by the owner of the property, i. e. the debtor and the creditor's claim was, if I may say so with respect, rightly disallowed. The second case cited on behalf of the respondent can be explained on more or less the same grounds. In that case a debtor had executed an agreement in favour of a creditor undertaking to execute a mortgage as security for his debts. An insolvency petition was presented against the debtor before a mortgage deed was executed and the creditor's debt was included in the schedule of debts filed by the insolvent. Subsequent to the presentation of the petition for insolvency, but prior to the order of adjudication, the creditor brought a suit for specific performance of the contract. This was defended by the debtor to begin with but the defence was subsequently withdrawn and the suit was decreed. It was held in those circumstances that the decree for specific performance in the creditor's favour was not binding upon the Official Receiver. The facts of the case thus show that it was the debtor's acts in executing an agreement and in withdrawing from the defence he had filed in the suit for specific performance, which led to the decree being passed by the Court. The case therefore fell directly within the provisions of S. 54, Provincial Insolvency Act. Moreover having regard to S. 28 of the Act, the whole of the insolvent's property including the one covered by the suit for specific performance had to be held as vesting in the Insolvency Court or in the Official Receiver not only from the date of adjudication but from the date of the presentation of the petition.

The same however could not be said of the suit for maintenance filed by the appellant. I have already come to a finding that the decree in that suit was not passed in consequence of any collusion between Venkatanarayana and his wife; and bearing the proceedings of that suit in mind, I am also of opinion that the decree could not be legitimately said to have been suffered by the husband. There was no justification for the remark made by the learned District Judge that the suit for maintenance was "seemingly a contested suit" and "the charge created by the Court was in effect a farce to defeat or delay the general body of creditors." This is strong language and the appellant's complaint on that score was reasonable. It added nothing to the case and has provided to some extent, a handle to attack the judgment. The fact that the Official Receiver has not even impugned the decree for maintenance and has confined his attack to the creation of the charge by the Court leads me to the same conclusion.

---

[2] **Tulsiram v. Mohomed Arif,** (1928) 15 A I R Lah 738=109 I C 373.

[3] **Achutaramayya v. Official Receiver, East Godavari,** (1935) 22 A I R Mad 817=158 I C 460=58 Mad 1032=69 M L J 241.

Learned counsel for the respondent however wants me to divide the decree for maintenance into two portions and to hold that two decrees, i. e. one for maintenance and the other creating a charge, were passed by the Court simultaneously and incorporated in one sheet. He urged that if the matter were thus viewed, the absence of attack against one decree could not have any adverse effect on the Official Receiver in regard to the portion of the decree which he was contesting. I am not prepared to assent to this dissection as the two portions of the decree are not independent but interdependent to a large extent. If the claim of maintenance were to be ignored, the creation of a charge would be meaningless. If on the other hand, the creation of charge is taken out of the decree, there would be no means left for the decree-holder to realize her decree. But even if I accede to the contention, it would not take one very far. It would only mean that the Official Receiver is entitled to contest that portion of the decree which created a charge in the appellant's favour. But it would not mean that if the portion of the decree granting maintenance was unassailable for want of collusion, the other portion of the decree creating a charge was so as a result of collusion between the husband and the wife. Venkata Narayana had not agreed to a charge being created and unless some sort of collusion is imputed to the Court, which it is impossible to do, the order creating a charge cannot be successfully attacked on that ground.

It was next contended on behalf of the respondent that the Official Receiver was not bound to accept the judgment passed by the District Munsif as conclusive in favour of the appellant, but was entitled to go behind it and question the charge created in her favour. It is quite true that a judgment given by a competent Court is merely prima facie proof of a debt and a Court of Bankruptcy is particularly when the suit has not been fought on merits, entitled to look into what has been called 'the consideration for the judgment debt' and ask the decree-holder to establish his claim before it. Sir W. M. James, L. J. in pronouncing his opinion in the leading case in (1875) 10 Ch Ap 373,[4] observed:

> It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. . . . If a judgment were conclusive a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation.

There is no need to refer to a number of other cases, which have been cited for the same proposition in 49 All 728.[5] It must be however remembered that in cases of simple money debts it is the claimant or the decree-holder who would have to go to the Insolvency Court or to the Official Receiver and request his name to be entered in the schedule of creditors. The case in 49 All 728[5] was that of a decree-holder who had obtained a money decree on the basis of an admission by the defendant in that case. The Official Receiver was not therefore held bound to treat the decree as conclusive evidence of the debt and was entitled to ask the decree-holder to adduce other evidence to show that the whole of the debt claimed by the decree-holder was actually due. The same however could not be said of a case where there has been a real contest or of cases where decree-holders claim to be mortgagees or charge holders. S. 28, Provincial Insolvency Act, provides that the powers of a secured creditor to realize or otherwise deal with his security remain unaffected by a debtor's insolvency and what comes to vest in the Official Receiver on a person's adjudication is the rest of his estate without taking the securities already created on his property into account. In such a case it would be open to the Official Receiver to question a charge or a mortgage by taking appropriate proceedings, but then he would have to show the grounds which would entitle him to have them annulled under Ss. 53 and 54 of the Act.

This is exactly the position in this case. The appellant did not go to the Official Receiver to have her claim admitted or to have her name included in the schedule of creditors. The Official Receiver has, on the other hand, come to the Court and asked for the annulment of that portion of the decree passed by the District Munsif which declared a charge in the appellant's favour. He has failed to establish any collusion between the husband and the appellant or even negligence by the husband in defending the suit for maintenance. Learned counsel for the respondent was at pains to show that the failure to prove collusion or negligence would not disentitle his client from getting the relief which he seeks if he has been able to prove that the maintenance decree has caused a miscarriage of justice; but when the learned counsel was pressed to state what he actually meant by these words, his reply was that the creation of charge by the Court was nothing short of gross injustice as it would have the effect of depriving the insolvent's creditors from realizing their just debts out of the property over which the charge has been declared. This is not the correct way to interpret these words. The creditors would be affected by every security which may have been created by their debtors validly. These words have been used in some English cases and were taken to convey, as held in (1895) 1 Q B 404,[6] that for some good reason there ought not to have been a judgment. It has not been shown in this case why the judgment ought not to have been given by the District Munsif in the appellant's favour.

---

[4] Ex parte Kibble, In re Onslow, (1875) 10 Ch A 373=44 L J B K 63=32 L T 138=23 W R 433.

[5] Union Indian Sugar Mills Co. Ltd. v. Brijlal Jagannath, (1927) 14 A I R All 426=102 I C 756=49 All 728=25 A L J 450.

An attempt was then made to argue that the powers of the Court were co-extensive with that of the debtor and if a party could not alienate the property after an application for insolvency was made by him, the Court could not also exercise the power. The fallacy in this argument lies in the assumption that the Court like an arbitrator derives its powers from the parties. It is obviously not so. Moreover, the principle on which the case, 54 Mad 132,[7] was decided would show that although a party may not be able to create a charge on a property which has been auctioned through Court, the sale would not deprive another Court of the power to create a charge on the same property in certain circumstances. The attack in this case is confined, as stated above, to the form in which the District Munsif chose to pass the decree. This was pre-eminently the concern of the Court and nothing has been or could have been said now to show that the exercise of discretion by the District Munsif was not justified. The observations in (1904) 1 K B 572[8] are instructive. In delivering the judgment of the Court in that case Vaughan Williams L. J. observed :

> It is plain that the objection to the judgment, if any, is one of form only, and the power of the Court of bankruptcy to go behind a judgment is a power to inquire into the consideration for and not into the form of the judgment. The judgment, in our opinion, is conclusive, unless the consideration can be questioned.

I would therefore agree with the learned Subordinate Judge that the Official Receiver is not entitled to question the form in which the decree was passed by the District Munsif. As a half-hearted attempt was made to show that the decree was defective on the ground that the Official Receiver was not impleaded as a defendant, it might not be out of place to mention that he could not have been impleaded in that suit, as the order of adjudication was not passed until a few months after the decree had been passed against the husband. These findings, however beneficial they may be to the appellant, are not enough to decide the case in her favour unless it is found that the charge did in fact or must be deemed to have come into existence before the application for his insolvency was presented by Venkata Narayana. If this is not so, the charge created by the Court in the appellant's favour would be hit by S. 53, Provincial Insolvency Act, which has been held to apply not only to voluntary alienations but also to transfers *in invitum*, A I R 1931 Mad 597.[9] The suit, as already stated, was instituted by the plaintiff on 28th September 1932 and the petition for insolvency was presented on 11th October 1932. The charge cannot be said to have been in existence prior to the suit.

The only question then is if it can be deemed to have come into existence on the date when the suit was instituted. If the doctrine of relation back, as applied to the orders of adjudication can also be applied to the decrees passed in suits for maintenance, the appellant's position would be secure. It has been held by a Division Bench of this Court that a maintenance decree creating a charge on a specific immovable property mentioned in the plaint operates to give a charge to the plaintiff not merely from the date of the decree but from the date on which the plaint was presented: 54 Mad 132.[7] The proposition settled by this case was not controverted by the learned counsel for the respondent but it was argued that as the learned Judges were not dealing with a case of supervening insolvency it could not be of any assistance to the appellant. It is true that the contest in that case was between a widow and an auction-purchaser but I cannot see what difference in principle would it make if an Official Receiver is substituted for the auction-purchaser. The question in both the cases would relate to the date on which the charge should be deemed to have come into existence and it was this point which has been settled by that case.

---

[6] Re Hawkins, Ex parte Troup, (1895) 1 Q B 404=64 L J Q B 373=14 R 44=72 L T 41=43 W R 306=2 Manson 14.

[7] Seetharamanujacharyulu v. Venkatasubbamma, (1930) 17 A I R Mad 824=127 I C 809=54 Mad 132=59 M L J 485.

[8] In re Beauchamp, Ex parte Beauchamp, (1904) 1 K B 572=73 L J K B 311=90 L T 594=52 W R 545=11 Manson 5=20 T L R 269.

[9] Ramabrahman v. Andalamma, (1931) 18 A I R Mad 597=135 I C 544.

I must therefore hold that the charge in the appellant's favour although ordered subsequently would take effect from the date on which she filed the suit. The learned counsel for the respondent finally urged that the appellant had not specifically mentioned the properties over which she prayed for the creation of a charge in respect of her maintenance and it could not therefore be contended that the charge would take effect from the date on which the suit was instituted. A perusal of the plaint presented by the appellant would however show that this contention has absolutely no force. The plaintiff had mentioned four items of properties on which she claimed a charge in the schedule attached to the plaint and the fact that the District Munsif declared it in regard to one property only would not justify the contention that the property did not form the subject-matter of the suit. *See* 43 M L W 201.[10] For the above reasons, this appeal must be and is hereby allowed, and the first Court's order restored. The appellant will have her costs both in this and in the lower Appellate Court.

C.R.K./D.S. *Appeal allowed.*

---

[10] Lakshmidevamma Bahadur v. Subba Rao, (1936) 23 A I R Mad 84=161 I C 421=43 M L W 201.

A. I. R. 1940 Madras 754

HORWILL J.

Pappammal and others — Petitioners.

v.

Seethammal and others — Respondents.

Civil Revn. Petn. No. 1460 of 1939, Decided on 15th March 1940, to revise order of Court of District Munsif, Tirumangalam, D/- 2nd August 1939.

Civil P. C. (1908), O. 33, R. 1, Explanation — Construction — Expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies second part of explanation and not first — Plaintiff unable to pay deficit court-fee — Both parties agreeing that plaintiff had saleable interest in certain items of suit property—Items held could not be ignored in determining whether plaintiff had sufficient means to pay deficit court-fee.

The expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies only the second part of the explanation and not the first. [P 755 C 1]

Where the plaintiff is unable to pay the deficit court-fee and wants to continue the suit as a pauper and both sides agree that the plaintiff has a saleable interest in certain items of the suit property, it would be contrary to the spirit of O. 33, if the plaintiff could ignore this property on which he could raise money in determining whether the plaintiff had sufficient means to pay the court-fee : *A I R 1926 Mad 567 and 30 Bom 593, Rel. on; A I R 1923 Bom 247, Not approved; A I R 1934 Mad 653, Expl.* [P 755 C 1]

K. V. Srinivasa Aiyar — *for Petitioners.*

R. Desikan — *for Respondents.*

Order. — The petitioners filed this suit for a declaration that the property left by petitioner 1's deceased husband belonged to her and for an injunction restraining defendant 1, a co-widow, from interfering with her possession. Defendant 1 resisted the suit on the ground that the property was the self-acquired property of her husband and that he had left a will by which he bequeathed all the property with the exception of items 9 and 10 to the defendants. Plaintiff 1 replied that her husband was not then in a sound disposing state of mind and that the will was therefore not binding on her. The plaintiff paid such court-fee as she thought sufficient; but during the course of the trial, the court-fee examiner discovered that a higher court-fee was payable. The plaintiff then declared that she was unable to pay that higher court-fee and prayed for permission to continue the suit in forma pauperis. That petition was dismissed by the District Munsif of Tirumangalam on the ground that whether on the plaintiffs' case or on the defendants' case, the plain-

tiff had an interest in items 9 and 10 upon which she could raise the amount necessary for paying the additional court-fee.

The first point that arises is whether items 9 and 10 can be said to be the subject-matter of the suit; and if so whether they are excluded by O. 33, R. 1, Civil P. C., for the purpose of evaluating the property of the plaintiff. It seems to me that the comma after the word "suit" separates the first part of the Explanation to R. 1 from the second part from which it would follow that the expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies only the second part of the Explanation and not the first. If this expression were intended to qualify the whole of the Explanation, then the comma after "suit" would be wrong. I am fortified in this opinion by the Commentary in Mulla's Civil Procedure Code and by the judgment of Jackson J. in 50 M L J 114,[1] in which he follows 30 Bom 593[2] and disagrees with 47 Bom 523[3] in which he says the earlier Bombay decision had been overlooked. It is true that Madhavan Nair J. in 67 M L J 581[4] seems to express an opposite opinion; but he did not consider the point which we are now discussing. All that he said was that

> in the explanation to O. 33, R. 1, Civil P. C., the definition of "pauper" is given from which it appears that in considering whether a person is a pauper, the subject-matter of the suit should be excluded.

So he did not consider the question whether the words "other than his necessary wearing apparel and the subject-matter of the suit" qualify only a part of the explanation to R. 1 of O. 33 or the whole. In a sense, the subject-matter of this suit may be considered as far as these two items are concerned to be the difference between half the widow's life-estate and the whole value of the property. Where both sides agree that the plaintiff has a saleable interest in these two items, it would be contrary to the spirit of O. 33 if the plaintiff could ignore this property on which she can undoubtedly raise money.

It is no doubt true that even if she has a saleable interest in items 9 and 10, she is entitled to continue the suit as a pauper unless the Court is satisfied that she can sell whatever interest she has in these items and raise sufficient money to pay the deficit court-fee. With so much doubt as to what title she had in the lands and the existence of the question whether, if she had a widow's estate, a sale would bind the reversion, she would probably obtain very little for them in the open market. This difficulty has however been removed by the offer of the defendants to pay the plaintiff what she states to be the full value of the two items, namely Rs. 350. The defendants are willing to take the risk of its being found by the Court that the plaintiff is not entitled to more than half the widow's estate in those items. They are also willing to bear the risk that some reversioner at some future time might succeed in having it declared in a Court of law that the alienation is not binding on him. There can therefore be no doubt that the plaintiff can raise money on items 9 and 10 to pay the deficit court-fee of Rs. 171-6-0. This revision petition is therefore dismissed with costs. Two months from this day will be allowed to the plaintiffs for payment of the requisite court-fee.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 755

LAKSHMANA RAO J.

In re V. Mekala Venkatappa and others — Petitioners.

Criminal Revn. Cases Nos. 423 to 426 and Petns. Nos. 393 to 396 of 1939, Decided on 2nd May 1939, to revise orders of Sub-Divisional Magistrate, Dhone, D/- 26th January 1939.

Criminal P. C. (1898), S. 106 — Offence under S. 510, I. P. C., does not involve breach of peace.

Offence under S. 510, I. P. C., is not an offence involving a breach of the peace. Hence an order for security under S. 106, Criminal P. C., is unsustainable. [P 755 C 2]

V. S. Rangaswami Iyengar — *for Petitioners.*

Public Prosecutor —*for the Crown.*

Order.—The petitioners have been convicted under S. 510, I. P. C., and it is not an offence involving a breach of the peace. The order for security under S. 106, Criminal P. C., is therefore unsustainable and it is set aside. Otherwise these petitions are dismissed.

C.R.K./D.S. *Petitions dismissed.*

---

[1] Mahalakshmi Ammal, In re, (1926) 13 A I R Mad 567=94 I C 337=50 M L J 114.

[2] Krishna Bai v. Manohar, (1906) 30 Bom 593= 8 Bom L R 671.

[3] Bai Balagauri v. Motilal Ghellabai, (1923) 10 A I R Bom 247 = 72 I C 224=47 Bom 523= 25 Bom L R 199.

[4] Ramaswami Naidu v. Vaiyapuri Nadan, (1934) 21 AIR Mad 653=152 I C 135=67 M L J 581.

A. I. R. 1940 Madras 756

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

T. S. Pichu Ayyangar — Appellant.

v.

Sri Perarulala Ramanuja Jeer Swamigal, Dhramakartha and manager of Sri Alagianambirayar Temple — — Respondent.

Appeal No. 229 of 1937, Decided on 6th March 1940, against decree of Dist. Court, Tinnevelly, in O. S. No. 4 of 1935.

(a) Civil P. C. (1908), S. 105—Suit by plaintiff for framing scheme — Court overruling defendant's preliminary objection that it had no power to frame scheme — High Court in revision upholding objection and dismissing suit—On order being communicated to it, lower Court passing formal decree dismissing suit—High Court's order is interlocutory and inappropriate within meaning of S. 115 — Appeal from decree is competent by virtue of S. 105.

In a suit by the plaintiff for framing a scheme the Court overruled the defendant's preliminary objection that the Court had no power to frame a scheme. The High Court in revision upheld the defendant's objection and dismissed the plaintiff's suit. On the High Court's order being communicated, the lower Court passed a formal decree dismissing the suit :

Held that the High Court's order was not final but interlocutory and was inappropriate inasmuch as the High Court dismissed the suit itself instead of directing the lower Court to dispose of it according to law. The order fell under S. 105 (1) and appeal from the decree was competent by virtue of S. 105 as the order affected the decision of the lower Court when passing the decree : *6 All 269 (P C); 16 All 306 and A I R 1921 P C 11, Disting.* [P 757 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 62—Board cannot be compelled to hold inquiry — Its decision holding inquiry as unnecessary is final.

Under S. 62 the Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary the applicants can carry the matter no further. [P 757 C 2]

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 63—Board refusing to frame scheme — Court has no power to frame one — S. 63 contemplates only orders settling, modifying or cancelling scheme — Words "institute a suit in the Court to modify or set aside such order" refer to aforesaid orders.

Section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the Section refers to are : (1) An order settling a scheme; (2) an order modifying a scheme, and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify, or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one : *10 Mad 179 (F B) and 2 Cal 131, Disting.* [P 758 C 1]

(d) Madras Hindu Religious Endowments Act (2 of 1927), S. 65—Court can settle scheme where one is framed by Board—S. 65 empowers Court to modify or cancel scheme after it is framed by Board.

Under S. 65 the Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. S. 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time. [P 758 C 2]

(e) Madras Hindu Religious Endowments Act (2 of 1927)— Scheme of Act stated — Court has no residuary power to frame scheme where Board has refused to do so.

The scheme of the Act is to place in the Board power of supervision of Hindu temples and maths in the Province of Madras and in proper cases the control of the management. S. 92, Civil P. C., has now been replaced by the Madras Hindu Religious Endowments Act and so far as Hindu Religious Endowments of the Province of Madras are concerned that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers to frame a scheme where the Board has refused to do so because the former powers are taken away by the Act. [P 759 C 1]

K. V. Sesha Ayyangar and R. Desikan — *for Appellant.*

K. E. Rajagopalachariar — *for Respondent.*

Leach C. J. — In 1933 an application was made by 20 worshippers of the Sri Alagianambirayar temple in the Tinnevelly District to the Madras Hindu Religious Endowments Board for an order directing an inquiry to be held into the question whether the Board should frame a scheme for the administration of the temple and its endowments. The Board held an inquiry and as the result of the investigation decided that it was not necessary to frame a scheme. The applicants then filed a suit in the Court of the District Judge of Tinnevelly with the object of obtaining the settlement of a scheme under a decree of the Court. The suit was defended by the trustee, who is the respondent in this appeal. It is unnecessary to set out all the objections to the suit. It is sufficient to say that the main objection was that the Court had no power to frame a scheme. On this question a preliminary issue was framed and was answered by the District Judge in favour of the plaintiffs. Thereupon the respondent applied to this Court to reverse the order in exercise of its revisional powers. The application was heard by Venkataramana Rao J. who decided that the District Judge had erred in holding that the suit lay. In addition to allowing the petition the learned Judge dismissed the suit. On the order being communicated to him the District Judge passed a formal decree dismissing the suit with costs. The appeal is from that decree. Before proceeding to discuss the merits of the appeal it is necessary to dispose of a preliminary objection raised by the respondent, who says that the order of Venkataramana Rao J. was final and therefore the appeal does not lie.

Section 115, Civil P. C., which confers upon the Court its power of revision states that if the Subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the Court may make such order in the case as it thinks fit. The Section only contemplates an order which is appropriate to the application, and the order of Venkataramana Rao J., dismissing the suit was not appropriate. Having decided that the District Judge had erred on the preliminary issue he should have set aside his ruling and directed the District Judge to dispose of the suit in accordance with law and not to have dismissed the suit himself. The order of Venkataramana Rao J. was an interlocutory order and the preliminary objection must be decided on this footing. In support of his contention that the decision of Venkataramana Rao J. is final the learned advocate for the respondent has quoted 6 All 269,[1] 16 All 306[2] and 48 Cal 499,[3] but as the present case is clearly governed by S. 105, Civil P. C., they are not in point and I do not propose to pause to examine them. That Section says :

> (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth, as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-s. (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Authority is given here to the Court to set aside an erroneous order affecting the decision of a case, unless it be an order of remand from which an appeal lies and no appeal is filed. Sub-s. (2) appeared in the Code for the first time in 1908. Now the order of Venkataramana Rao J. certainly affected the decision of the case. As the result of the order, the District Judge was left with no other course open to him but to dismiss the suit. Therefore the order is one which directly falls within sub-s. (1) of S. 105. If the argument of the learned advocate for the respondent were to be accepted it would mean that this suit would be decided by an interlocutory order and there would be no appeal either to this Court or to the Privy Council. The order of Venkataramana Rao J., was not appealable. The Letters Patent of this Court expressly provide that an order passed in revision shall not be subject to an appeal and S. 3, Civil P. C., says that no appeal shall lie to His Majesty in Council from the decree or order of one Judge of a High Court. Therefore the order of Venkataramana Rao J. does not fall within the purview of S. 109 of the Code which provides for appeal to His Majesty in Council from a final order or a decree of a High Court. The present appeal is from the decree, and as the order affected the decision of the Court when passing the decree it is clearly open to this Court by virtue of S. 105 to consider its correctness.

I will now turn to the merits of the appeal. S. 62, Madras Hindu Religious Endowments Act, 1926, says that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than 20 persons having interest make an application to the Board stating that in the interests of the proper administration of the endowments a scheme of administration should be settled, the Board may hold an enquiry. The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary the applicants can carry the matter no further. So much is conceded by the learned advocate for the appellant. The decision of the appeal depends upon the interpretation to be placed on sub-s. (4) of S. 63, but the sub-section must be read in conjunction with the first part of sub-s. (1) and sub-s. (3). The first part of sub-s. (1) of S. 63 reads as follows :

> If after making the inquiry referred to in S. 62, the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the

---

[1] Ram Kirpal v. Rup Kuari, (1884) 6 All 269 = 11 I A 37 (P C).

[2] Mubarak Hussain v. Bihari, (1894) 16 All 306 =1894 A W N 97.

[3] Hook v. Administrator-General of Bengal, (1921) 8 AIR P C 11=60 I C 631=48 I A 187 =48 Cal 499 (P C).

trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple.

Sub-ss. (3) and (4) are in these words:

> (3) The Board may at any time by order and in the manner provided in sub-s. (1) modify or cancel a scheme settled under that sub-section.
>
> (4) Every order of the Board under this sub-section shall be published in the prescribed manner.
>
> The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order.

For the appellant it is said that inasmuch as sub-s. (4) gives a person having interest in an endowment to institute a suit in the Court to modify or set aside an order under this Section, the power must include a power to the Court to frame a scheme, if the Court sets aside an order of the Board refusing to do so. It is also said that the Court has power to frame a scheme by reason of S. 65 to which I shall refer later. It is further said that apart from the provisions of the Madras Hindu Religious Endowments Act, 1926, there is power in the Court to frame a scheme. I agree with Venkataramana Rao J., that S. 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the Section refers to are: (1) An order settling a scheme; (2) an order modifying a scheme; and (3) an order cancelling a scheme. I consider that the words "institute a suit in the Court to modify, or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

Mr. Sesha Ayyangar on behalf of the appellant has referred us to 10 Mad 179[4] and 2 Cal 131.[5] In 10 Mad 179,[4] a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under S. 503 of the Code of 1882, (now O. 40, R. 1) and was therefore appealable under S. 588, cl. (24) (now O. 43, R. 1, cl. s). An appeal was given from an order appointing a receiver, but nothing was said with regard to an appeal from an order refusing to appoint a receiver. The Court considered that as there was an appeal from an order appointing a receiver it followed that there must be an appeal from a negative order. This meant that on appeal the Court could appoint a Receiver, if an appointment had been improperly refused by the Court below. Mr. Sesha Ayyangar says that inasmuch as the Court has the power to set aside an order of the Board to frame a scheme under S. 63 it can set aside the order refusing to settle a scheme, and if it does so this must imply a power to frame a scheme. This does not follow. The Act may vest in the Board the power to frame a scheme and in the Court only the power to modify or cancel it, and this is my reading of the Act. The Board must in the first instance frame a scheme. The Court can modify or cancel it, but it cannot take initial action. Therefore, it is not a question of the Court having power to do something and refusing to do it, as in 10 Mad 179,[4] and that makes all the difference. The decision in that case was based on 2 Cal 131,[5] the second case quoted by Mr. Sesha Ayyangar. If sub-s. (4) were to be held to apply to the order of the Board in this case, what would be the result? The Court would have to set aside the order, but it could not pass any further order, because the power to frame a scheme is in the Board. Venkataramana Rao J. put the position here very aptly in these words:

> So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame that scheme. Unless the Court has got that power it would be futile to set aside such an order.

In my opinion the Legislature never intended sub-s. (4) to have application except to orders of the Board framing schemes or modifying or cancelling them. This brings me to the second contention of the appellant. S. 65 says that "any scheme of administration which has been settled by a Court under S. 63," or which under S. 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest but not otherwise. Mr. Sesha Ayyangar says that the words "any scheme of administration which has been settled by the Court under S. 63" must be read as meaning that the Court is given power to settle a scheme in any circumstances. I cannot read S. 65 in this way. The Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. S. 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time.

---

[4] **Venkatasami v. Stridevamma, (1887) 10 Mad 179 (F B).**

[5] **Reasut Hossain v. Hadjee Abdullah, (1876) 2 Cal 131 = 3 I A 221 = 26 W R 50=3 Suther 221 (P C).**

I am also unable to accept the argument that there is a residuary power in the Court to frame a scheme. The first Act relating to the Madras Hindu Religious Endowments was passed in 1923. Before then a scheme for the management of a temple could only be framed in accordance with the provisions of S. 92, Civil P.C., and the suit required the sanction of the Advocate-General to its institution. It is common ground that since 1923, S. 92 has ceased to apply and that the Madras Hindu Religious Endowments Board has taken the place of the Advocate-General. The scheme of the first Act was to place in the Board power of supervision of Hindu temples and maths in this province and in proper cases the control of the management, and this is the scheme of the present Act. As S. 92, Civil P. C., has now been replaced by the Madras Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this province are concerned, that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. The only Section which has application here is S. 63, and, as I have indicated, this Section, in my judgment, gives no power at all to the Court to frame a scheme when the Board has refused to do so. I consider that Venkataramana Rao J. correctly interpreted the Act in his order of revision and consequently I hold that the appeal fails and should be dismissed with costs.

Krishnaswami Ayyangar J.— I agree with my Lord the Chief Justice on both the points dealt with in the judgment just now delivered. On the second point, which turns on the true construction of the last sentence in S. 63 (4), Madras Hindu Religious Endowments Act, I desire to add a few words of my own. That clause runs as follows:

> The trustee or any person having interest, may within six months of the date of such publication institute a suit in the Court, to modify or set aside such order.

The words "such publication" and "such order" in this clause have reference obviously to the kind of order mentioned just previously, in the earlier portion of the same sub-section which directs the publication of "every order of the Board under this Section" in the prescribed manner. The order with which we are here concerned is no doubt an order of the Board, but is it also one *under this Section* so as to give to the appellants a right to institute a suit to modify or set it aside? I was at first impressed by the argument that the point is covered by the decision of the Full Bench in 10 Mad 179,[4] but on further consideration, I think that that view cannot be sustained. The above decision was rendered no doubt on similar words but occurring in a different enactment, namely the Civil Procedure Code, 1882. By S. 588 (24) of that Code, corresponding to O. 43, R. 1 (s) of the present Code, an appeal was allowed against, amongst others, orders under S. 503. S. 503 contained the various provisions relating to the appointment of a receiver, his rights and duties, etc. but said nothing about the dismissal of an application made under the Section, a feature which is common to both the old and the new Codes. The argument was advanced that an appeal was permitted only in respect of an affirmative order, that is to say orders granting the application, and none against an order refusing it. The contention was negatived, the Court holding that even an order rejecting the application was an order passed *under* the Section and was therefore appealable under S. 588 (24). The result was that, in the view of the Full Bench, an order *under the Section*, comprehended both classes of orders positive as well as negative. Here then it is said, we have a construction of the words *orders under* a Section, and the question is, are we free to adopt a different construction in respect of what is practically the same language in the Madras Hindu Religious Endowments Act?

Two reasons in particular have operated on my mind in persuading me to assent to the opinion expressed in the judgment of the learned Chief Justice. In the first place, it is to be observed that there is nothing in common between the Civil Procedure Code and the Hindu Religious Endowments Act; or to say the same thing in other words, the two statutes are not in pari materia. Further, the judgment of the Full Bench appears to have proceeded on considerations, which have little or no application to an Act like the one with which we are concerned. Parker J. felt compelled to place a reasonable construction on the Act, and pointed out that the opposite construction could not have been intended by the Legislature. Brandt J. laid stress on principles and expediency, and held that the view of the Full Bench was more consonant with the general principles of the Code and the rules of construction. But it cannot be said that there is anything in the general principles of the Hindu Religious Endowments Act, which, as pointed out by my Lord, can be said to lend support to the construction accepted in the case cited. The purpose and scope of the Madras Hindu Religious Endowments Act are quite different and leave no room for doubt that it was the intention of the Legislature to vest the supervision and control of religious institutions in the Board composed of men specially qualified by their knowledge and equipment to discharge the duty entrusted to them by the Act. It is therefore right to say that in a statute of this kind, we should require language more explicit than we have, to give a right of suit against the decisions of a body composed presumably of persons having expert knowledge in the special field of Hindu religion and charities.

Secondly, and this in my view is a more powerful argument against the appellant, the Court should be slow to adopt a construction which is not likely to afford a real and effective remedy to the complaining party. The initial duty of framing a scheme rests with the Board and with the Board only, and all that the Court can do, assuming it has the power, is to modify or set aside its order of refusal, and not to compel it to frame a scheme. There is nothing in Ss. 63, 64 and 65, to warrant our holding that the Court by its decree can itself frame a scheme in the suit. To imply such a power in the Court from the opening words of S. 65, namely "Any scheme of administration which has been settled by a Court under S. 63," is to place an unreasonable construction on these words, and cannot be permitted. Is the Court then to be placed in a position in which it is merely to set aside the order and still leave it open to the Board to refuse to frame a scheme, in other words to stultify itself? I think not. I therefore feel that whatever might be the meaning of the words in question in some other enactment or in some other context, it is not correct to construe S. 63 as conferring a right of suit against a refusal to frame a scheme under the Section.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 760

LAKSHMANA RAO J.

In re K. C. Pandalai, representing South Indian General Assurance Co. Ltd., and others — Appellants.

Criminal Appeal No. 173 of 1939, Decided on 14th March 1939, against order of Second Presidency Magistrate, of Court of Presidency Magistrate, George town, Madras, in C. C. No. 1129 of 1938.

Life Assurance Companies Act (1912), S. 34 —Company as well as persons falling under one or more of specified categories in S. 34 can be punished—Person can be convicted in different capacities separately.

Under S. 34, besides the company persons falling under one or more of the specified categories can be punished. An accused represented in different capacities can be convicted in each capacity separately. [P 760 C 2]

K. S. Jayarama Ayyar—*for Appellants.*

K. V. Ramaseshan — *for the Crown.*

Facts.—The charge against the accused was default of payment of the Government securities of the face value of Rs. 12,490—breach of S. 4 (1) and punishable under S. 34, Life Assurance Companies Act. The accused, K. C. Pandalai represented the South Indian General Assurance Co. Ltd., as its director and the Company of Managing Agents and for himself individually, all three of whom were charged as accused. Mr. K. C. Pandalai was convicted by the Presidency Magistrate, Madras and punished with fine in each of the aforesaid capacities. In revision before the High Court it was contended that as the same person is represented in all the capacities he should be fined only once and not in each capacity separately.

Judgment.—The appellants are the South Indian General Assurance Co. Ltd., Mr. K. C. Pandalai, a director of the company, and K. C. Pandalai and Co., the managing agents of the company though all were represented by the second appellant, and they pleaded guilty to the charge under S. 4 (1), Life Assurance Companies Act (6 of 1912). S. 34 of the Act provides that any life assurance company which makes default in complying with any of the requirements of the Act and every director, manager or secretary or other officer or agent of the company who is knowingly a party to the default shall be punishable with fine, and there is no force in the contention that besides the company only persons falling under any one of the specified categories can be punished. The punishment of the appellants is therefore legal and having regard to the period of default the fine cannot be said to be excessive. The appeal therefore fails and is dismissed.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 761

WADSWORTH J.

Nagi Reddi — Appellant.

v.

Nanjundappa — Respondent.

Second Appeal No. 560 of 1935, Decided on 19th April 1939, against decree of Sub-Judge, Salem, D/- 1st February 1935.

(a) Hindu Law—Adoption—Illatom adoption—Findings of fact.

It is not open in second appeal to attack the findings of fact on the essential questions of the authorisation by the prospective father-in-law to his wife to complete the affiliation after his death, and of the subsequent marriage and the status recognized in favour of the adoptee as an illatom son-in-law. [P 761 C 2]

(b) Hindu Law—Adoption—Illatom adoption—Incidents to be determined by evidence in each case — Illatom adoption is creature of agreement — But detailed contract embodying all incidents is not necessary—Plaintiff taken in family for regular adoption — Son being born subsequently to adoptor, plaintiff continuing to live in family on proposal of illatom adoption—On death-bed adoptor authorizing his wife to complete aforesaid adoption by marrying his daughter to plaintiff — Marriage carried out — Adoption held valid and was carried out on basis of agreement.

The incidents of illatom adoption should ordinarily be settled by evidence in the particular case : *A I R 1930 Mad 883, Rel. on.* [P 762 C 1]

There are, however, certain incidents of the custom which have been established by decisions. It is well recognized that although illatom affiliation is a creature of agreement it does not mean that in every case there must be a detailed contract embodying all the incidents of the arrangement in the particular case. [P 762 C 1]

The plaintiff was taken into the household of adoptor originally with a view to a regular adoption but, after the birth of a son to him, the plaintiff continued there under a proposal that he should be married to his daughter and treated as an illatom son-in-law. On his death-bed, the prospective father-in-law authorized his wife to complete the arrangement by marrying the daughter to the plaintiff, giving him a share in the property as an illatom son-in-law. The arrangement was completed accordingly and the marriage performed and the plaintiff lived in his mother-in-law's household as an illatom son-in-law :

Held that the plaintiff was an illatom son-in-law, and the plaintiff having performed his part by marrying the daughter and thereafter having been treated as an illatom son-in-law, it must be inferred that there was an agreement on the basis of which the illatom affiliation was carried out: *22 M L J 265 ; A I R 1919 P C 162 and 11 I C 25, Ref.* [P 762 C 2 ; P 763 C 1]

M. S. Ramachandra Rao and D. R. Krishna Rao — *for Appellant.*

T. M. Krishnaswamy Ayyar and A. Balasubramania Iyer — *for Respondent.*

Judgment.—This appeal arises out of a suit in which the plaintiff claimed properties on the basis of an alleged illatom affiliation. The plaintiff married the daughter of one Konda Reddi who died about the year 1909. The facts found are that Konda Reddi at a time when he had no children took the plaintiff into his family apparently with the idea of a regular adoption. Subsequently there were born to Konda Reddi first a son, then a daughter and then another son. After the birth of the son it is found that Konda Reddi, no longer being able to adopt the plaintiff, formed the idea that, in due course, he would marry his daughter to the plaintiff and take the plaintiff as an illatom son-in-law. On this understanding the plaintiff continued to live in the family. But an epidemic of plague intervened, the eldest son being the first victim, followed by Konda Reddi himself about a week later. It is found as a fact that on his death-bed Konda Reddi instructed his wife to complete the illatom affiliation by marrying the daughter to the plaintiff. It would appear that the plaintiff was a major at the time of Konda Reddi's death. After his death the marriage of the plaintiff to Konda Reddi's daughter was duly carried out by the widow and it is found as a fact by the Courts below that thereafter the plaintiff was treated as the illatom son-in-law of the deceased Konda Reddi, that he lived in the family and managed the properties for his mother-in-law. It is not open in second appeal to attack the findings of fact on the essential questions of the authorization by Konda Reddi to his wife to complete the affiliation and of the subsequent marriage and the status recognized in favour of the plaintiff as an illatom son-in-law. It is, however, contended that there is no finding nor proof of such an agreement as is necessary to form the basis of an illatom adoption.

The case has certain peculiarities. In the first place it comes from the Salem District which is not one of the Districts in which the illatom custom is widely recognized. Another peculiarity is that, according to the Subordinate Judge, the parties belong to the Kammala caste. But I am constrained to conclude that this must be a mistake due to the unfamiliarity of the learned Judge with the Telgu caste name, for the learned Judge, after stating that the parties are Kammala Reddis, states that this is one of the castes in respect of which Mayne's Hindu Law recognizes that the illatom practice prevails. Actually the learned author recognizes the existence of the custom in the Kamma and Reddi castes not in the Kammala caste which is quite a different community and one in which, so far as I am aware, it has never been suggested that this practice peculiar to the various castes which call themselves Reddis can apply. The Kammala caste is essentially a Tamil caste of artisans, not to be confused with the Telugu Kamma caste, which not infrequently adopts the title of Reddi and has strong affinities with the numerous Kapu castes, the members of which are normally known as Reddis. But I am unable to find any basis in the record for the Subordinate Judge's description of this community as Kammala Reddi. The witnesses describe themselves as Reddis simply. Presumably, they must be Kamma Reddis wrongly described by the Subordinate Judge as Kammala Reddis.

It was not disputed in the Courts below that the community to which the parties belonged was one which recognizes the custom of illatom affiliation. I do not think that the Subordinate Judge is quite right in saying that the validity of the particular affiliation alleged was not denied; for, it is in fact put in issue. The incidents of the very widespread practice of illatom affiliation have not been completely established by judicial decisions and it was recognized by a Bench of this Court in 54 Mad 27,[1] that these incidents should ordinarily be settled by evidence in the particular case. There are however certain incidents of the custom which have been established by decisions. It is well recognised that an illatom affiliation is a creature of agreement: 22 M L J 265.[2] But I do not think that this means that in every case of an illatom affiliation there must be a detailed contract embodying all the incidents of the arrangement in the particular case. Normally, there would be an agreement between the father of the boy, if he was a minor and the prospective father-in-law or, if the prospective son-in-law was a major, between the son-in-law himself and the prospective father-in-law, that the proposed illatom son-in-law should be taken into the family by his prospective father-in-law with a view to his marriage with a daughter of the house and the conferment upon him of the illatom status, with its customary incidents. These customary incidents being well known would not ordinarily be the subject of specific agreement.

It is settled by the Privy Council's decision reported in 42 Mad 805[3] that the practice of illatom affiliation is frequently followed even when the family into which the son-in-law had been taken has a natural born son living. There is also authority in 11 I C 25,[4] for the proposition that, when a boy has been taken into a family on the understanding that he would be married to a daughter and given the status of an illatom son-in-law, the arrangement may be completed by the solemnization of the marriage even after the death of the prospective father-in-law. So far as I am aware, it has never been held that a mere arrangement to take a boy as an illatom son-in-law, followed by living in the prospective father-in-law's household, but not followed by marriage to the proposed bride will complete an illatom affiliation. In the present case it has been found that the plaintiff was taken into the household of Konda Reddi originally with a view to a regular adoption but, after the birth of a son to Konda Reddi, he continued there under a proposal that he should be married to the daughter and treated as an illatom son-in-law. It has been found that on his death-bed Konda Reddi asked his wife to complete this arrangement by marrying the daughter to the plaintiff, giving him a share in the property as an illatom son-in-law. It has also been found that the arrangement was completed and the marriage performed and that the plaintiff did live in his mother-in-law's household as an illatom son-in-law. These findings of fact are in my opinion sufficient to warrant a legal inference that the plaintiff was an illatom son-in-law. It is true that there is no specific evidence of any actual agreement for an illatom affiliation but the whole of the evidence postulates the assumption that, at the time when the plaintiff was a major, Konda Reddi authorized the completion of an arrangement for illatom affiliation by the marriage of the plaintiff to his daughter. The plaintiff performed his part by marrying the daughter and was thereafter treated as an illatom son-in-law. From these facts it must, I think, be inferred that there was an agreement on the basis of which the illatom affiliation was carried out. In this view, therefore, I dismiss the appeal with costs. Leave refused.

---

[1] **Subbarao v. Mahalakshmamma, (1930) 17 A I R Mad 883=128 I C 561=54 Mad 27=59 M L J 558.**

[2] **Narayadu v. Venkamma, (1912) 22 M L J 265 =13 I C 866.**

[3] **Krishnamma v. Venkatasubbayya, (1919) 6 A I R P C 162 = 51 I C 1 = 46 I A 168 = 42 Mad 805 (P C).**

[4] **Venkayalapathi v. Negandla, (1911) 11 I C 25.**

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 763

WADSWORTH J.

Unnamalai Ammal — Appellant.

v.

Amba Baghyathammal and others — Respondents.

Second Appeal No. 873 of 1935, Decided on 6th April 1939, against decree of Dist. Court, South Arcot, in A. S. No. 108 of 1934.

(a) Civil P. C. (1908), O. 21, R. 63 — Objection dismissed—Subsequently attachment ceasing within one year—Claimant is not bound to institute suit under Rule 63.

When the attachment has been cancelled within one year of the dismissal of the claimant's objection by some other agency than a suit by the defeated claimant, it is not incumbent upon the claimant to file a suit to remove an obstacle which no longer exists: *A I R 1925 Mad 1113 and A I R 1934 All 267 (F B), Rel. on.* [P 764 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 57 — R. 57 is not exhaustive.

Rule 57 is not exhaustive of all the ways in which an attachment can be raised. [P 765 C 2]

(c) Civil P. C. (1908), O. 21, R. 58—Property attached on decree-holder's execution petition —Objection to attachment rejected—Execution petition dismissed finally due to decree-holder's death — Attachment ceases — Defeated objector's claim in fresh execution and attachment of same property by decree-holder's legal representative is not barred by his failure to institute suit contesting dismissal of claim under earlier attachment.

Where an objection to the attachment in execution of a decree is rejected and subsequently the decree-holder's execution petition is in fact and intention dismissed finally, even though the dismissal may be due to circumstances which cannot be described as the default of the decree-holder, e. g. the decree-holder's death, then the attachment made under that petition must automatically cease to operate and there is no longer any occasion for the defeated claimant to file a suit contesting the liability of the property to the attachment. Where there is a subsequent execution and attachment of the same property by the legal representative of the decree-holder, the claim by the defeated claimant against that attachment does not relate back to the prior attachment of the same property under the same decree. The words "such attachment" in R. 58 of O. 21, make that position clear. Consequently, the claim of the defeated objector under the subsequent attachment is not barred by his failure to file a suit contesting the dismissal of his claim under the earlier attachment, which had ceased to exist owing to the order dismissing the execution petition: *A I R 1931 Mad 303, Expl.; A I R 1927 Mad 184, Held Overruled by A I R 1932 Mad 73.* [P 765 C 2]

T. R. Srinivasan and R. Viswanathan — *for Appellant.*

R. Desikan — *for Respondents.*

Judgment. — This appeal arises out of proceedings by way of a claim to properties attached in execution of a decree. The decree which gave rise to the claim proceedings was a small cause decree in favour of the husband of the present plaintiff and against defendant 2 who is the husband of defendant 1, the appellant. Execution proceedings were first taken by the plaintiff's husband to attach the property which was claimed exclusively by defendant 1, wife of the judgment-debtor, as her own, in virtue of a will. After the dismissal of the claim petition, the decree-holder, i. e. the plaintiff's husband, died and an order was passed by the executing Court: "Decree-holder dead. Petition dismissed." The main question in the present appeal is whether this order has the effect of raising the attachment on the land claimed by defendant 1. Evidently, the parties themselves thought that it had this effect, for, after the death of her husband, the plaintiff as his heir filed a fresh execution petition and applied for a fresh attachment. Against this attachment a fresh claim was preferred by defendant 1 and the executing Court apparently thought that there was no infirmity in this claim by reason of the prior proceedings and the claim was allowed. Hence this present suit.

Now the dates on which these proceedings took place threw a considerable light on the intention of the Court which passed the order dismissing the first claim petition. The dismissal was on 9th December 1929. The plaintiff's husband died some time after that date and before June 1930. On 9th June 1930 the death was reported to the Court and the first execution petition was consequently dismissed. On 19th June 1930 a fresh execution petition with a fresh application for attachment was filed by the plaintiff. The significance of these dates is that in September 1926 the decision reported in 50 Mad 1[1] held that the legal representative of a deceased decree-holder could not continue the execution petition filed by the deceased decree-holder but must file a fresh petition. Though the correctness of this ruling was doubted at least as early as 1928, it was not overruled until the decision of the Full Bench in 55 Mad 352[2] which was in September 1931. It may therefore, in my opinion, be inferred that the District Munsif who automatically dismissed the petition on a report of the death of the decree-holder, was passing an order according to the law as it was then understood by the Madras High Court with reference to the decision in 50 Mad 1.[1] The point is of importance in that if the executing Court held the view that under the law the legal representative of a deceased decree-holder had a right to continue the execution petition, the only possible interpretation of this dismissal order would be that it was one of those dubious orders passed for statistical purposes which in accordance with the accepted view of the law would not have the effect of putting an end to the execution petition or the attachment thereunder. In my opinion, having regard to the fact that at that time the decision of the Bench in 50 Mad 1[1] was a clear authority so far as this High Court was concerned that it was not open to the legal representative of a deceased decree-holder to continue the same execution petition, it must be inferred that the executing Court dismissing this petition on a report of the death of the decree-holder, intended not merely to adjourn the petition, showing it as a dismissal for statistical purposes, but intended to dismiss the petition judicially as one which could no longer be prosecuted owing to the death of the party.

---

[1] Palaniappa Chettiar v. Valliammai Achi, (1927) 14 A I R Mad 184=99 I C 627=50 Mad 1 = 51 M L J 745.

Now, it seems to me clear that if the effect of this order was to raise the attachment, the order having been passed within less than one year after the dismissal of the first claim petition filed by defendant 1, it cannot be held that defendant 1's subsequent claim petition under the fresh attachment was barred by her failure to file a suit contesting the correctness of the dismissal of her former claim. Obviously, there was nothing to be gained by a suit contesting the correctness of an attachment which owing to extrinsic circumstances had ceased to operate and I do not think that it can be held that when the attachment has been cancelled by some other agency than a suit by the defeated claimant, it is incumbent upon the claimant to file a suit to remove an obstacle which no longer exists. If authority is needed for this self-evident proposition it will be found in 48 M L J 616[3] and 56 All 537.[4] The only question therefore is whether this attachment continued to subsist after the death of the decree-holder and the dismissal of his first execution petition. No specific ruling on this point has been cited before me, but the appellant relies on certain incidental observations in the case in 60 M L J 628[5] at p. 631. In that case Reilly J. was discussing the effect of the decision in 50 Mad 1[1] the correctness of which he doubted. He points out that this decision is in conflict with the long established practice of the Courts and would involve certain inconvenient and even unjust consequences. He observes :

> If an execution petition is in progress and an attachment has been made and then the judgment-debtor dies, according to the principle adopted in 50 Mad 1,[1] that petition comes to an end and the attachment must go.

He points out that this would be a serious obstacle in the way of a diligent decree-holder and might adversely affect persons who have filed applications for rateable distribution and might even in an extreme case when the decree-holder dies just before the end of the 12th year result in a complete defeat of his rights. Certainly these observations rest on the assumption that when an execution petition is dismissed in accordance with the view of the law laid down in 50 Mad 1,[1] the result will be not a mere dismissal of the petition for statistical purposes, but a complete termination of the proceedings and the attachment thereunder. No doubt these observations do not amount to a ruling, but I respectfully agree with the reasoning which they contain. It is one thing to say that when the Court passes an order of dismissal purely for statistical purposes, not for any default of the decree-holder, but merely to prevent the file being encumbered with a petition under which nothing can be done, then notionally, at any rate, the petition remains in being and the attachment thereunder will not be vacated. But it is quite another thing to hold that when a Court, following the decision of the High Court which it is bound to follow, automatically dismisses an execution petition as soon as the death of the decree-holder is reported, there can be any notional keeping alive of that petition which has been dismissed or of the attachment thereunder. It has been suggested that since there is no specific order declaring that the petition has abated, it cannot be inferred that the executing Court actually intended to treat this petition as one which had ceased to exist by reason of the death of the petitioner. The circumstances, however, seem to me quite clearly to negative this contention. The order contains merely a reference to the death and the dismissal follows. The facts that the executing Court subsequently received a fresh petition and a fresh application for attachment and even allowed a fresh claim petition to succeed, to my mind, make it clear that the dismissal of the first application was intended to be and was in fact a complete termination of the proceedings.

---

[2] Venkatachalam Chetti v. Ramasami Servai, (1932) 19 A I R Mad 73=135 I C 561=55 Mad 352=62 M L J 1 (F B).

[3] Kumara Goundan v. Thevaraya Reddi, (1925) 12 AIR Mad 1113=87 I C 635=48 M L J 616.

[4] Habib Ullah v. Mahmood, (1934) 21 A I R All 267=148 I C 676=56 All 537=1934 A L J 19 (F B).

[5] Venkatalakshmamma v. Seshagiri Rao, (1931) 18 A I R Mad 303=131 I C 610=60 M L J 628.

It seems to me that not very much profit is to be got by quoting cases in which Courts have held that in effect an order terminating an execution proceeding whatever be the form in which it may be expressed, may be a mere statistical order putting the proceeding aside during the period when nothing could be done. The learned counsel for the respondents has gone so far as to contend that an attachment can never be raised by any process other than by a dismissal of the petition for default under O. 21, R. 57, Civil P C. This seems to me to be a very extreme proposition. Certainly there are decisions in which it has been stated that because a petition was dismissed for no default on the part of the decree-holder, it must be treated as a mere statistical suspension of the execution petition and not as a final termination of it. But to hold that every attachment which has been made continues to subsist until there is a default by the decree-holder is a proposition for which no authority has been quoted and which seems to me to be patently untenable. For instance, if there is an execution petition and an attachment and after the attachment the judgment-debtor pays the amount into Court and the executing Court dismisses the petition, it cannot be said that this is a dismissal for default ; it is a dismissal because the decree is satisfied and there is no longer anything to execute. But it certainly cannot be said that the attachment in such circumstances will subsist even though the decree has been satisfied.

It seems to me to follow that R. 57 is not exhaustive of all the ways in which an attachment can be raised. It seems to me also to be the correct view to take that when an execution petition has been in fact and intention dismissed finally, even though the dismissal may be due to circumstances which cannot be described as the default of the decree-holder, then the attachment made under that petition must automatically cease to operate. When the attachment ceases to operate there is no longer any occasion for the defeated claimant to file a suit contesting the liability of the property to the attachment. Nor can it be contended that when there is a subsequent attachment and a claim against that attachment, the claim must be related back to the prior attachment of the same property under the same decree. The words 'such attachment' in R. 58 of O. 21 make that position clear. It appears to me therefore that the claim of defendant 1 under the subsequent attachment is not barred by her failure to file a suit contesting the dismissal of her claim under the earlier attachment, which, in the view I take, had ceased to exist owing to the order dismissing the execution petition. There has been no adjudication on the merits of the suit. It follows therefore that the appeal must be allowed and the suit remanded to the trial Court for disposal after giving a finding on issue 1. The parties will be at liberty to adduce evidence. Costs will abide by the result. Court-fee paid on the memorandum of appeal will be refunded. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 765

HORWILL J.

Attili Rajagopala Rao — Petitioner.

v.

A. V. Bhanoji Rao and others — Respondents.

Civil Revn. Petn. No. 1429 of 1939, Decided on 15th March 1940, to revise order of Dist. Munsif, Vizagapatam, D/- 23rd December 1938.

Civil P. C. (1908), O. 9, R. 13 and O. 23, R. 1 — Vendee suing vendor and impleading person claiming title to sale property by adverse possession and his tenant for possession and alternatively for return of purchase money with damages —Suit against vendor decreed ex parte for latter relief and withdrawn against rest — Decree under O. 9, R. 13 held could be set aside against the vendor but not against rest — Proper remedy for plaintiff was to obtain

permission under O. 23, R. 1 to file fresh suit against rest.

The vendee instituted a suit for possession of the property purchased and in the alternative for the return of purchase money with damages against the vendor and impleaded the person who claimed the sale property by adverse possession and his tenant. The vendor was declared ex parte and the suit was decreed against him for return of purchase money with damages and was withdrawn against the rest. On the application of the vendor under O. 9, R. 13 :

Held that the decree could not be set aside against the defendants against whom the suit was withdrawn for the decree was in their favour and not against them. O. 23 did not make any provision for withdrawing a withdrawal; so that there was no provision in the Code whereby the withdrawal of a suit against a defendant could be cancelled. The only thing that could be done for the plaintiff was to grant permission under O. 23, R. 1 to file a fresh suit against defendants against whom the suit had been withdrawn. [P 766 C 2]

Y. Suryanarayana — *for Petitioner.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

Order. — The plaintiff was a purchaser of an item of land from defendant 1 and she seems to have had some difficulty in obtaining possession of the property, which defendant 3 claims as his by virtue of long possession. She brought a suit against defendant 1, her vendor; defendant 3, who claimed to have been in enjoyment of the property; and defendant 2, a tenant of defendant 3, for possession of the land and in the alternative for return of the purchase money with damages. Defendant 1 was declared ex parte. That meant that the plaintiff was able to obtain the return of the purchase money with which she would have been satisfied. She therefore reported to the Court that she did not press the suit against defendants 2 and 3, and the suit as against them was withdrawn. She obtained merely a decree against defendant 1 for the purchase money and damages. Unfortunately for the plaintiff, defendant 1 was able to get the ex parte decree set aside on a technical ground. As defendant 1 might now be able to satisfy the Court that he had given her a valid title and the plaintiff would not be able to obtain possession from defendant 3 because she had let the suit against him be dismissed, she was in danger of losing both the land and her money. In her counter to defendant 1's petition she therefore prayed that in case the petition of defendant 1 were granted, the whole decree might be set aside and she be allowed to proceed against the other defendants also. The learned District Munsif of Vizagapatam thought that this was only just, and so he set aside the entire decree, restoring the suit to the condition in which it was when originally filed. Defendant 3 appeals on the ground that this order is illegal.

It is no doubt true—as the learned District Munsif felt—that it would be equitable and just to allow the plaintiff to proceed against defendant 3 because her withdrawal of the suit against defendants 2 and 3 was only because defendant 1 had been declared ex parte; but the question is whether the learned District Munsif had any power to do this. The relevant provisions of the Civil Procedure Code are clearly worded and afford little support for the order of the learned District Munsif. O. 9, R. 13 which deals with the setting aside of an ex parte decree, contains a provision which enables the Court in certain cases to set aside the decree against the other defendants also; but that can only be done where the decree is of such a nature that it cannot be set aside as against such defendant only. There is no such difficulty in this case. Moreover, the decree cannot be said to be against defendant 3. On the contrary, it is in favour of defendant 3. O. 23, which deals with the withdrawal and adjustment of suits, does not make any provision for withdrawing a withdrawal; and so it would seem that there is no provision in the Code whereby the withdrawal of a suit against a defendant can be cancelled. The only thing that can now be done for the plaintiff is to grant her permission under O. 23, R. 1 to file a fresh suit against defendant 3. The petition is therefore allowed with regard to that part of the lower Court's order restoring the suit against defendants 2 and 3 and an order will be passed granting permission to the plaintiff to file a fresh suit against defendants 2 and 3 if she so desires. Defendant 1 has appeared in this Court through an advocate; but clearly defendant 1 cannot be affected by the order of the lower Court or by any order that this Court might pass in revision. Under the circumstances of this case, there will be no order as to costs.

C.R.K./G.N. *Order accordingly.*

---

* A. I. R. 1940 Madras 766

HORWILL J.

Kondayya Nayudu and another — Petitioners.

v.

Marianan — Respondent.

Civil Revn. Petn. No. 2120 of 1939, Decided on 21st March 1940.

(a) Civil P. C. (1908), S. 60—Allowances of Railway Guard can be taken into account in determining salary attachable.

There is no exemption of allowances in any of the clauses of S. 60. Hence, allowances of a Railway Guard can be taken into consideration in determining salary attachable. [P 767 C 1]

✲(b) Civil P. C. (1908), S. 60 (k)—Recoveries of advances from provident fund cannot be deducted from attachable income.

A Railway Guard had taken certain advance from the provident fund and that amount was being recovered from him at certain rate per month:

Held that the recovery of advances from provident fund could not be deducted from attachable income. Only ordinary provident fund deposit could be deducted. [P 767 C 2]

(c) Civil P. C. (1908), S. 60 (i) and (k) — Salary upto Rs. 100 and half the remainder and also, independently of it, amount of provident fund is exempted.

The Legislature intended to exempt not only the salary up to Rs. 100 and half the remainder, but also, independently of it, such amount as is compulsorily deducted for the provident fund. [P 768 C 1]

V. Ganapathi Ayyar and R. Ramachandra Pant — *for Petitioners.*

A. Dorairaj — *for Respondent.*

Order. — The respondent is a guard on the South Indian Railway and the petitioner is a creditor who applied to the Court for an order of attachment of a part of the guard's salary and allowances. An order was passed; but the Audit Officer, South Indian Railway, sent to the lower Court a report to the effect that the attachable amount of the salary was Rs. 21-12-0 from which had to be deducted provident fund, Rs. 11-15-0, and provident fund advance, Rs. 10, the total of which two was greater than the attachable salary. He therefore said that no amount was available for attachment. The learned advocate for the respondent argues that the allowances of the guard should not be taken into account. They are, he says, compensation for the expense of travelling and having to buy his meals and sleep away from his home. I do not however find any reason for the exemption of allowances, and they are ordinarily included in the salary. There is no exemption of allowances in any of the clauses of S. 60, Civil P. C. Under S. 60 (k) are exempted all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, applies, in so far as they are declared by the Code of Civil Procedure not to be liable to attachment. It is suggested that allowances may be one of the "other sums" mentioned in the sub-section. The Provident Funds Act, 1 of 1925, makes no mention of allowances. Moreover, the Audit Officer, in making his calculation, makes no distinction between salary and allowances. We may therefore take it that for the purpose of this revision petition, the salary of the respondent is Rs. 143-8-0.

Two further questions arise. The respondent had taken an advance from the Provident Fund and that amount was being recovered from him at the rate of Rs. 10 a month. The Audit Officer has deducted that amount as well as the ordinary provident fund deposit from the attachable income. The question is whether he rightly did so. The only clause under which it is said that such a deduction can be made is cl. (k). Recoveries of advances made from the provident fund are certainly not deposits, although they may be compulsory deductions or recoveries. It is however contended that such a recovery is made under the other and vaguer part of cl. (k), "other sums in or derived from any fund to which the Provident Funds Act, 1925, applies." This Rs. 10 is not a sum in the fund nor, in my opinion, can it be said to be a sum derived from the fund. The guard had borrowed a sum of money from the Provident Fund which he was entitled to do under the rules and he thereby became a debtor to the Provident Fund. In paying this Rs. 10 a month he was only paying off a sum for which he was liable as a debtor, and the Provident Fund cannot claim to be in any better position than any other creditor with regard to that sum. I therefore do not find any basis either in S. 60, Civil P. C., or in logic or equity for the deduction of this Rs. 10 from the salary of the guard available for attachment.

The other question is with regard to the manner in which the calculation should be made. The learned advocate for the petitioner contends that from the salary and allowance of Rs. 143-8-0 should be deducted the Provident Fund contribution of Rs. 11-15-0 and that the remainder should be considered to be his salary. The attachable salary would then be half of Rs. 43-8-0 minus Rs. 11-15-0, (Rs. 31-9-0), which would be Rs. 15-12-6. S. 60 (i), Civil P. C., exempts salary to the extent of Rs. 100 and half the remainder while an independent cl. (k) exempts compulsory deposits in the Provident Fund. These two sub-sections are independent and therefore on reading these two sub-sections together, it would seem that the Legislature intended to exempt not only the salary up to Rs. 100 and half the remainder, but also, independently of it, such amount as is compulsorily deducted for the Provident Fund. Moreover, Rs. 131-9-0 (obtained by deducting Rupees 11-15-0 from Rs. 143-8-0) is not the respondent's salary. It is a sum representing the difference between the salary and the Provident Fund contribution. I have therefore no doubt that the Audit Officer of the South Indian Railway adopted the correct method of calculation, except that he wrongly deducted the monthly sum recovered on account of the advance. It follows from the above that the petitioner is entitled to attach out of the respondent's salary a sum of Rs. 10-13-0. The revision petition is therefore allowed with half costs from the respondent, and E. P. No. 805 of 1939 on the file of the District Munsif, Erode. The District Munsif should dispose of the petition according to the above findings.

C.R.K./D.S. *Petition allowed.*

✻ ✻ A. I. R. 1940 Madras 768

FULL BENCH

LEACH C. J., KING AND SOMAYYA JJ.

Katikineni Venkata Gopala Narasimha Rama Rao — Appellant.

v.

Chitluri Venkataramayya—Respondent.

Appeals Nos. 234 and 235 of 1937 and Civil Misc. Petns. Nos. 980 and 981 of 1940, Decided on 30th April 1940, against decrees of Sub-Judge, Ellore, D/- 29th March 1937.

(a) Evidence — Document legally admissible under Evidence Act and not excluded by statutory prohibition cannot be excluded from evidence on ground of public policy (Per *Wadsworth J. in Order of Reference.)*

The ground of public policy is not a sufficient reason for excluding from evidence any document which is legally admissible under the Evidence Act and is not excluded by any statutory prohibition: *A I R 1940 Mad 308, Rel. on.* [P 772 C 2]

✻ (b) Income-tax Act (1922), S. 54 — Effect of S. 54 explained — S. 54 does not prohibit party from putting in evidence certified copy of income-tax return if that return is public document.

While S. 54 prohibits the disclosure, except on specified occasions of matters connected with an assessment to income-tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the Section or to give evidence in respect of them, it does not follow that the Court may not admit in evidence a document which falls within S. 54 (1). This will depend on whether the document is admissible under the provisions of Evidence Act. S. 54 does not make the issue of a certified copy of an income-tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of the return having a copy for his own purposes if he so desires. So far as the assessee is concerned he is not bound to treat the document as confidential. There is nothing in S. 54 which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document. [P 773 C 2; P 774 C 1; P 775 C 1]

✻ ✻ (c) Evidence Act (1872), Ss. 74 and 65 (e) — Profit and loss statement and statement showing details of net income filed in support of return of income furnished under S. 22, Income-tax Act, are public documents—Certified copies of these documents are admissible under S. 65 (e) : *I L R (1940) Mad 329=A I R 1940 Mad 161=1939 M W N 1237, Overruled.*

It would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" in S. 74, Evidence Act, to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. The record of an income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore any document properly on the record is just as much a public document as the final order of assessment. Hence, a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under S. 22, Income-tax Act, are public documents with reference to S. 74, Evidence Act, of which certified copies would be admissible under S. 65 (e), Evidence Act : *I L R (1940) Mad 329= AIR 1940 Mad 161=1939 M W N 1237*, **Overruled,** *Case law discussed.* [P 773 C 1; P 775 C 2]

P. V. Rajamannar, K. Subba Rao and D. Suryaprakasa Rao—*for Appellant.*

Sir Alladi Krishnaswamy Iyer, Nugent Grant and V. Suryanarayana — *for Respondent.*

ORDER OF REFERENCE

Wadsworth J.—These two appeals raise the question of the liability of the appellant on two missing promissory notes, one for Rs. 9704 dated 16th February 1932 and the other for Rs. 24,400 dated 13th February 1933. The former promissory note formed the subject-matter of O. S. No. 14 of 1935 against which A. S. No. 234 is preferred. The execution of this promissory note was admitted but the defendant (appellant) pleaded that it was discharged except for a small amount. The second promissory note formed the subject-matter of O. S. No. 28 of 1936 (against which A. S. No. 235 is filed) and its execution is totally denied by the appellant. The promisee (plaintiff) was a well-to-do Vaisiya money-lender and it is common ground that up to 28th March 1934, he and the defendant, an important Mokhasadar, were on very friendly terms and had considerable dealings. On 1st February 1934, the defendant made over the income from some of his lands to his wife for a term of years and it is said that this transaction made the respondent uneasy about his advances to the appellant. On 17th February 1934, both the parties were at Ellore and it is alleged that the respondent, accompanied by P. W. 2, who is admittedly a member of the same community and indebted to the respondent, visited a vakil (P. W. 3) who also belongs to the Vaisya community and who is the legal adviser of P. W. 2. That vakil was asked to draft a promissory note in renewal of previous debts due from the appellant to the respondent, the promissory note to be executed by both the appellant and his wife because of the alienation in the wife's favour already referred to.

The plaintiff's case was that the vakil was shown both the promissory notes, not only the note for Rs. 9000 odd but also the note for Rs. 24,400 and that he prepared a draft with reference to those two notes which were to be renewed by the joint promissory note. It is alleged that in the same evening the draft was handed over to the appellant in the shop of P. W. 2 and that an arrangement was made that the appellant should send word to the respondent, so that the latter might come to the appellant's house for the execution of the new promissory note. The respondent leaves at Chintalapudi, the appellant at Pothanur some five miles away from Chintalapudi. On 28th March 1934, there was a meeting of the Chintalapudi Taluk Board of which both the plaintiff and the defendant were members. It is alleged that there was on that day some slight misunderstanding between them arising out of a vacancy on the District Educational Council. There is nothing to show however that there was any serious quarrel and the incident is only referred to on behalf of the appellant as indicating that the appellant would not be very likely to have to send an invitation on the following day to the respondent. It is by no means clearly established that any real misunderstanding did in fact arise. On 29th March, it is alleged that the appellant sent his servant, G. Sitayya, who has not been examined, to the respondent to ask him to come on the following day with the notes to Pothanur for the execution of the joint promissory note. On the same evening, it is alleged that the appellant himself visited the respondent and told him that he and his wife would execute a fresh promissory note and asked him to bring the prior notes. At the same time he is alleged to have borrowed a further sum of Rs. 300.

On 30th March 1934, the respondent went to Pothanur accompanied by his brother Sitayya, (who has not been examined) and a dependant (P. W. 22) in a cart driven by D. W. 2. D. W. 2 denies that he drove the cart and even denies that he knows how to drive a cart and there is reason to think that he has been won over. The party is said to have met P. W. 12 and P. W. 17 on the way to Pothanur and to have told them the purpose of their journey. P. W. 12 is indebted to the plaintiff and P. W. 17's evidence is contradicted by D. W. 1 with reference to the object with which he had gone out that day. Little importance can be attached to either of these witnesses. When they arrived at the appellant's house, the respondent and his companions were asked to go and get their food and return afterwards. They are alleged to have had a meal in the house of the village schoolmaster (D. W. 10) who has been examined to deny this occurrence. He is however obviously subject to the influence of the appellant and no weight can be attached to his denial. When the respondent and his companions returned to the appellant's house shortly after noon, it is alleged that the proceedings were witnessed by three independent witnesses. One is P. W. 4, a Christian employed in a Chintalapudi tannery, who is said to have gone there accidentally when going on his rounds collecting skins. He is mentioned as an eyewitness in the report to the police made the same evening and there is no apparent reason for him to be introduced into the case unless he was actually present. He generally supports the respondent's story.

Besides him three other persons belonging to the village of Ganicherla, four miles from Pothanur, are said to have been present. They are P. Ws. 5 and 6 and another man who has not been examined. Their presence is not mentioned in the complaint to the police. P. Ws. 5 and 6 are both indebted to the plaintiff. They are said to have gone to the respondent's house to buy timber. They support the respondent's version of the occurrence but the fortuitous presence of these persons who are indebted to the respondent at the time of this occurrence must necessarily be suspicious and the suspicion is enhanced by the omission of their names from the complaint to the police. No great weight can therefore be attached to their evidence. The respondent's story of the occurrence at 1 P. M. on 30th March is briefly this :

He and his party were sitting on the verandah. The appellant went inside to call his wife and came out saying that his wife was behind the door, she being a lady who does not appear in public. The appellant said that he would read the notes to his wife and asked the respondent for them. The respondent handed over the whole bundle of promissory notes. The appellant began reading out the note for Rs. 24,400 and suddenly rushed into the house with the notes in his hand and bolted the door from inside. He then called to his servant Subbayya, whose presence is spoken to by all the respondent's witnesses, and told him to drive the respondent's party away. Then some 25 or 30 of the appellant's servants came with sticks and drove them out. The respondent and his companions returned on foot to Chintalapudi meeting P. W. 12 and another on the way. P. W. 12 is significantly another of the plaintiff's debtors and his evidence carried the matter little further. At 10 P. M. on the night of the 30th, the respondent made a complaint to the Chintalapudi police. This complaint (Ex. 13) states that the appellant was indebted under the two promissory notes the second of which was in respect of the respondent's wife's money, that as a result of the conveyance of the appellant's property to his wife, the respondent pressed for payment and on the invitation of the appellant went to Pothanur with his brother and P. W. 22 taking "the aforesaid promissory notes" and it mentions the cart driver D. W. 2. The appellant asked them to come back at noon so that all the old promissory notes could be read over to his wife. Ex. 13 then describes briefly the incident in the afternoon mentioning the presence of P. W. 4. There are certain significant omissions from Ex. 13. The most important is that it says nothing about the respondent's brother Mallayya to whom the major portion of the money due under the promissory note for Rs. 24,400 is alleged to have been originally due. It does not mention the presence of P. Ws. 5 and 6 nor does it refer to the witnesses who are said to have met the respondent on his way to and from Pothanur.

This complaint was investigated by the police. On 4th April 1934 the respondent made a statement to the police which is Ex. 17. In that statement he says that the promissory note for Rs. 24,400 was executed in substitution for two debts due under promissory notes by the appellant to the respondent's wife and his brother Mallayya. The respondent was apparently asked if this larger promissory note was mentioned in his ledger and he said that he would search for the ledgers and then say that he could not say if that amount was entered separately in another book or if it was entered in the usual book and he could not say if he had opened a ledger in his wife's name. He said that he had taken his account books on 1st of April to show to his vakil with reference to a civil suit, and had handed them over to his younger brother and that he would make a fuller statement after sending for the books from Ellore. It must be conceded that the terms of the statement to the police do not suggest that the respondent at that time was confident that the details regarding this transaction for Rs. 24,400 would be found in his ordinary accounts. The criminal case against the appellant failed and subsequent revisional proceedings were also unsuccessful. The respondent thereafter filed first a suit on the admitted promissory note for Rs. 9000 odd and it was only after this suit had made some progress that the further suit was filed on the promissory note for Rs. 24,400 and the two suits were clubbed together for trial.

There are numerous circumstances in this case which have made it very difficult to come to a confident conclusion. Prima facie, the evidence adduced by the respondent regarding the occurrence at Pothanur is such as to give rise to suspicion. Nearly all the witnesses who speak to this occurrence are his castemen or demonstrably persons amenable to his influence. The delay in filing the criminal complaint was sufficient to permit of some exaggeration if the complainant had been so minded. The omission of reference to Mallaya's debt in Ex. 13, the addition to the original story of several apparently interested witnesses and the non-committal attitude of the respondent on 4th April when questioned about his accounts, were also circumstances which would justify a suspicion that we had to deal with a story which was undergoing developments; and it may well have been that these suspicious factors led to the failure of the criminal case. On the other hand, there are many circumstances which prevent us from rejecting the respondent's story as a completely false story, though no doubt it was supported by a considerable volume of dubious evidence. It cannot be denied that something must have happened at Pothanur on 30th March which led to the complaint (Ex. 13) and we see no reason to doubt that the incident which led to this complaint was witnessed by the tannery employee (P. W. 4). Otherwise, there is no apparent reason for including his name in that complaint. It was probably also witnessed by the cart driver, D. W. 2, who has been prevailed upon to deny all knowledge of the occurrence.

The defence story is a complete denial of the whole occurrence coupled with a denial of the execution of the promissory note for Rs. 24,400 and the prior notes which led up to that transaction and also with a story of discharge of the earlier promissory note except for a sum of Rs. 500 odd. Now, it seems to us clear that the defence evidence must be to a great extent, if not entirely, false evidence. It is common ground that the respondent and the appellant, both men of influence and position, were on very friendly terms up to 30th March 1934; the slight incident on the 28th, even if true, was admittedly not of such importance as to effect generally friendly relationship. In such circumstances, it is incredible that the respondent, a rich Vaisya money lender, should have invented out of nothing at all a completely false story of an outrageous crime whereby he could fasten upon his friend a liability for approximately Rs. 34,000, which was not true at all. It would of course be quite conceivable, if there had been a violent quarrel between the parties connected with the admittedly genuine promissory note for Rs. 9000 odd, and resulting in the destruction or appropriation of this promissory note, that the respondent might have utilized the interval between this incident and his complaint to exaggerate the story and add to it a false claim for Rs. 24,000, and in such circumstances it is conceivable that the appellant might have retaliated by putting forward a false story of discharge of the admitted promissory note and have denied the whole occurrence in order to support his false story of discharge.

Such a theory would explain the delay in the complaint and its omissions, the hesitations of the respondent in his first statement to the police and the anxiety of the respondent to add to his witnesses a number of persons subject to his control who would support the details of his story. It would also explain the anxiety of the appellant to repudiate the whole occurrence, his unwillingness to produce his own accounts and the not very convincing evidence adduced by him of the discharge of the earlier promissory note. But such a theory can only be entertained in the absence of reliable evidence that this promissory note for Rs. 24,400 was in existence before 30th March. If the respondent can prove that this large debt was evidenced by a promissory note which had been in his possession long before this alleged occurrence on 30th March 1934, it is incredible that he would have concocted a false story of the loss of the promissory note instead of simply filing a suit upon it. We are unable to accept the theory that there was no occurrence at Pothanur on 30th March 1934 and unless it is possible to show that the respondent's story of what happened that day has been exaggerated probably by the inclusion of a promissory note for Rs. 24,400 which did not exist amongst the documents lost on that day, the only possible inference from the appellant's denials, from the false evidence which he has adduced, from the suppression of his accounts and from the failure to examine his two servants, Sitayya and Subbayya who are alleged to have taken part in this occurrence, is that the respondent's story must be substantially true.

The main question in this case therefore becomes the question whether the existence of this promissory note for Rs. 24,400 before 30th March 1934 has been satisfactorily demonstrated. (After examining certain evidence the order proceeded further.) The most conclusive piece of evidence on this question of the previous existence of the promissory note for Rs. 24,400 is provided by Exs. E and H which are certified copies of the income statement and profit and loss statement, the latter purporting to have been signed by the plaintiff on 17th May 1933, the former of which sets forth this debt of Rs. 24,400 as due to the respondent. There is, however, a serious difficulty with reference to the admissibility of this evidence. Objection was taken to it at the time when it was tendered and we deem it necessary to refer to a Full Bench the question of its admissibility in view of the decision of our learned brothers Burn and Stodart JJ. in 1939 M W N 1237.[1] In our opinion, the evidential value of these income-tax documents is such that if they are admitted, the correctness of the lower Court's conclusion is clear. If they are to be rejected, we shall have to decide hereafter whether the remaining evidence is sufficient to establish the pre-existence of this note for Rs. 24,400, which if established, seems to us, in view of the defendant's denials and suppressions, to warrant the decree which has been given.

---

[1] Mythili v. Janaki, (1940) 27 A I R Mad 161= I L R (1940) Mad 329=1939 M W N 1237.

The legal difficulty may be briefly stated. Exs. E and H are both certified copies. If the original is a public document within the meaning of S. 74, Evidence Act, then the certified copies are good secondary evidence of that original under S. 65 (e). If these statements are not public documents we are unable to see how the certified copies can be admitted into evidence under any other clause of S. 65, Evidence Act. S. 74 defines public documents as documents forming the acts or records of the acts: (1) of the sovereign authority, (2) of official bodies and tribunals and (3) of public officers, legislative, judicial and executive, and the term includes also public records kept in British India of private documents. The question is whether an income-tax return and the statements accompanying it form part of the record of the act of the Income-tax Officer who makes the assessment. In the case just referred to the learned Judges decided, without quoting any authority other than the statutory provisions, that it was the policy of the law that statements made in income-tax returns should not be used in evidence against the person making them or against anyone else, that income returns could not be proved by secondary evidence and that the income-tax return was not part of the record of the act of assessment and not a public document as defined in S. 74, Evidence Act.

In coming to this conclusion, the learned Judges appear to have been greatly influenced by the provisions of S. 54, Income-tax Act, which prohibits the disclosure by any public servant of particulars contained in an income-tax return or statement. Now, quite clearly, this Section applies only to disclosures and does not prohibit the Income-tax Officer from giving to the person who made the return a copy of that return. In fact, we are informed that the departmental orders expressly provide for the giving of such a copy to the assessee on application. It seems to us that there is no ground of public policy which would prevent such an assessee from using in evidence such a copy when it has been granted to him. Nor are we convinced that the ground of public policy is a sufficient reason for excluding from evidence any document which is legally admissible under the Evidence Act and is not excluded by any statutory prohibition. This view has been adopted in the case in 1939 M W N 1028,[2] a decision of Varadachariar and Pandrang Row JJ., anterior to the decision of Burn and Stodart JJ. but apparently not brought to their notice. Varadachariar and Pandrang Row JJ. were actually dealing with a copy of a statement recorded by the Income-tax Officer which clearly was a public document and they held that certified copies of such a statement were admissible notwithstanding the provisions of S. 54, Income-tax Act.

The learned Judges refer to a decision in 2 Rang 391[3] wherein a single Judge held that income-tax returns being made confidential by S. 54, Income-tax Act, certified copies of such a return could not lawfully be given and if given could not be used in evidence. In 56 Bom 324[4] at p. 329, a Bench of the Bombay High Court held that certified copies of an income-tax return could not be given in evidence, because the return is not a public document within the meaning of S. 74, Evidence Act, and that the prohibition in S. 54, Income-tax Act, was sufficient to warrant the view that a certified copy could not be lawfully obtained and would not be admissible in evidence if obtained. It seems to us that these decisions raise a question of far reaching importance. With all respect to the learned Judges who have held otherwise, we do not consider that the prohibition against the disclosure of the contents of an income-tax return can have any bearing on the admissibility of the contents of that return filed at the instance of the person who made it. If the income-tax return is a part of the record of the act of the Income-tax Officer making the assessment, a certified copy of that document can lawfully be given, subject to the prohibition against disclosure in S. 54, Income-tax Act. If it has been so given, then by the terms of S. 65, Evidence

---

[2] Venkataramana v. Varahalu, (1940) 27 A I R Mad 308=1939 M W N 1028=50 M L W 681.

[3] Anwar Ali v. Tafozal Ahmad, (1925) 12 A I R Rang 84=84 I C 487=2 Rang 391.

[4] Devidutt v. Shriram Narayandoss, (1932) 19 A I R Bom 291=137 I C 381=56 Bom 324=34 Bom L R 236.

Act, it is, no matter who produces it, good evidence of the original, provided that the original is a public document; and we do not think that considerations of public policy can warrant its exclusion from evidence. If an income-tax return is not a public document, as being part of the record of the act of the assessing officer, it is difficult to see how a plaint or written statement in a civil suit or a complaint in a criminal case can be deemed to be public documents such as can be proved by the production of certified copies. It is the almost universal practice of the Courts to grant certified copies of such documents and to admit them in evidence, though the admissibility of a certified copy of a plaint appears to have been successfully challenged in one or two cases not of this High Court.

We are inclined to the view that an income-tax return, being the basis of the Income-tax Officer's assessment, must be treated as part of the record of the act of assessment and must therefore be regarded as a public document of which a certified copy can be given in evidence. The matter however being the subject of somewhat conflicting rulings of Benches of this High Court, we refer to a Full Bench the following question: "Whether a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under S. 22, Income-tax Act, are public documents with reference to S. 74, Evidence Act, of which certified copies would be admissible under S. 65 (e), Evidence Act."

OPINION

Leach C. J. — Before proceeding to examine the provisions of the Sections of the Evidence Act mentioned in the question under reference, it is desirable to state the effect of S. 54, Income-tax Act, 1922, as in some cases where certified copies of the income-tax documents have been tendered in evidence its provisions have been misunderstood and misapplied. Sub-s. (1) of S. 54, Income-tax Act, states that all particulars contained in a statement made, return furnished, or accounts or documents produced under the provisions of the Act, or in evidence given in the Court of proceedings under the Act other than proceeding under Chap. VIII (which relates to offences and penalties) or in a record of an assessment proceeding, or a proceeding relating to the recovery of a demand shall be treated as confidential, and notwithstanding anything contained in the Evidence Act, 1872, no Court shall be entitled to require a public servant to produce a document referred to in the Section or to give evidence thereon. Sub-s. (2) provides for the punishment of a public servant who unlawfully discloses particulars of an income-tax matter. Sub-s. (3) sets out the occasions on which disclosure can lawfully be made. It is not necessary to set them out as the provisions of sub-s. (3) have no application here and have no bearing on the reported decisions which have relation to the application of Section 54.

While S. 54 prohibits the disclosure, except on specified occasions of matters connected with an assessment to income-tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the Section or to give evidence in respect of them, it does not follow that the Court may not admit in evidence a document which falls within S. 54 (1). This will depend on whether the document is admissible under the provisions of the Evidence Act. Para. 85 of the notes and instructions compiled by the Income-tax Department for the guidance of its officers states that the following persons shall, in practice, be allowed to inspect or to receive copies: (1) In any case the person who actually made the return; (2) any partner (known to be such) in a firm registered or unregistered to whose income the return relates; and (3) the manager of a Hindu undivided family to whose income the return relates, or any other adult member of the family who has been treated as representing it. There is nothing in S. 54 to prohibit this practice and it is only right that a person who is concerned with an assessment should be allowed to obtain copies of the documents relating to his assessment to income-tax should he so desire, and if copies are supplied he may put them in evidence in a suit if the Evidence Act allows it. I will now turn to the relevant provisions of the Evidence Act. S. 74 says that the following documents are public documents: (1) documents forming the acts or records of the acts, (i) of the sovereign authority, (ii) of official bodies and tribunals, and (iii) of public officers, legislative, judicial and executive, whether of British India or of any other part of His Majesty's dominions, or of a foreign country; (2) public records kept in British India of private documents.

Section 75 states that all other documents are private. S. 76 provides that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of the copy that it is a true copy. S. 77 says that certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Therefore, if a document is a public document, it may be proved by means of the production of a certified copy. Private documents must be proved by primary evidence, except in such cases where secondary evidence is permitted under the provisions of S. 65. Cl. (e) of that Section allows secondary evidence to be given when the original is a public document within the meaning of S. 74. If an income-tax return or a statement filed in support of it is a public document within the meaning of S. 74, certified copies will be admissible under S. 65 (e). The answer to the question whether a document of this nature is a public document depends on whether it is a document forming an act or the record of an act or acts of an Income-tax Officer. Before stating opinion on the question I will first refer to certain of the cases which have been quoted in argument.

In 2 Rang 391[3] a single Judge of the Rangoon High Court held that income-tax returns being made confidential by reason of S. 54, Income-tax Act, and the disclosure of their contents being a punishable offence, certified copies cannot be admitted in evidence. The Court did not consider the effect of S. 74, Evidence Act, and decided against the admissibility of the certified copies submitted on the ground that S. 54, Income-tax Act, made the issue of copies unlawful and made the disclosure of the particular contents in the return an offence punishable with imprisonment. In my opinion, there is here a misconception. S. 54 does not make the issue of a certified copy of an income-tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of the return having a copy for his own purposes if he so desires. So far as the assessee is concerned he is not bound to treat the document as confidential.

A Bench of the Bombay High Court considered the question of the admission of certified copies of income-tax returns in 56 Bom 324[4] and held that they were not admissible, but the decision was based on a different ground from that given by the Rangoon High Court in 2 Rang 391.[3] The reason given here was that the assessee had no right to inspect the original documents in the custody of the Income-tax Officer and the latter was not bound to give certified copies to the assessee on demand. It was considered that the words "right to inspect" in S. 76, Evidence Act, exclude all such documents as a Government Officer has a right to refuse to show "on the ground of state policy or privilege, etc." But an Income-tax Officer would not be fulfilling his duty if he refused to allow an assessee to inspect his own return. If he did so he might be placing an assessee at a disadvantage when the assessee was objecting to an improper assessment. The Bombay High Court, however, considered that there was nothing in the terms of S. 54, Income-tax Act, and the intention of the Legislature underlying it, prohibiting an assessee from giving secondary evidence of the contents of the return made by him or on his behalf or of the assessment order made upon him or his firm on that return, where such secondary evidence would be admissible under the Evidence Act. Where the original cannot be produced the best secondary evidence must be a true copy.

A Bench of this Court (Varadachariar and Pandrang Row JJ.) held in 50 M L W 681,[2] that a certified copy granted to an assessee of a statement made by him on oath before an Income-tax Officer is admissible in evidence and there is nothing in S. 54, Income-tax Act, or any of the provisions of the Evidence Act which precludes its admissibility. The statement was regarded as being a public document because it was a statement recorded by the Income-tax Officer and therefore a document forming a record of his act. Though they did not accept the Bombay interpretation of S. 76, Evidence Act, the learned Judges concurred in the opinion expressed by the Bombay High Court in 56 Bom 324,[4] that an income-tax return is not a public document. They did not say so, but it is to be gathered from their judgment that they did not regard an income-tax return as a public document because it is prepared by the assessee.

The question whether an income-tax return is a public document was discussed at some length by a Bench of this Court (Burn and Stodart JJ.) in I L R 1940 Mad 329[1] and the conclusion arrived at was that it is not a public document within the meaning of S. 74, Evidence Act. The learned Judges considered that it was impossible to infer from the wording of the Act that a return made by an assessee is either part of the act of the Income-tax Officer or part of the record of the act of that officer. In their opinion, to allow a person who comes into possession of a certified copy of a return to produce it in Court, and so prove the contents of the return, would be defeating the express provisions of S. 54. I have said sufficient to indicate that in my opinion there is nothing in S. 54 which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document and that the learned Judges misunderstood the effect of that Section. It only remains to be considered whether the opinion that an income-tax return is outside S. 74, Evidence Act, is correct.

The judgments in 50 M L W 681[2] and I L R (1940) Mad 329[1] indicate that in the opinion of the learned Judges who decided those cases a document on the record of an assessment proceeding cannot be deemed to be a public document within the meaning of S. 74, Evidence Act, unless it be a statement recorded by the Income-tax Officer himself or an order passed by him, and therefore does not include a document drawn up by the assessee or under the assessee's directions. In my opinion, this interpretation of S. 74, Evidence Act, is too limited. S. 22, Income-tax Act, empowers the Income-tax Officer to call upon a person to submit a return of his income. S. 23 states that if the Income-tax Officer is satisfied that a return made under S. 22 is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of the return. The submission of the return constitutes the fulfilment of a requirement of the Income-tax Officer; in other words, it is a document which he has caused to be prepared. Can it then be dissociated from his action in calling for the return? If the Income-tax Officer is not satisfied with the return he can call upon the assessee to produce evidence in support of it. If the assessee produces evidence the Income-tax Officer must consider it in determining the sum to be paid by the assessee. A profit and loss statement filed by the assessee is evidence in the matter and the Income-tax Officer may draw it up himself, if he thinks it expedient to do so. It is common ground, that an order of assessment is a public document within the meaning of S. 74 and the decision in 50 M L W 681,[2] that a statement recorded by an Income-tax Officer falls in the same category, has not been questioned. Now, if a statement recorded by an Income-tax Officer in the course of his examination of the assessee is a public document, it is difficult to see why a statement handed in by the assessee disclosing the basis of the return called for should not be similarly regarded. Surely the test cannot be whether the profit and loss statement is actually drawn up by the Income-tax Officer.

As the learned Judges who have made the reference have pointed out, a plaint or a written statement has always been regarded by this Court as forming part of the record of a case and a public document of which an interested party may obtain a certified copy. If the argument, that an income-tax return is not a public document, but that the order passed thereon is, were carried to its logical conclusion, it would mean that no part of the record of a civil suit could be regarded as constituting a public document except evidence recorded by the Court or summonses or notices or interlocutory orders or the judgment in the case. In 25 W R 68[5] Garth C. J. and Birch J. expressly held that a petition which was the subject-matter of an order passed was part of the record in the suit, and I do not think that this can reasonably be doubted. In my judgment, it would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. I consider that the record of an income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore that any document properly on the record is just as much a public document as the final order of assessment. For these reasons I would answer the question propounded in the affirmative. I would make the costs of this reference costs in the cause.

King J. — I agree.

Somayya J. — I agree.

C.R.K./D.S. *Answered in affirmative.*

---

[5] Bhagain Megh Ranee Koer v. Gooroo Pershad Singh, (1876) 25 W R 68.

A. I. R. 1940 Madras 776

PANDRANG ROW AND ABDUR RAHMAN JJ.

Alapati Bulli Venkanna — Appellant.

v.

Kantamani Ramanna—Respondent.

Appeal No. 158 of 1936, Decided on 2nd May 1939, against decree of Sub-Judge, (Addl.), Ellore, D/- 10th October 1935.

Civil P. C. (1908), O. 34, Rr. 4 and 5—Legal right of marshalling cannot be extended by relying on provisions of O. 34, Rr. 4 and 5 in way which cannot be justified by any well established principle.

The right of marshalling in equity and in law is co-extensive and there is no justification to extend the legal right of marshalling by relying on the provisions of O. 34, Rr. 4 and 5 in a way which cannot be justified by any well-established principle. [P 776 C 2]

V. Suryanarayana — *for Appellant.*

P. V. Vallabhacharyulu, D. Suryaprakasa Rao, T. Satyanarayana, C. Bhuvanaika Rao Choudhury and V. G. Rao — *for Respondent.*

Pandrang Row J. — This appeal raises a question of marshalling. The appellant is the purchaser of one of several items mortgaged in favour of the plaintiff in the suit, namely item 3, under the suit mortgage, Ex. A, dated 24th August 1921. This item was purchased by defendant 8 in 1925 for a sum of Rs. 13,000. The appellant wanted that his property, namely item 3, should be sold last after exhausting all the properties covered not only by the suit mortgage, Ex. A, but also the suit mortgage, Ex. B of April 1926, and even the properties in another district, namely Vizagapatam, mortgaged under Ex. C in 1930. This claim was disallowed by the Court below and defendant 8 appeals. So far as the properties covered by Ex. C are concerned, the appellant's property, item 3 of sch. A, is not included in it, and it is conceded before us that the appellant will not be entitled under S. 56, T. P. Act, to claim the right of marshalling as against Ex. C properties. This concession was obviously unavoidable because the words of the Section themselves are very clear that the right of marshalling can be claimed only where

> the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person.

So far as the Ex. C properties are concerned, it is obvious that this condition is not satisfied. It is satisfied only so far as Ex. A properties are concerned. It follows therefore that the appellant is not entitled to ask that Ex. C properties should be sold before the item in which he has an interest, namely, item 3 of sch. A, is sold. Some argument was addressed to us with a view to make out a case apart from S. 56 as if there was some other rule of law or equity, which entitled the appellant to marshal as against Ex. C properties even when the Section defining the right of marshalling does not recognize such a right. He relied on the words "sufficient part" found in O. 34, Rr. 4 and 5, Civil P. C., which give the Court the power to order the sale of the whole of the mortgaged property or a sufficient part thereof, as conferring upon the Court a power, apart from rules of law relating to marshalling contained in the Transfer of Property Act, to give relief in respect of marshalling to a wider extent than is recognized by the substantive law. Even assuming that this contention is right, without deciding it, it does not follow that the Court would be justified in using that power unless some recognized principle of law or equity justified the exercise of the power in favour of the appellant. It is not shown that there is any special equity in favour of the appellant so far as the Ex. C schedule properties are concerned. The resort made to the provisions of O. 34, Rr. 4 and 5 in certain decisions that were quoted to us was necessitated by the fact that those cases had to be decided under the old Act, before it was amended in 1929, which did not in so many words declare that the right of marshalling to the same extent as the doctrine of equity did, and it was therefore open to the Court in exercising its powers under the provisions of O. 34, Rr. 4 and 5 to exercise its discretionary power so as to give effect to the full right of marshalling as recognized by equity.

At present the position is different in the sense that the right of marshalling in equity and in law is co-extensive and there is no justification, in our opinion, to extend the legal right of marshalling by relying on the provisions of O. 34, Rr. 4 and 5 in a way which cannot be justified by any well established principle. The appellant's claim, therefore, so far as Ex. C properties are concerned, must be negatived. As regards the other properties covered by Ex. A the right of marshalling obviously exists under S. 56, T. P. Act, and in ordering these properties to be sold in execution of the mortgage decree, the Court is bound to give protection to the appellant in such a way as not to prejudice the rights of the mortgagee. It follows from this principle that the properties covered by Ex. A have to be sold in the following order, item one of course not being liable to sale as found by the Court below as it has been exonerated from the mortgage. The order in which the items are to be sold will be as follows: item 4, item 2, items 5 to 7 subject to the prior mortgage in favour of Alapati Gurayya, item 3 and item 8. To this extent the decree of the Court below will be modified. In the circumstances, the appellant will bear his own costs and pay half the costs of the plaintiff-respondent in the appeal.

C.R.K./D.S. *Decree modified.*

A. I. R. 1940 Madras 777

KING J.

C. Jayaram Mudaliar — Appellant.

v.

Lakshmi Ammal — Respondent.

City Civil Court Appeal No. 27 of 1938, Decided on 26th March 1940, against decree of Principal Judge, City Civil Court, Madras, D/- 29th November 1937.

Husband and Wife — Restitution of conjugal rights — Suit for — Relief is discretionary with Court — Husband few years after his first marriage with immature girl contracting second marriage and living with second wife — First wife neglected for 20 years after her marriage and 13 years after she attained puberty — Husband rejecting last offer made by first wife to join him and in order to overcome her opposition to claim put forward by him under will which was also in favour of his first wife instituting suit for restitution of conjugal rights — Husband held not entitled to relief claimed.

The relief as to restitution of conjugal rights is discretionary with the Court. [P 779 C 1]

The husband a few years after his first marriage with an immature girl contracted a second marriage and lived with his second wife since then. At the time of his second marriage, his first wife had not attained puberty and was living with her parents. For twenty years the husband has had nothing to do with his first wife after his marriage and 13 years after she attained puberty and even rejected the last offer by his first wife to join him. But simply to overcome the opposition of his first wife to a claim put forward by him under a will which was also in favour of his first wife he instituted a suit for restitution of conjugal rights against her:

Held that the husband was not entitled to the relief claimed: *A I R 1927 Bom 264 and A I R 1935 Lah 386, Rel. on; A I R 1927 Mad 1159, Disting.; Case law referred.* [P 778 C 1; P 779 C 2]

T. K. Rangaswamy Ayyangar — *for Appellant.*

P. Krishnamachari — *for Respondent.*

Judgment. — This appeal arises out of a suit filed by a husband against his wife for the restitution of conjugal rights. The parties are Hindus and Mudaliars. The undisputed facts are these. The marriage took place in June 1916 when defendant was nine years old. It was brought about largely by an elderly relative of both parties named Ponnambala, who also executed a will making provisions in favour of both parties to take effect on the death of his widow. About 1921 when Ponnambala was dead and defendant had not yet attained puberty, plaintiff married a second wife, also then an immature girl. She was his sister's daughter. She attained her puberty within a few months, and ever since has lived with the plaintiff. Defendant attained puberty in 1922 or 1923, but continued to live with her parents. In 1926 occurred the only correspondence between the parties or their families until shortly before the suit. Plaintiff wrote to both defendant and defendant's father complaining that defendant had not been sent to him, and calling upon her father to bring her on one of two auspicious days, threatening legal proceedings if they refused. Defendant's father replied expressing his anxiety that defendant's married life with plaintiff should begin, but pointing out that according to custom it was plaintiff's duty to come to him and have the nuptial ceremony performed in his house. Nothing further was communicated by plaintiff. In 1927 defendant's father died. In May 1936 Ponnambala's widow died, and plaintiff took possession of certain property under Ponnambala's will. On 22nd May a lawyer's notice was sent to him on behalf of defendant calling upon him to vacate the property, which defendant claimed was hers under the terms of the will. Within four days of the receipt of this notice plaintiff replied by a lawyer's notice demanding that defendant should come and live with him, and he followed up this notice in July by filing the present suit.

These are the undisputed facts. The case, as put forward by plaintiff, was that his second marriage was undertaken by him owing to the delay in defendant's attainment of puberty. Defendant's father was so angered by this conduct that he called a caste meeting which resolved that the members of the caste should henceforward dissociate themselves from plaintiff because he had married his sister's daughter. Defendant's family failed in their duty to inform him of defendant's puberty and to bring defendant to his house. It was impossible for him, even if it had been otherwise customary, to go to defendant's house owing to his bitter resentment at defendant's father's actions. Not only in 1926 but on other subsequent occasions plaintiff attempted through various messengers to persuade defendant's people to send her, but they refused. The learned City Civil Judge dismissed the suit. He held that plaintiff's original intention was to marry only his second wife. He was persuaded by Ponnambala to marry defendant, but after Ponnambala died he had no intention whatever of treating her as his wife. Plaintiff's letters in 1926 were cold and formal, and were written by him in the certain knowledge that his proposals would be rejected. The other alleged attempts to secure the company of the defendant have not been proved and did not take place. On the other hand, plaintiff deliberately rejected overtures made in about 1930 by defendant's family through D. W. 2 that he should arrange to fetch her. The suit has been filed, not because plaintiff really wanted the society of his wife, but in order to overcome her opposition to the claims which he put forward under Ponnambala's will. The granting of a decree in a suit of this kind is an equitable relief, and as plaintiff has neglected his wife for this long period, and has brought his suit for the sole purpose just mentioned he is not entitled to such relief.

In the appeal-arguments the findings of fact on the question of plaintiff's attitude are contested, and the case for plaintiff put in this form. It is the wife's duty to join the husband. Normally in the caste of the parties the nuptial ceremony is performed in the husband's house. Plaintiff may have been obstinate in insisting upon this condition, but in view of defendant's father taking the lead in virtually excommunicating him he could not reasonably be expected to submit to the indignity of approaching him first. In any case defendant is as obstinate as the plaintiff and the delay is as much due to her as to him. There is no fear of physical violence or cruelty. Plaintiff's immediate motive for filing the suit is admitted, but it is not necessarily a sordid motive. It may well be to the advantage of both parties to settle their disputes in regard to Ponnambala's will by a general reconciliation. The foundation of fact upon which this argument must rest is threefold: (i) The truth of the caste meeting and its resolution, (ii) the truth of the assertion that the wife's people must bring the wife to the husband, (iii) the truth of plaintiff's case that he has made repeated efforts to secure the company of his wife. The learned City Civil Judge has discussed all these points in detail. On the first question he shows how the caste meeting is not referred to in plaintiff's letters in 1926 and how meagre the evidence is which was adduced in its support. Only one witness (P. W. 4) was cited to corroborate plaintiff in this matter. The learned Judge says he was 'not impressed with this witness' and points out that even he says that the resolution was not put into force and was rescinded in 1931. The learned Judge is clearly right in holding that if ever such a meeting were held there ought to have been ample evidence to prove it.

On the second point the evidence of plaintiff's own witness is clear that the nuptial ceremony may take place in the house of either party, and P. W. 2 admits that in the case of defendant's four sisters all the nuptial ceremonies took place in defendant's father's house. The learned Judge also finds that, if the ceremony is to take place in the husband's house, though it may not be necessary for the husband himself to fetch his bride he should send some relations or friends ceremonially to do so, and this plaintiff entirely omitted to arrange for. That finding was not seriously challenged in the arguments.

On the third point the learned Judge has given good reasons for rejecting plaintiff's explanation that the second marriage was due to his sexual impatience. He contrasts the legal formalism of plaintiff's letters in 1926 with the cordial terms in which defendant's father replies, and in para. 14 of his judgment shows how the evidence entirely fails to establish that plaintiff made any other attempts to get his wife. I have been taken through the whole evidence in the case and can see no reason to differ from the learned Judge's final conclusion that at no time did plaintiff really want his wife's society. It must also be remembered in this connexion that defendant's father died in 1927, so that plaintiff's chief difficulty (according to his own contention) was removed nine years before the suit was filed and that according to the evidence of D. W. 2 which the learned Judge accepts, plaintiff refused in or about 1930 to take the necessary measures to get his wife.

The question then arises whether on this view of the facts the learned Judge made a right use of his discretion in refusing plaintiff a decree. It is not seriously disputed that this relief is discretionary. Whatever may have been said a generation or more ago, (*see* 10 Bom 301[1] and 21 Bom 610)[2] it is now well established (*see* 51 Bom 329,[3] 16 Lah 892[4] and 69 M L J 210)[5] that this discretion can and should be exercised by a Court. There have been two cases in Lahore, cases, no doubt, in which the parties were Mahomedans, where the failure of a husband to send for his wife for two and three years respectively after her puberty has entailed the dismissal of his suit : *see* A I R 1924 Lah 188[6] and A I R 1928 Lah 700.[7] In 51 Bom 329[3] at p. 341, the learned Judges say :

> In the absence of legislation it appears therefore on the whole that the Courts desire to consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hands of the Court the relief which he seeks, and whether such a relief is not unreasonable in the particular case against the defendant.

In 16 Lah 892[4] at page 897 the learned Judges say :

> The Court in each case will consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted bona fide, the suit will be dismissed.

It is true that in A I R 1927 Mad 1159,[8] the learned Judges point out that there is no duty cast upon a Hindu husband to beg his wife to return to him, but that is a case of a wife's suit for separate maintenance, where the considerations which determine the result of the suit are not necessarily the same as those in a suit for restitution of conjugal rights; and a case too which can be distinguished on the facts, for there the wife made no request to the husband to take her. Applying the principles of the Bombay and Lahore cases just quoted, and bearing in mind the facts in this case that plaintiff has had nothing to do with his wife for twenty years after his marriage, and at least thirteen years after she attained puberty, and that plaintiff has definitely rejected the last offer made by defendant through D. W. 2 in 1930 to join him, I am of opinion that the learned City Civil Judge was justified in refusing the plaintiff a decree. This appeal accordingly fails, and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 779

ABDUR RAHMAN J.

Nallangal — Appellant.

v.

Arasappappillaipatti Co-operative Society by Secretary, A. Mangayana Pillai — Respondent.

Appeal No. 147 of 1936, Decided on 2nd December 1938, against appellate order of Sub-Judge, Dindigul, D/- 4th February 1936.

(a) Trusts Act (1882), Ss. 88, 90 and 94 — Husband applying for issue of pattah and depositing money for survey stones and growing trees but dying before grant of pattah — His widow making fresh application and pattah issued in her favour — Land covered by pattah attached by creditor of her husband — Ss. 88, 90 and 94 held inapplicable.

A person applied to the Government for the issue of a pattah and made a deposit of certain sum for the value of survey stones and of the trees growing on the land; but before the grant could be made, he died and his widow submitted a fresh application which was accepted by the Government and the pattah was issued to the widow. A decree-holder of her husband attached this land on the ground that it was liable to be sold for a decree passed against her husband :

Held (1) that the widow could not be said to have acquired the property for the benefit of her husband's estate; [P 780 C 2]

(2) that S. 88 was inapplicable as the widow could not be said to be a person holding any fiduciary character of such a nature as to be bound to protect the interests of the creditor of her deceased husband; [P 781 C 1]

(3) that S. 90 was also inapplicable as a Hindu widow could neither be described to be a tenant for life or qualified owner. Moreover the expression "persons interested" did not cover the creditors of a widow's deceased husband; [P 781 C 1, 2]

(4) that since the widow could not be held to have owed any duty to the husband's creditor or to be holding the property for his benefit, the provisions of S. 94 of the Act could not be held to apply. [P 782 C 1]

(b) Trusts Act (1882), Ss. 88 and 90—Ss. 88 and 90 are not exhaustive only in sense that if person cannot be brought under these Sections he must be found to fall under S. 94.

The terms of Ss. 88 and 90 are not exhaustive only in the sense that if a person cannot be brought within these Sections, and held liable as a trustee, he must be found to fall under the residuary Section, i. e., S. 94. In other words where no

---

1. Dadaji Bhikaji v. Rukmabai, (1886) 10 Bom 301.
2. Purshothamdas Maneklal v. Bai Mani, (1897) 21 Bom 610.
3. Bai Jivi v. Narsingh Lalbhai, (1927) 14 A I R Bom 264 = 101 I C 403 = 51 Bom 329 = 29 Bom L R 332.
4. Ude Singh v. Mt. Daulat Kuar, (1935) 22 A I R Lah 386 = 158 I C 223=16 Lah 892= 37 P L R 864.
5. Rukumani Ammal v. T. R. S. Chari, (1935) 22 A I R Mad 616=157 I C 968=69 M L J 210.
6. Mt. Nawab Bibi v. Allah Ditta, (1924) 11 A I R Lah 188=73 I C 896.
7. Imam Baksh v. Mt. Amiran, (1928) 15 A I R Lah 700=107 I C 607.
8. Seenayya Reddi v. Mangamma, (1927) 14 A I R Mad 1159=99 I C 974.

trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is termed in English law as a constructive trustee. [P 781 C 2; P 782 C 1]

K. S. Ramamurthi — *for Appellant.*

K. Rajah Ayyar and R. Rangachari — *for Respondent.*

Judgment. — This appeal arises in consequence of an attachment of a property made at the instance of the respondent company on the ground that it was liable to be sold in a decree passed in its favour against one Karuppan Samban. His widow Nallangal objected to the attachment and claimed that the property belonged to her. This objection prevailed in the executing Court, but the order was reversed by the learned Subordinate Judge of Dindigul on appeal. Aggrieved by this order Nallangal has preferred the present appeal. The pattah in regard to the land attached by the decree-holder was issued by the Government in favour of the widow on 25th March 1933 (Ex. I). But it appears that a darkhast for this land was originally made by her husband Karuppan Samban on 19th July 1931 during his lifetime (Ex. A). Before passing any final orders on this application, the tahsildar called upon Karuppan Samban first to deposit a sum of Rs. 37-9-5 for the value of survey stones and of the trees growing on the land. This money was paid on 8th August 1932, but before the grant could be made, Karuppan Samban died on 19th January 1933. The appellant then submitted a fresh application on 21st January 1933 in which after relating all the facts stated above she referred to her impecunious condition and prayed for the grant to be made in her favour for her and her daughter's subsistence. This application was accepted by the Government and the pattah was issued to the widow on 25th March 1933 (Exs. I and V).

The widow had alleged in the executing Court that the money which was deposited in pursuance of the Tahsildar's notice was hers, but there is a concurrent finding by both the lower Courts that the price of the trees was paid by Karuppan Samban himself and not by the widow. This is a finding of fact and cannot be questioned in this appeal. In view of this finding, it must be held that the survey stones and the trees on the land belonged to Karuppan Samban and would therefore be attachable by the decree-holder in execution of its decree. The next question is whether the pattah issued by the Government to the widow should be considered to have been issued for the benefit of her husband's estate or for the benefit of the widow and her daughter. It has been found by both the Courts that under the rules the application made by the husband for the grant of a pattah or the deposit of the value of the trees made by Karuppan Samban during his lifetime would not have made it obligatory on the Government to issue the pattah after his death to his heirs. The Government had a complete discretion in the matter and could very well have refused to make a grant in favour of the widow. It is however urged on behalf of the respondent that the widow should, in the circumstances, be held to have taken the property in trust for the estate of her deceased husband. The question is if it can be so regarded. It is obvious from what has been said that Karuppan Samban was not and could not be the owner of the property at the time of his death and the widow could not therefore have inherited it as her husband's heir. It has been however contended that in view of the application made by the husband for the grant during his lifetime and bearing the deposit made by him for the value of the survey stones and trees in mind, it must be presumed that the application was made by the widow in a representative capacity, and even if she may be assumed to be holding an absolute right against the Government, this could not prevent the company from attaching the property in its decree against the husband. A constructive trust is thus alleged to have arisen under which the widow should be held to be holding the property on behalf of her deceased husband.

Having heard the learned counsel for the parties, I am of opinion that the widow cannot be said to have acquired the property for the benefit of her husband's estate. It is hardly necessary in this case to refer to a large number of cases cited on behalf of the parties regarding the grant of service on personal inams. It may be that when a personal inam held by the husband is enfranchised in favour of the widow, the grant of the inam title deed will not constitute her to be an absolute owner. Karuppan Samban held no inam in this case from the Government and the grant made to the widow for the first time by the Government after her husband's death cannot be governed by the principle on which these cases were decided. It has been found by the lower Courts and the finding was not challenged before me that the property was at the disposal of the Government when Karuppan Samban died and alienable to whomsoever the Government was pleased to grant. It was urged on behalf of the respondent that the widow should be held in the circumstances to have a fiduciary character and since she gained an advantage by availing herself of that character, she must hold the property for the benefit of the estate. In the alternative, it was suggested that the widow was a qualified owner and gained an advantage for herself in derogation of the rights of the other persons interested in the property and she must therefore hold the property for the benefit of the persons so interested. Both these contentions are based on Sections 88 and 90, Trusts Act.

A perusal of S. 88 would show that it is inapplicable to the present case. Under the provisions of the Section, a person is to hold the benefit gained by him for another person only when he holds a fiduciary character, is bound in that character to protect the interests of the other person, and availing himself of that character gains any pecuniary advantage for himself. How can the widow in this case be said to be a person holding any fiduciary character and of such a nature as to be bound to protect the interests of the respondent company which was a creditor of her deceased husband? Could she be said to hold any fiduciary character towards her husband who was no more? Can it be seriously argued then that she was bound to apply to the Government for the grant in the interests of her husband's creditor and acquired it so as to enable the latter to sell it through Court in the execution of its decree? The answer to all these questions must be in the negative and the provisions of this Section cannot therefore be held to apply.

Turning to S. 90 of the Act, I find that it applies in terms to a tenant for life, co-owner, mortgagee, or other qualified owner of any property. A Hindu widow can neither be described to be a tenant for life or qualified owner in the sense in which these expressions have been used in this Section. Her position in regard to her husband's estate is that of an owner with limited rights. She can alienate the property inherited by her absolutely under certain circumstances which need not be stated here. In the absence of those circumstances, the property left by her husband may devolve on the reversioners. But she cannot be said to be a tenant for life only because she inherits a life estate and as a qualified owner her right of alienation is restricted and may be questioned by her husband's reversioners, if she exceeds it. Even if either of these expressions are assumed to cover a widow, which in my opinion they cannot, she could not in any case be held responsible until she gained an advantage in derogation of the rights of the other "persons interested" in the property. The expression "persons interested" has been held by a Full Bench of the Allahabad High Court not to cover the reversioners: 43 All 374.[1] Much less can it be said to cover the creditors of a widow's deceased husband. So far as one can glean the facts from the evidence on the record, the only property which Karuppan Samban is shown to have left behind him was the amount held to have been paid by him for the value of the stones and trees. When she is proved to have paid nothing out of her husband's estate for obtaining the grant from the Government, she cannot be held to have gained an advantage in derogation of the rights of the persons interested in the property left by her husband. The illustration to this Section, to which my attention was drawn by the learned counsel for the respondent does not help his contention.

It was contended that even if these two Sections are not held to be in terms applicable they are not exhaustive and the principles underlying them and particularly under S. 90 would make the widow liable to surrender the property acquired by her for the discharge of her deceased husband's debts. In that connexion reliance was placed on A I R 1932 Bom 240,[2] the leading English case in 25 E R 223[3] commonly called the Ramford Market case, and 44 E R 855.[4] But before these cases are considered, it might be observed that the terms of Ss. 88 and 90 are not exhaustive only in the sense that if a person cannot be brought within these Sections, and held liable as a trustee, he must be found to fall under the residuary Section in this Chapter, i. e., S. 94. In other words where no trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature

---

1. Sriram Jankiji Birajman Mandir v. Jagadamba Prasad, (1921) 8 A I R All 11=61 I C 3=43 All 374=19 A L J 129 (F B).
2. Babani Soiroo v. Dulba Gobind, (1932) 19 AIR Bom 240=137 I C 355=34 Bom L R 357.
3. Keech v. Sandford, 25 E R 223.
4. Yem v. Edwards, 44 E R 855.

of a trust and under which he may be held to be, what is termed in English law, as a constructive trustee. These obligations have been described in Chapter 9, Trusts Act. Having already held Ss. 88 and 90 of the Act to be inapplicable to the facts of the present case, I must now ascertain if the appellant as required by S. 94 has no beneficial interest in the property granted to her by the Government. If she is found to be holding the property for the use of others and not for herself, the doctrine of constructive trust would be held to apply to her and she would be assumed to be holding it for their benefit as provided by S. 94 of the Act. But can the appellant in the abovementioned circumstances be said to be holding the property for the benefit of the respondent company? The grant was made to her by the Government and she did not stand in any fiduciary position towards her husband who had died or towards a creditor of her husband, whom she was under no obligation to repay from out of the property acquired by her, without any help from or detriment to her husband's estate. It was held in (1903) 2 Ch 40,[5] that a person cannot be held to be a constructive trustee unless his possession is such that he owed some duty to the other persons interested. Since the widow cannot be held to have owed any duty to the respondent company or to be holding the property for its benefit, the provisions of S. 94 of the Act cannot be held to apply.

Turning to the English cases cited on behalf of the respondent, I find that the facts in 25 E R 223[3] were that a lessee of the profits of a market had devised the lease to a trustee for an infant. The trustee applied for renewal on behalf of the infant, but his application was refused on the ground that the minor was incapable of entering into a contract and that there could be no distress of the profits of a market. The trustee then took the lease for himself. In a suit on behalf of the infant it was held that the trustee could not take advantage of his position and he was therefore ordered to assign it to the infant. This case was decided on the principle that the trustee was "the only person of all mankind," who could not have the lease for his benefit. This was simply because he was an express trustee for the infant while the appellant is neither an express nor a constructive trustee. The next English case relied upon on behalf of the respondent was that in 44 E R 855.[4] There it was held that a grant having been obtained by a widow by virtue of a possession referable to her husband's will must be treated in equity as made for the benefit of the devisees, to whom the husband had bequeathed the remainder after giving merely a life interest to the widow. It was decided in those circumstances, and if I may say so with great respect, rightly, that the widow, who had got into possession of a property belonging to the Crown for her life under a will of her husband, cannot be held to have acquired any interest in that property if the Crown allowed persons, who had encroached on the properties, to take a conveyance on payment of a nominal consideration.

It will thus be seen that both the English cases do not help the contention raised on behalf of the respondent. In the first case, the trust in favour of the infant was an express one and the trustee was, on account of his fiduciary capacity, held to have acted for the infant's benefit alone. In the second case, the widow was found to have purchased the land encroached upon on very easy terms as she was put into possession of the land for her life under her husband's will and was held to have no beneficial interest in the land. Once it is found that the widow in this case was not a trustee on behalf of her deceased husband or that of the creditor company and the acquisition under the Government grant on a darkhast made by her was not an unfair gain or benefit obtained by her in a fiduciary or semi-fiduciary capacity, the doctrine of 'graft' embodied in S. 90, Trusts Act, must be held to be inapplicable. I would therefore find that the property acquired by the widow from the Government on her darkhast is her own property and not liable to be attached in the execution of a decree obtained by the respondent company. The same however cannot be said of the survey stones and the trees which were paid for by Karuppan Samban during his life. The appeal is therefore accepted to that extent with costs of both this and the lower Appellate Courts. If the trees or the stones have been removed by the appellant, she will have to account for the same in appropriate proceedings.

C.R.K./D.S. *Appeal partly allowed.*

---

[5] In re Bliss, (1903) 2 Ch 40.

A. I. R. 1940 Madras 783

HORWILL J.

Secretary of State — Appellant.

v.

Reddipalle Hussain Saheb and others— Respondents.

Second Appeal No. 658 of 1936, Decided on 27th February 1940.

(a) Lease — Patta is document of title and has great value as between Government and pattadar.

Although a patta is not a title deed, it is a document of title, to which great weight is generally given both by possessor and by the Government. It is true that a patta is not a title deed in the sense of a document, the grant of which conclusively passes title from the Government to the pattadar; but with regard to a first grant, at any rate, a patta is granted as a matter of course to the person to whom the Government has granted the land. The value of a patta generally comes up for consideration in proceedings between the pattadar and a third party; but as between the Government and the pattadar a patta clearly has a greater value. The Government cannot say that pattadar is not entitled to the land or the trees granted under the patta nor can the pattadar say that he is not holding title from the Government. A tree patta moreover differs from an ordinary ryotwari patta in being more in the nature of a lease, which was the original meaning of the word patta *: A I R 1925 Mad 723, Rel. on.* [P 783 C 2]

(b) Lease — Government has right to trees standing on unoccupied sites and has right to issue tree patta for them.

Although the Government do not ordinarily charge any tax for trees that are raised on unoccupied sites by the occupiers, there is nothing in Board's Standing Order No. 18 which suggests that the Government do not regard the trees as their property. They may not wish to discourage the occupiers from making improvements; but they do not thereby give up their rights to these improvements. Where a site is abandoned, the Government are entitled to take over anything that remains standing on it, including the building and trees. If therefore the land is unoccupied, the Government have a perfect right to the trees that are standing on that land and have therefore a right to issue a tree patta for them. [P 784 C 2]

B. Sitarama Rao, Govt. Pleader — *for Appellant.*

N. Viswanatha Ayyar and N. V. Nagaraja Ayyar — *for Respondents.*

Judgment. — The plaintiff held a tree patta from the Government for five tamarind trees standing on a house site, S. No. 848. That site had admittedly been vacant for some years; but five or six years ago defendants 2 to 6 came and settled there. S. No. 848 was a site reserved for the houses of Madigas. In accordance with the policy of the Government, set out in Board's Standing Order No. 18, the tree patta to the plaintiff was cancelled when defendants 2 to 6 came to settle on the site and the trees were offered to them. As they could not afford to purchase them, the tree patta was granted to them. The plaintiff was aggrieved at losing his tree patta and has brought this suit for a declaration of his right to enjoy the tamarind trees on his paying tree tax as usual and for recovery of possession and for mesne profits. The Government, as defendant 1, contended that the trees belonged to them and that they had a perfect right to grant the trees to whomsoever they pleased. The respective rights of Government and the tree pattadars were dealt with at great length by the Munsif, who decreed the suit as prayed for. In appeal, the learned District Judge disposed of the matter briefly by saying that a patta was not a document of title but was a mere bill for rent or tax which, being of little or no value, proved nothing. As that was the only evidence on which the Government could rely, the plaintiff was entitled to succeed.

With due deference to the opinion of the learned District Judge, I do not consider that a patta is quite such a valueless document as he thinks. As was pointed out by Srinivasa Ayyangar J. in 48 Mad 454,[1] although a patta is not a title deed, it is a document of title, to which great weight is generally given both by the possessor and by the Government. It is true that a patta is not a title deed in the sense of a document, the grant of which conclusively passes title from the Government to the pattadar; but with regard to a first grant, at any rate, a patta is granted as a matter of course to the person to whom the Government has granted the land. The value of a patta generally comes up for consideration in proceedings between the pattadar and a third party; but as between the Government and the pattadar, a patta clearly has a greater value. The Government cannot say that the pattadar is not entitled to the land or the trees granted under the patta nor can the pattadar say that he is not holding title from the Government. A tree patta moreover differs from an ordinary ryotwari patta in being more in the nature of a lease, which was the original meaning of the word patta.

The case on which the plaintiff placed the most reliance in this Court (as in the trial Court) is 53 M L J 104,[2] in which

---

[1] Official Assignee of Madras v. Basudevadoss Badrinarayana Doss, (1925) 12 A I R Mad 723=88 I C 401=48 Mad 454=48 M L J 423.

[2] Chinnappa Naidu v. Raju Govindan, (1927) 14 A I R Mad 717=102 IC 656=53 MLJ 104.

Ramesam J. dealt with the question of the nature of a patta given to a tree pattadar in a case where the land on which the trees were standing was afterwards granted to another person. It is the policy of the Government in such circumstances to offer the tree pattadar the patta for the land also. If he is not willing to take it or if, for any other reason, a grant to that person is not desirable, then the land may be given to another; but in any event the tree patta is cancelled. The trees are then included in the patta of the land pattadar and his rent is fixed according to the value of the land and the trees. Ramesam J. did not however dispose of the appeal on the ground that the tree pattadar has retained his title; for he finds that the trees were not actually standing on the land in question. I think the wording of Board's Standing Order 18 (2) indicates that the Government assert their ownership in the trees. If they do not, it is difficult to see how they can charge the pattadar of the land rent for the trees. In 36 Mad 148,[3] two learned Judges of this Court were inclined to think that, when the Government cancelled the tree patta, they did not intend to resume their rights in the trees; but to that case the Government were not parties; and the appeal was decided on the ground that even if the Government had intended to cancel the patta and to take away the rights of the former tree pattadar, they did not in fact grant these rights to the pattadar of the land. So the latter acquired no title to the trees at all and the enjoyment of the former tree pattadar could be protected against the land pattadars. In the present instance the tree patta was issued under Board's Standing Order 18 (2), which relates to unoccupied lands. The evidence of P. Ws. 1 to 3 is to the effect that the lands remained occupied until a few years before defendants 2 to 6 came into occupation; but the evidence of these three witnesses is interested, as they themselves attempted to pass title, under sale deeds, of these trees. The plaintiff in para. 8 of his claim says:

> The said Madigapalli became abandoned several years ago as the Madigas shifted to a different locality. Thereupon, the Government were collecting tree tax at the rate of 12 annas per tree from the persons who owned the said trees from time to time including the plaintiff.

I think this must be true, or a patta under Board's Standing Order 18 (2) would not have been issued. The relevant date is 13th November 1909, the date on which a tree patta was first granted to Babu Sahib. Appendix 20 of Board's Standing Orders says that

> if a building . . . is erected and is subsequently abandoned, that is, left unoccupied and is in disrepair for a period of one year, the Government shall have the right to re-enter forthwith and take possession of the said site or the site and building and shall not be liable to pay any compensation for any buildings or other improvements then existing on the land.

Although the Government do not ordinarily charge any tax for trees that are raised on unoccupied sites by the occupiers, there is nothing in Board's Standing Order 18 which suggests that the Government do not regard the trees as their property. They may not wish to discourage the occupiers from making improvements; but they do not thereby give up their rights to these improvements; and it is clear from Appx. 20 just quoted that where a site is abandoned, the Government are entitled to take over anything that remains standing on it, including the building and trees. If therefore, on 13th November 1909, this land was unoccupied, the Government had a perfect right to the trees that were standing on that land and had therefore a right to issue a tree patta for them. The Government are certainly not bound by the various sales that took place from 1885 onwards. Moreover, the plaintiff seems estopped from asserting that the trees do not belong to Government, because he and his predecessors-in-title accepted pattas from the Government which, as I have pointed out, is tantamount to an admission that they held title to the trees from the Government. Even if the payment of tree tax under Ex. 5 does not estop the plaintiff from denying that the land was unoccupied in 1909, it at any rate affords very strong evidence that the land was unoccupied in 1909 and that the Government therefore had a right to take over the land and all that stood thereon. The pattas issued to the plaintiff and his predecessor gave them a right to enjoy the usufruct of the trees, the patta being liable to cancellation at the end of the year or at three months' notice. I am therefore of opinion that the plaintiff had no title to the trees at all and that the Government had a right to resume them and to grant them to defendants 2 to 6. The appeal is allowed with costs throughout of defendant 1 and the suit dismissed.

C.R.K./D.S. *Appeal allowed.*

---

[3] Sengoda Goundan v. Varadappan, (1913) 36 Mad 148=13 I C 39=22 M L J 201.

A. I. R. 1940 Madras 785

WADSWORTH AND PATANJALI SASTRI JJ.

Maherwan Jehangir and others — Appellants.

v.

Dhunbhai Kavasha Mistri and others — Respondents.

Appeals Nos. 199 of 1937 and 140 of 1937, Decided on 16th February 1940, against decree of Subordinate Judge, South Malabar at Calicut in O. S. No. 4 of 1932 and against appellate order of Dist. Court, South Malabar at Calicut, D/- 1st September 1937, respectively.

(a) Adverse possession — Cosharers — Mere non-receipt by one co-owner of share in profits of land in physical possession of another co-owner is not sufficient to establish adverse possession.

Possession is never considered adverse if it can be referred to a lawful title. It is not possible for the co-owner in possession, whose possession is deemed to be that of his co-owners, to put an end to that common possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result. The mere non-receipt by one co-owner of a share in the profits of land in the physical possession of another co-owner will not be sufficient to establish adverse possession, in the absence of positive indications that the co-owner in physical possession was setting up an adverse title to the knowledge of the other co owner: *(1912) A C 230, Rel. on; AIR 1919 PC 44 and 29 Bom 300, Expl.* [P 786 C 2]

(b) Succession Act (1925), Ss. 102 and 103 —Testator providing that certain items of properties shall remain as tarwad properties and then providing that properties omitted from will shall go to certain persons—Attempt to create property on analogy of tarwad held invalid and items held fell into residue.

The testator by a clause in the will provided that certain items of property should remain unencumbered, unalienated and should be kept as tarwad properties. The will then provided that properties omitted to be shown in the will should be taken possession of by certain persons:

Held that the attempt to create a perpetuity on the analogy of a Malbar tarwad in respect of those items must be held to be invalid. Those items therefore fell into the residue. [P 787 C 1]

(c) Estoppel — Mortgagor is estopped from denying mortgagee's title.

The mortgagee has a security which he can enforce as against the mortgagor, who is estopped from denying his mortgagee's title. A similar estoppel operates against the Official Receiver who succeeds to the title of the mortgagors. [P 788 C 2]

Ch. Raghava Rao and A. P. Kuttisankara Menon — *for Appellants (in 199) and for Respondents (in 140).*

B. Sitarama Rao and M. C. Sridharan — *for Respondents (in 199) and for Appellants (in 140).*

Judgment. — These appeals both raise questions relating to the will of a Parsi gentleman by name Nanabhai Hirji who died on 30th June 1916. Appeal No. 199 of 1937 is preferred by the plaintiffs who represented the interest of Nanabhai Hirji's daughter, Meherbai Jehangir, plaintiff 1 (who is now dead) being her husband; plaintiffs 2 to 7 are her children. They sued to recover a half share in a legacy given to Nanabhai's widow Bhikaijee and also to recover Meherbai's share in specific properties which are items 9 to 12 in the will. We are no longer concerned with Bhikaijee's legacy which has been validly dealt with by Bhikaijee herself in a will which excludes Meherbai. The claim in the appeal is therefore confined to the four items 9 to 12 in the will Ex. A. This will is a somewhat unusual document. Nanabhai was a merchant trading in Calicut. The will Ex. A, is dated 21st April 1916. It enumerates firstly twelve items of property, items 1 to 6 being various moveables connected with the trade, item 7 consisting of four Government promissory notes of the face value of Rs. 5000 while item 8 is a site with the buildings thereon and their contents and the disputed items 9 to 12 are four parcels of immovable properties. These twelve items are valued at Rs. 95,300 and in addition to these items, the will recites the existence of certain bank balances and outstandings of unspecified value. Under the will, his estate was to be managed by the widow.

The first provision is that the widow, the eldest son Framroze, defendant 1 and the two sons of Framroze, Jai and Bomman, both of whom are now dead, shall possess equal rights to the properties shown as items 1 to 8. The next provision is that if the widow Bhikaijee died without disposing of her share, that share shall go to the wife of Framroze and the testator's two daughters Meherbai and Dhanu Bai. Then follow three legacies of Rs. 5000, one to the widow, one to Meherbai and the third to the other daughter Dhanu Bai. Meherbai has already got a decree for this legacy of Rs. 5000. Next follow small legacies to employees and a recital that one of the promissory notes referred to in item 7 which is in the name of Framroze shall go to Framroze as beneficiary. Then after small bequests for charity and provision for funeral rites and tombs, the will provides that items 9 to 12 shall be retained unencumbered and unalienated in any way and that any such alienation shall be void. Then follows the sentence: "The said four items of properties have been kept as tarwad properties" and it is directed that out of the income from the business the tarwad karnavan Framroze shall meet the expenses for the maintenance of these items. After that provision for the creation of a tarwad to control these items, there follow certain minor provisions with which we are not concerned. Then comes the following sentence :

> all the properties that may be found to belong to me and that have been omitted to be shown herein should be taken possession of by my wife Bhikaijee, Framroze and the two grandsons in equal shares.

At the time of her father's death, Meherbai was living at Hyderabad as the wife of a doctor practising there. There is no evidence that she was informed of the provisions of the will at the time of the testator's death and she was not paid anything under the will. In 1919 Framroze wrote a letter Ex. K-1 to Meherbai's husband referring to a claim for certain wedding presents of Meherbai which he repudiates. The letter concludes with the statement that in Nanabhai's will a sum of Rs. 750 is provided for Meherbai and is being kept at the desire of the testator for her children to be given at their marriage. This appears to refer to an earlier will which was superceded by Ex. A. It would appear that in 1921 Meherbai's husband got a registration copy of Ex. A and made a claim thereunder which was repudiated in a lawyer's letter Ex. L dated 16th August 1921 which says that the will is invalid and inoperative. This letter Ex. L is within 12 years of the present suit which was filed on 5th January 1932. In 1921 and 1925 under Exs. II and III there were settlements by Framroze and his son Jal of properties got under the will and in 1928 Framroze and his son Jal mortgaged their properties to the Chalapuram Bank for Rs. 35,000. It does not appear that Meherbai ever received any part of the income of the properties covered by the will.

The learned Subordinate Judge who tried the suit held that it was barred by adverse possession; basing his decision on the absence of any claim to the properties, items 9 to 12 in the will, prior to 1921, the hostility between Meherbai's husband and the rest of the family and the alleged exclusion of Meherbai from the profits of the property taken along with the alienations made by the rest of the family. It should be mentioned that the arrangement made in the will for constituting a tarwad in respect of these properties has already been found to be invalid in a previous suit and the plaintiffs' claim was based on the assumption that there was an intestacy with regard to these four items. We find difficult to accept the conclusion of the learned Subordinate Judge that the plaint claim is barred by adverse possession. Assuming for the moment that the failure of this disposition in favour of the tarwad creates an intestacy, the result would be that Framroze and his children would be co-owners of these items along with the two sisters. Meherbai was living at Hyderabad, the other sister Dhanubai was living at Cannanore. Before 1921 there is, so far as we can gather, no positive evidence of the assertion of any hostile claim to these properties by Framroze and his children except such as can be spelt out of the exclusive enjoyment of the income of those properties. Very little weight can be attached to the omission of any reference to Meherbai's interest in these properties in Framroze's letter Ex. K.1. It is well established that the mere non-receipt by one co-owner of a share in the profits of land in the physical possession of another co-owner will not be sufficient to establish adverse possession, in the absence of positive indications that the co-owner in physical possession was setting up an adverse title to the knowledge of the other co-owner.

As was laid down by the Privy Council in (1912) A C 230,[1] possession is never considered adverse if it can be referred to a lawful title. It is not possible for the co-owner in possession, whose possession is deemed to be that of his co-owners, to put an end to that common possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. In the present case Framroze was in lawful possession as a co-owner who along with his sons had a major interest in the property. His possession must be attributed to his lawful title unless there is some clear indication that he was openly asserting a title hostile to that of his co-owners. A mere secret intention on his part to hold that property as his own, or to repudiate the will under which he got title, cannot rob another co-owner, unaware of that intention, of the right to benefit from his possession. Mr. Sitarama Rao for the respondents, has quoted the decision of the Privy Council in

---

[1] Corea v. Appuhami, (1912) A C 230=81 L J P C 151=105 L T 836.

43 Mad 244,[2] as an authority for the proposition that an ouster might be deduced from long continued enjoyment by one co-owner; but that was a case in which adverse possession had started before the devolution which created the co-ownership. In 29 Bom 300,[3] it was held that more than 40 years' exclusive enjoyment without any participation in the profits or any demand for an account thereof might justify the presumption of actual ouster. There are no such circumstances in the present case. Nanabhai died in 1916 and it was not until 1921 that anything in the nature of a repudiation of the rights of Meherbai can be demonstrated. The mere exclusive enjoyment of the income of the properties for the five years preceding that repudiation is not, in our opinion, sufficient to justify the conclusion that during these five years, the possession of Framroze was openly hostile to the rights of his sister. It follows that the judgment of the learned Subordinate Judge is based on a wrong inference of ouster.

Mr. Sitarama Rao has however supported the decision on another ground which was not taken in the Court below, but which, in our opinion, must succeed. The attempt to create a perpetuity on the analogy of a Malabar tarwad in respect of these four items must be held to be invalid. Mr. Sitarama Rao contends that the effect of the invalidity of this disposition is not to create an intestacy regarding these four items, but to add these four items to the residue which under the terms of the will is to be enjoyed by the testator's widow, his son Framroze and his grandsons Jal and Bomman. That is to say, it has to be added to the estate which these same four persons got under the specific bequest of items 1 to 8. In our opinion, the provisions that these persons should take all properties found to belong to the testator and not shown in the will, is a good residuary bequest. S. 102, Succession Act, prescribes that a residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. S. 103 provides that under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death of which he has not made any other testamentary disposition which is capable of taking effect and the illustration shows that when a legacy is void or has lapsed, the residuary legatee is entitled to such legacy. These statutory provisions merely codify certain well established rules of English law. In (1883) 23 Ch D 218[4] the testatrix gave to H all her personal property except a certain item the bequest of which failed for remoteness; it was held that that item fell into the residue and belonged to H. Jessel M. R. observes:

> You may have a residuary bequest in various forms. The same thing may be meant though not expressed in the same words. But however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to anybody at all. When I say a residue I mean the residue of the estate not professed to be otherwise disposed of by the will.

Now the residuary clause of Ex. A purports to give the four legatees all the testator's properties that have been "omitted to be shown herein." The properties shown in the will are all covered by certain dispositions. It has been suggested by way of a reply to this contention that there is no disposition in the will of four items 9 to 12 in respect of which the testator made his ineffective attempt to create a tarwad. The argument is built upon the words "the said four items of property have been kept as tarwad properties." The will is written in Malayalam. Though the Malayalam words naturally indicate a past act, they are capable of indicating a continuing act. There is no suggestion that there was any prior creation of a tarwad interest in these items apart from the will and in fact the plaintiffs themselves contended that it was the will which set aside the four items as tarwad properties and that this provision of the will was inoperative. We have no doubt that the use of the past tense in this sentence is without significance and that it was the intention of the testator to give these properties by his will to a tarwad of which by the will, he nominated his son Framroze, as karnavan. This bequest is void not only as creating a perpetuity, but also for uncertainty. No one can tell from the words of the will whether the testator intended to give these properties to a tarwad formed on the analogy of a marumakathayam family in which case the daughters would be sharers, or one founded on the analogy of a Nambudiri family, in which case the daughters would be entitled only to maintenance. We are of opinion that this will did purport to dispose of all the properties of the testator and that it did purport to make a disposition of items 9 to 12 which disposition is invalid. It follows that these items fall into the residue in which the plaintiffs have no interest. The suit therefore fails. It seems to us however that as the suit was dismissed in the Court below on an invalid ground and as the appeal has been resisted successfully on the basis of a legal contention not raised in the trial Court, the proper order is that each party should bear his own costs in appeal. With this provision Appeal No. 199 of 1937 is dismissed.

---

[2] Varada Pillai v. Jeevarathnammal, (1919) 6 A I R P C 44=53 I C 901 = 46 I A 285 = 43 Mad 244 (P C).

[3] Gangadhar v. Parashram, (1905) 29 Bom 300 =7 Bom L R 252.

[4] Blight v. Hartnoll, (1883) 23 Ch D 218=52 L J Ch 672=48 L T 543=31 W R 535.

A. A. O. No. 140 of 1937: — Turning now to the C. M. S. A., we have already stated that Meherbai got a decree for her legacy of Rs. 5000. The decree was obtained in O. S. No. 42 of 1928 to which the mortgagee the Chalapuram Bank was not a party. After this decree was obtained, Framroze and his son Jal were adjudged insolvents in I. P. No. 28 of 1931 on the file of the Subordinate Judge of Calicut. The Official Receiver proceeded to realize the assets and he has in his hands money representing the value of items 1 to 4 in the will. These items are bound by the mortgage in favour of the bank. They are also liable to satisfy the decree obtained by Meherbai in O. S. No. 42 of 1928. The question in the present appeal, which is preferred by the bank, is whether under the will Meherbai's legacy is charged on items 1 to 4 and whether the decree for this legacy has priority over the claim based on the mortgage.

The matter seems to us to be capable of a simple solution. Under S. 213, Succession Act, no right as legatee under a will to which the Section applies can be established in any Court, unless probate or letters of administration of the will under which the right is claimed have been obtained. Though this will has been established to be valid by the judgment in O. S. No. 42 of 1928 on the file of the Subordinate Judge of Calicut, that Court had no jurisdiction to grant probate or letters of administration and the will has not been formally proved. Meherbai's representatives have got a decree against the estate of the testator, which decree they are entitled to execute without relying upon the will. But the decree creates no charge. They can only spell out a charge by setting up a right under the will, which right cannot be established without probate, having regard to the terms of S. 213. On the other hand, the mortgagee has a security which he can enforce as against the mortgagors, who are estopped from denying their mortgagee's title. A similar estoppel operates against the Official Receiver who succeeds to the title of the mortgagors. It is therefore unnecessary for the mortgagee to prove, as against the mortgagors and the Official Receiver, the title which the mortgagor has got under the will. The bank therefore can establish its position as a secured creditor and has priority over the simple decree-holder.

Apart from this somewhat technical solution of the question we are clearly of opinion that under the terms of the will, the legacy in favour of Meherbai is not charged on items 1 to 8. The learned District Judge proceeds on the footing that items 1 to 12 in the will are exhaustive of all the properties of the testator and that as the will makes items 9 to 12 unalienable and attaches them to the tarwad his intention must have been that the legacies in favour of his widow and daughters should be satisfied out of items 1 to 8; and this conclusion is fortified by reference to the fact that one of the Government promissory notes included in item 7 is the subject of a separate bequest to Framroze, one of the persons entitled to the whole of items 1 to 8. It seems to us that the reasoning of the learned District Judge is fallacious. The legacy of items 1 to 8 to Framroze, his mother and his sons is a specific legacy. The legacy of Rs. 5000 to Meherbai is a general legacy. Under S. 328, Succession Act, apart from deductions necessary for debts and expenses, a specific legacy must be delivered to the legatee without any abatement. It is true that if the will indicated that another legacy was to be paid out of the funds included in a specific legacy, this might create a charge thereon. But the learned District Judge is definitely in error in his basic assumption that items 1 to 12 exhaust the whole of the property of the testator. There are the outstandings and the bank balances, the value of which we do not know, which are not included in items 1 to 12. Moreover it seems to us dubious whether the mere absence of a general fund out of which a general legacy can be paid would be sufficient to warrant the inference that that legacy is to be paid out of the funds earmarked as a specific legacy to others. In any view of the case, the Civil Miscellaneous Second Appeal must succeed. We allow the appeal with costs throughout and restore the order of the learned Subordinate Judge. We wish to add that this decision will not prejudice any right which Meherbai's representatives may have to exclude the decree against items 9 to 12 which, by our finding in the connected Appeal No. 199 of 1937, must be deemed to be part of the residue of the estate.

C.R.K./D.S. *Order accordingly.*

---

* A. I. R. 1940 Madras 789

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Madina Bibi Sahiba — Appellant.

v.

Ismail Durga Association and another — Respondents.

Appeal No. 188 of 1937, Decided on 29th February 1940, against decree of Sub-Judge, Madura, in O. S. No. 31 of 1936.

*** (a) Transfer of Property Act (1882), S. 53 —Judgment-debtor's property attached in execution of decree — Objection by wife claiming property attached as belonging to her by virtue of sale deed allowed—Suit by decree-holder for cancellation of sale deed on ground that it was executed with intent to defeat and delay creditors — Suit falls under S. 53 and must fail for want of Court's permission under O. 1, R. 8, Civil P. C. — O. 21, R. 63 is not incompatible with S. 53, T. P. Act.**

The decree-holder in execution of his decree attached the property of the judgment-debtor. An objection to the attachment was taken by the judgment-debtor's wife claiming the property attached as belonging to her by reason of a sale deed executed by her husband in her favour and was allowed. Thereupon the decree-holder instituted a suit for cancellation of the sale deed on the ground that it was executed with intent to defeat and delay the creditors :

Held that the suit fell within the purview of S. 53, T. P. Act, and was incompetent for want of Court's permission under O. 1, R. 8, Civil P. C., and that the provisions of O. 21, R. 63, Civil P. C., were not incompatible with S. 53, T. P. Act: *A I R 1933 P C 183; A I R 1936 Cal 783; A I R 1934 Rang 302; A I R 1934 Rang 332 and A I R 1936 Rang 117, Rel. on; Case law referred.* [P 790 C 1 ,2]

(b) Transfer of Property Act (1882), S. 53—Suit under S. 53—Objection by defendant that suit was incompetent for want of Court's permission under O. 1, R. 8, Civil P. C., put in issue and disallowed—In appeal amendment of plaint turning suit into representative one held too late.

A suit by the creditor under S. 53, T. P. Act, was instituted for cancellation of a sale deed on the ground that it was executed with intent to defeat and delay the creditors. The defendant's objection that the suit as laid was incompetent for want of permission of the Court under O. 1, R. 8, Civil P. C., was however put in issue and disallowed. In the appeal by the defendant the plaintiff sought to amend the plaint and turn the suit into a representative one :

Held that having gone to the trial on the issue raised by the defendant it was far too late in the day for the plaintiff to ask in appeal for leave to amend, and that the course which the plaintiff should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all the creditors. [P 791 C 2]

K. V. Sreenivasa Iyer — *for Appellant.*

K. Bhashyam and V. Minakshisundaram — *for Respondents.*

Leach C. J.— The appellant is the wife of respondent 2. In 1931 the respondent association obtained two money decrees against respondent 2 for an aggregate sum of Rs. 894. In 1934, in execution of these decrees, the association attached five houses in Madura as property belonging to the judgment-debtor. The appellant objected to the attachment and her objection was successful. The appellant claimed title to the houses and other properties under a deed of sale executed in her favour by her husband on 16th September 1932. As the result of the removal of the attachment the association filed in the Court of the Subordinate Judge of Madura the suit out of which this appeal arises for a declaration that the deed of sale was executed in fraud of creditors "nominally and colourably." In the meantime respondent 2 had been adjudicated an insolvent and permission of the Official Receiver was sought, and granted, for the institution of the suit. The association, however, did not apply for an order under the provisions of O. 1, R. 8, Civil P. C., permitting it to sue on behalf of all the creditors and in spite of objection proceeded with the suit for its own benefit and not for the benefit of the creditors generally. The association based its claim for the relief on two grounds. In the first place it said that the transaction was a sham and in the second place that the transfer was a fraudulent transaction, entered into with a view to defeat and delay the creditors. The alleged consideration for the sale deed was a sum of Rs. 10,000. The Subordinate Judge held that the transaction was not a nominal one as the appellant had given consideration to the extent of Rs. 8000, but he considered that the transaction constituted a fraud on the creditors as the properties were worth Rs. 18,000. In accordance with this finding he granted the association a declaration that the sale deed was invalid, being a fraud on the creditors, and directed that it be annulled. He also vacated the order passed in favour of the appellant in the execution proceedings, but allowed her to rank as a creditor of her husband to the extent of Rs. 8000 which she had paid.

The appellant has persisted in her contention that the suit as framed did not lie and she disputes the finding of the Subordinate Judge that the transaction was a fraud on the creditors. If her first contention is sound, it will not be necessary for the Court to consider the merits of the case. The appellant says that it was incumbent upon the association to sue on behalf of itself and all the other creditors of respondent 2 and relies on the provisions of S. 53, T. P. Act. That Section says that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. By the Transfer of Property (Amendment) Act, 1929, the following provision was added to the Section :

> A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

The appellant says that as this provision has not been complied with, the suit must fail. On the other hand, the association says that O. 21, R. 63, Civil P. C., gives to a decree-holder whose attachment has been disallowed the right to have the question decided by suit and the rule must be read entirely independent of the provisions of S. 53, T. P. Act. The suit clearly falls within the purview of S. 53, T. P. Act. It is not a suit merely for a declaration that the transaction is a bogus one but a suit in which the association also seeks to have the transaction set aside on the footing that it is a fraud on the creditors. The association accepts this and does not challenge the finding of the Subordinate Judge that consideration passed from the wife to the husband to the extent of Rs. 8000. As the suit admittedly falls within S. 53, it can only be maintained if the association has obtained the permission of the Court under O. 1, R. 8, Civil P. C., to sue on behalf of all the creditors. The words "on behalf of, or for the benefit of, all the creditors" in S. 53, T. P. Act, are taken from O. 1, R. 8, Civil P. C., which provides that where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the Court, sue or be sued or defend on behalf of or for the benefit of all persons interested. If a suit has to be brought in a representative capacity, it can only be maintained when it has been instituted in compliance with the provisions of this Rule. This was laid down by the Privy Council in 56 Mad 657.[1]

Before S. 53, T. P. Act, was amended there was a conflict in India on the question whether a decree-holder who was compelled to file a suit as the result of a successful objection to the attachment was compelled to sue on behalf of himself and all the other creditors. This Court was of opinion that it was not necessary for him to sue in a representative capacity : *see* 42 Mad 143[2] and 43 Mad 760.[3] The decision in the latter case was that of a Full Bench. The Calcutta and the Bombay High Courts were of the opinion that it was necessary for the plaintiff to sue in a representative capacity : *see* 34 Cal 999.[4] The decisions of this Court and that of the Calcutta High Court arose out of suits which followed unsuccessful proceedings in execution. The Bombay cases are 16 Bom 1[5] and 27 Bom 146.[6] These cases did not arise directly out of execution proceedings, but the Court indicated that a suit of the nature of the present one should be brought in a representative capacity. It seems to me that the amendment of S. 53, T. P. Act, by the insertion of the provision that a suit instituted by a creditor shall be instituted on behalf of, or for the benefit of, all the creditors must have been intended to put an end to this controversy. The words in brackets "which term includes a decree-holder whether he has or has not applied for execution of his decree" which follow the word "creditor" in the Section, in my opinion, makes this clear. If this is the case the association is clearly out of Court.

But even if the question had to be decided on the reading of S. 53, without taking into consideration what has gone before, it would still be difficult to accept the association's argument. As the suit admittedly is one of the nature contemplated by S. 53, T. P. Act, surely the provisions of that Section must be applied, especially as there is nothing in the section incompatible with O. 21, R. 63, Civil P. C. S. 53 does not take away from the disappointed decree-holder the right to sue. His right to sue is left unaffected. All the Section says is that he must sue on behalf of all the creditors, not for himself alone, and this implies no hardship. If the suit is successful and the judgment-debtor has not become insolvent, he has still the right to attach the property. If the judgment-debtor has become insolvent, then the right to attach is gone entirely and the decree-holder can only look to the Insolvency Court for payment. The requirement of S. 53 saves the filing of unnecessary suits and saves the judgment-debtor from being harassed by other creditors. I hold that it was necessary for the association to sue in a representative capacity and that, not having done so the suit must fail. The same view of the law has been taken by the Calcutta High Court in 62 C L J 548[7] and by the Rangoon High Court in 12 Rang 666,[8] 12 Rang 670[9] and 14 Rang 81.[10]

---

[1] Kumaravelu Chettiar v. Ramaswami Aiyar, (1933) 20 AIR P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

[2] Pokker v. Parkum Chandrankandu, (1919) 6 A I R Mad 257=51 I C 714=42 Mad 143=36 M L J 231.

[3] Ramaswami Chettiar v. Mallappa Reddiar, (1920) 7 A I R Mad 748=59 I C 947=43 Mad 760=39 M L J 350 (F B).

[4] Hakim Lal v. Moorshahar Sahu, (1907) 34 Cal 999=11 C W N 889=6 C L J 410.

[5] Burjorji Dorabji Patel v. Dhunbai, (1892) 16 Bom 1.

[6] Ishwar Thimappa v. Devar Venkappa, (1903) 27 Bom 146=5 Bom L R 19.

Mr. Bhashyam has asked that the Association be allowed to amend the plaint and turn the suit into a representative one. In support of this application Mr. Bhashyam has pointed to the fact that before the suit was instituted, the Association had obtained leave from the Official Receiver and the leave was conditional on the Association depositing in Court to the credit of the insolvent's estate any amount realized by him as the result of the suit. Mr. Bhashyam has also pointed out that the declaration asked for was a declaration that the disputed transaction was a fraud on the creditors. If the failure to sue in a representative capacity was the result of oversight, the Court might have been disposed in these circumstances to allow the amendment, but that is not the case. The appellant in her written statement raised this very question and an issue was framed on it. The Association preferred to contest the validity of the appellant's averment and succeeded in the argument before the Subordinate Judge. Having gone to the trial on this issue, it is now far too late in the day for the Association to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the Association should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all the creditors. This the Association did not do and it has only itself to blame for the failure of the suit. The appeal will be allowed with costs in this Court and below.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 791

WADSWORTH J.

Roopchand Merlacha — Petitioner.

v.

Sha Motaji Mokanji — Respondent.

Civil Revn. Petn. No. 462 of 1940, Decided on 1st May 1940, to revise order of Principal City Civil Judge, Madras, D/- 23rd February 1940.

Madras Debt Conciliation Act (11 of 1936), Ss. 7 and 25—Word 'dismissed' in S. 25 includes rejection under S. 7 — Application rejected under S. 7 becomes application under S. 4 when re-presented and provisions of S. 25 will come into force —Stay will operate until application is dismissed.

The word "dismissed" in S. 25 of the Act must include a rejection under S. 7. When an application is rejected for a formal defect under S. 7 the stay will cease to operate, but when that application is re-presented it becomes once more a subsisting application under S. 4 and the provisions of S. 25 will come into force and the executing Court will be obliged when the fact of this re-presented application is brought to its notice, to stay proceedings in execution. That stay will operate until the application is dismissed subject, of course to the legal requirement that the application shall be disposed of within one year. It is not competent to the Court to go on with the proceedings in execution while this application is pending and though the Court may fix a date on which the matter shall be called as a matter of convenience the Court has no power to say 'I will order stay for two months and no more.' The duration of the stay is fixed by statute and is out of the hands of the Court altogether. [P 792 C 2, P 793 C 1]

R. Narasimham — *for Petitioner.*

P. S. Kothandapani — *for Respondent.*

Order. —This petition raises a question under Madras Act, 11 of 1936. The petitioner was the judgment-debtor under a compromise decree. On 27th October 1939 a sale was ordered under that decree. At some date in November the petitioner presented an application to the Debt Conciliation Board which application was not in proper form and was consequently rejected on 2nd December 1939 under the provisions of S. 7 of the Act. At the time of the rejection, an application for stay of execution of proceedings under S. 25 of the Act was pending before the executing Court and on 8th December 1939 the Court ordered a stay of the sale for two months. It is to be observed that at the time of this order there was in fact no application pending and if there had been an application pending, the limitation of the period of stay to two months seems to be not in accordance with the provisions of S. 25 of the Act which makes it obligatory upon the Court to stay proceedings until the Board has dismissed the application, subject to the limitations imposed under S. 17 of the Act. The Court may, of course, when staying proceedings under S. 25 fix a date on which the matter shall be called in order to prevent it being lost sight of. But as I read S. 25 the Court has no power to go on with the proceedings when the application is still pending subject to the proviso that the Board is required to deal with the application under S. 17 within one year. This order for stay for two months was questioned by the respondent on 19th December 1939 when he applied to vacate the stay on the ground that there was no pending application before the Debt Conciliation Board. On 20th December 1939 the petitioner re-presented his application to the Board as he is empowered to do under S. 7. He also applied again for a stay to the executing Court. On 21st December 1939 the learned Judge directed the previous stay order to continue to operate, dismissing both the application of the respondent to vacate the stay and the application of the petitioner for a fresh stay. This stay order in terms provided for only two months' stay which would cease to operate on 8th February 1940. Consequently, on 14th February 1940, the respondent applied for the issue of directions to the Commissioner to proceed with the sale and the Judge ordered accordingly and it is against this order the present revision petition is filed.

---

[7] Ekkari Ghose v. Sidheswar Ghose, (1936) 23 A I R Cal 783=167 I C 268=62 C L J 548.

[8] Chidambaram Chettiar v. R. M. A. R. S. Firm, (1934) 21 A I R Rang 302=152 I C 555 =12 Rang 666.

[9] Maung Tun Thein v. Maung Sin, (1934) 21 A I R Rang 332=153 I C 942=12 Rang 670.

[10] Asgar Ali v. C. V. R. M. Firm, (1936) 23 A I R Rang 117=161 I C 887=14 Rang 81.

My attention has been drawn to a decision of Stodart J. in (1939) 2 M L J 727[1] where the learned Judge held that when one of several joint defendants had made an application to the Debt Conciliation Board and the other joint defendants had participated in that application though they were not named as applicants and the application had been dismissed, it was not open to one of those other judgment-debtors to file a fresh application and get a fresh stay under Ss. 4 and 25, Debt Conciliation Act, the reasoning being that this would permit an almost indefinite series of applications really by the same person for a relief which had already been refused and an indefinite series of stays on the applications which really were not sustainable. It is not necessary for me to go into the merits of that decision for it seems to me that it has little bearing on the facts of the present case. I am of opinion that the word 'dismissed' in S. 25 of the Act must include a rejection under S. 7, for obviously a stay order can have no basis when there is no pending application. At the same time when an application is rejected under S. 7, the Act itself expressly provides for a fresh application after remedying the defects, so that there can be no question of the rejection being a bar to further proceedings and the fresh application cannot be deemed to be an abuse of the process provided by statute such as was the case before Stodart J. The position is that when a defective application is presented it cannot provide the basis for a stay after it has been rejected; but there is no reason why it should not provide a basis for a stay when the defect has been remedied and the application has been re-presented in the manner allowed by Section 7.

The learned Judge of the Court below has evolved the theory that an application presented under the powers given by S. 7 is not an application under S. 4. This seems to me to be clearly erroneous. All that S. 7 provides is that when an application under S. 4 has been rejected for a formal defect there is no bar to a fresh application being made. This fresh application when made must be made under the only Section which provides for a substantive application to the Debt Conciliation Board, namely S. 4, and must be made in the form prescribed by S. 4. It seems to me to follow that when an application is rejected for a formal defect under S. 7 the stay will cease to operate, but that when that application is re-presented it becomes once more a subsisting application under S. 4 and the provisions of S. 25 will come into force and the executing Court will be obliged when the fact of this re-presented application is brought to its notice to stay proceedings in execution. That stay will operate until the application is dismissed, subject of course, to the legal requirement that the application shall be disposed of within one year. In the view, which I take, it is not competent to the Court to go on with the proceedings in execution while this application is pending, and though the Court may fix a date on which the matter shall be called as a matter of convenience, the Court has no power to say "I will order stay for two months and no more." The duration of the stay is fixed by statute and is out of the hands of the Court altogether.

---

[1] **In re Ellapa Chettiar, (1940) 27 A I R Mad 31 =(1939) 2 M L J 727.**

In this view I hold that the lower Court's directions to the Commissioner to proceed with the sale while the application before the Debt Conciliation Board is pending are contrary to law and must be set aside. The petition is therefore allowed with costs here and in the Court below, and the lower Court is directed to stay proceedings pending the disposal of the application before the Debt Conciliation Board.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 793

WADSWORTH AND PATANJALI SASTRI JJ.

Nimmagadda Ramaseshayya — Petitioner.

v.

Adusumilli Kutumba Rao and another — Respondents.

Civil Revn. Petn. No. 2543 of 1939, Decided on 9th April 1940, to revise order of Sub-Judge, Masulipatam, D/- 9th August 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 9 — Debt incurred before 1st October 1932 ripened into decree after that date— Scaling down is governed by S. 8 and not by Section 9.

Clause (1) of S. 8 contemplates the debt incurred before 1st October 1932 as the original debt which ultimately ripened into a decree and consequently it must be the date of the original debt which is the governing factor and not the date of the decree. Hence, when there is a debt incurred before 1st October 1932 which has ripened into a decree after 1st October 1932, the scaling down must be governed by S. 8 and not by S. 9: *A I R 1940 Mad 485, Ref.* [P 793 C 2; P 794 C 2]

A. Lakshmayya — *for Petitioner.*

D. Narasaraju — *Amicus Curiæ.*

Wadsworth J. — This revision petition raises the question of the meaning of the words "debts incurred before 1st October 1932" in S. 8 of the Madras Act, 4 of 1938. The transaction with which we are concerned is a decree dated 21st August 1936 which itself is passed on the basis of a promissory note of 1928 which promissory note was in renewal of an earlier promissory note of 1925. The learned Subordinate Judge has held that the debt to be scaled down is the decree itself and not the antecedent debt which formed the basis for the decree. He bases his decision on the definition of the word "debt" in S. 3 of the Act which contains the words :

> "debt" means any liability in cash or kind . . . . due from an agriculturist, whether payable under a decree or order of a Civil or Revenue Court or otherwise.

He holds that since the definition of the word "debt" covers one payable under a decree we must regard the decree as the starting point and since the decree was passed in 1936, it must be scaled down under S. 9 of the Act and not under S. 8. The learned Subordinate Judge has not however considered two provisions in the Act which in our opinion render it impossible to hold the view which he expresses. Firstly, we have Part 2 of S. 7 which says :

> No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter.

This provision seems to contemplate the scaling down of the original debt notwithstanding a decree and it is difficult to give any meaning or purpose to this clause if the process of scaling down is to start with the decree. Secondly, we have cl. (1) of S. 8 which in dealing with the way in which debts incurred before 1st October 1932 shall be scaled down, speaks of interest outstanding on 1st October 1937 :

> whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not.

It seems to us impossible to give any effect to the words "whether the debt or other obligation has ripened into a decree or not" if the debt contemplated in the initial words of the Section is the decree itself. On the other hand this cl. (1) of S. 8 seems quite clearly to contemplate the debt incurred before 1st October 1932 as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decree.

The inclusion of a decree in the definition of "debt" in S. 3 (iii) of the Act is quite consistent with this view. For, obviously, there are many debts which start with the decree, as for instance, when there is a decree for damages which of itself creates a debt bearing interest and liable in certain circumstances to be scaled down. Clearly, the idea underlying these provisions is that when the decree merely enforces the payment of a pre-existing debt bearing interest that pre-existing debt shall be regarded as the liability the date of which shall govern the Section to be applied.

The subject has come already before this Court, though there is apparently no considered decision of a Bench hitherto. In 1940 M W N 338,[1] there is a very brief judgment of one of us, adopting the view which we have just adumbrated though it deals with another point which does not arise here. In (1940) 1 M L J 225,[2] Horwill J. has taken the same view even with reference to a compromise decree. We are not now concerned with compromise decrees which may possibly be affected by different considerations. But it is to be noted that the learned Judge definitely regards the debt incurred before 1st October 1932 as the original liability which has ripened into the decree and does not treat the decree itself as the starting point. Other cases have been quoted before us in which this view has been tacitly assumed to be correct without any argument or consideration of the point involved : *vide* (1939) 2 M L J 658[3] and the decision of the Bench in I L R (1939) Mad 218[4] at page 222.

Unfortunately the respondent in the present case is not re-presented, but we have to express our gratitude to Mr. D. Narasaraju who has given us the benefit of his argument for the respondent as amicus curiæ, he having gone into the subject with reference to another case posted for hearing by us in which a similar question arises. The only authority which he has been able to cite on behalf of the respondent is contained in a mere observation of Venkataramana Rao J. in 1940 M W N 329,[5] where the learned Judge merely remarks that there is a good deal of force in the contention that when the decree has been passed after 1st October 1932 it is governed by S. 9 of the Act. He gives however no decision to this effect and the matter does not appear to have been argued at length before the learned Judge. We are clearly of opinion that when there is a debt incurred before 1st October 1932 which has ripened into a decree after 1st October 1932 the scaling down must be governed by S. 8 and not by S. 9. We therefore allow the petition and remit the matter to the lower Court with a direction to scale down the debt in accordance with this decision. The petitioner is entitled to costs.

C.R.K./D.S. *Petition allowed.*

---

[1] Kanakaraju v. Achutharamanaraju, (1940) 27 A I R Mad 432=(1940) 1 M L J 600 = 1940 M W N 338.

[2] Narayanasami Naidu v. Rajamanickam Pillai, (1940) 27 A I R Mad 419=(1940) 1 MLJ 225.

[3] Anandam v. Muthukumaraswami Mudali, (1940) 27 A I R Mad 52=186 I C 458=(1939) 2 M L J 658.

[4] Perianna v. Sellappa Goundan, (1939) 26 AIR Mad 186=182 IC 879=I L R (1939) Mad 218 (1938) 2 M L J 1068.

[5] Sreenivasachariar v. Krishniah Chetty, (1940) 27 A I R Mad 485=(1940) 1 MLJ 860=1940 M W N 329.

A. I. R. 1940 Madras 794

WADSWORTH AND PATANJALI SASTRI JJ.

Vendoor Thazhath Paravan and another — Petitioners.

v.

Venthrayil Tarwad Karnavan Gopalan Nair — Respondent.

Civil Revn. Petn. No. 95 of 1939, Decided on 26th April 1940, to revise order of Sub-Judge, South Malabar at Calicut, D/- 3rd September 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 9 — Liability to pay principal originating in contract or tort — Compensation for withholding payment is interest and can be scaled down under Act.

Whatever be the nature of the liability to pay the principal sum—whether it originates in contract or in tort, the compensation awarded for a wrongful withholding of its payment can appropriately be regarded as "interest" and is thus liable to be scaled down under the Act: *A I R 1939 Mad 471, Disting.* [P 795 C 2]

(b) Vendor and Purchaser — Sale proving abortive — Claim for purchase money is claim for money had and received — Liability to refund arises when money is received by vendor.

A claim for recovery of the purchase money paid under an abortive sale is one for money had and received to the vendee's account and where there is no consideration and the sale fails ab initio, the liability to refund the purchase money arises when it is received by the vendor : *19 Cal 123 (P C), Rel. on.* [P 796 C 1]

N. R. Sesha Aiyer — *for Petitioners.*

T. K. Raman Nambissan — *for Respondent.*

Patanjali Sastri J.—This is a petition to revise the order of the Court of the Subordinate Judge of South Malabar amending the decree obtained by the petitioner in S. C. S. No. 432 of 1934 on the file of that Court, under S. 19, Madras Agriculturists' Relief Act, 1938. The respondent sold some trees to the petitioner on 29th September 1931 for Rs. 400 but before the petitioner could cut and carry them away, a third party successfully asserted a paramount claim to them and the sale to the petitioner therefore failed to take effect. The petitioner thereupon sued for the recovery of the amount of Rs. 400 "with interest at 24 per cent. per annum from 29th September 1931." The Court however allowed interest at 12 per cent. only and passed a decree for Rs. 538-5-3 for principal and interest till 20th August 1934, the date of the suit and Rs. 94-9-4 on account of costs with further interest at 6 per cent. on the aggregate amount from 4th November 1936, the date of the decree. The respondent applied to the Court below under S. 19 of the Act claiming to be an agriculturist for scaling down the decree debt aforesaid in accordance with the provisions of the Act. There is no dispute that the respondent is an agriculturist as defined by S. 3 (ii) of the Act. But it was contended for the petitioner that there was no relationship of debtor and creditor created between the parties when the sum of Rs. 400 was paid by the petitioner as the price of the trees, that no interest was payable on that sum, and the Court having allowed interest only as damages, it was not "interest" which could be scaled down under the Act. It was said therefore that the only relief that the respondent would be properly entitled to was under S. 9 of the Act, in respect of the interest that was payable from the date of the decree, namely 4th November 1936. Alternatively, it was also urged that S. 8 was not in any case applicable as the liability in question must be deemed to have been incurred only when the consideration for the sale failed, that is to say, when the third party claiming paramount title to the trees successfully prevented the petitioner from cutting and carrying them away by obtaining an injunction from the Court, which was admittedly some time after the 1st October 1932; so that, even assuming that the interest awarded under the decree prior to the date of suit was liable to be scaled down under the Act, it should be scaled down in accordance with the provisions of S. 9 and not S. 8. We are of opinion that both these contentions are unsustainable.

Learned counsel urged that no interest would be payable under the law in respect of the plaintiffs' claim for refund of the purchase money and the liability to pay the sum awarded as interest arose only on the date of the decree. It is unnecessary, in our view, to consider whether interest could be awarded on a claim for recovery of purchase money where a contract of purchase fails to take effect, as in this case a decree has been passed awarding interest and it is no longer open to the petitioner to question such award. It must therefore be taken that the petitioner's claim for the purchase money was a claim in respect of which interest was payable. The fact that the Court awarded interest as "damages" cannot, in our opinion, exclude the operation of the provisions of the Act. The Act nowhere defines "interest" and it must be remembered that "interest" is sometimes payable even where there is no agreement to pay it. The Interest Act provides for "interest" being allowed, subject to certain conditions, as damages for wrongful withholding of payment of sums due, and Illus. (n) and (r) to S. 73, Contract Act, contemplate "interest" being awarded as compensation for loss or damage caused by a breach of contract in certain cases. It seems to us therefore clear that whatever be the nature of the liability to pay the principal sum — whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as "interest" and is thus liable to be scaled down under the Act. The petitioner's learned counsel cited I L R (1939) Mad 525[1] as being contrary to this view. We are however clear that the case has no bearing on the question we are now considering. That was a case where a co-owner in possession of common funds had realized interest by their investment, and, in a suit for partition, he was directed to pay to the other co-owners their shares of such funds including the interest earned. An application having been made for relief under Act 4 of 1938, the Court held that the liability enforced by the decree was not a "debt" within the meaning of the Act. It was pointed out that the interest awarded in such cases could be regarded either as an accretion to the fund liable to be divided or compensation for breach of trust payable under S. 23, read with Ss. 90 and 95, Trusts Act, the application of Act 4 of 1938 being excluded in either case. It is obvious that the position here is entirely different. The petitioner's suit for recovery of the purchase money paid under an abortive sale was one for money had and received to his account: *see* 19 Cal 123[2] at p. 126, and it cannot be disputed that the basis of such an action is an implied or imputed contract, at all events in circumstances like those of the present case which plainly exclude any hypothesis of tort or trust. The decision cited has therefore no application here.

---

[1] Mottai Meera v. Abdul Kadhir, (1939) 26 A I R Mad 471=186 I C 214=I L R (1939) Mad 525 =(1939) 1 M L J 528.

As regards the alternative contention that S. 8 does not apply to this case because the liability to refund the price must be held to have arisen only after 1st October 1932 when an injunction was obtained against the petitioner, it is to be observed that this is not a case where the petitioner got anything under the sale of which he was subsequently deprived. It is not denied that before the petitioner could cut any of the trees, the person claiming paramount title intervened and successfully prevented the petitioner from doing so by obtaining an injunction from Court. The case is thus one where there never was any consideration and the sale failed ab initio. The liability to refund the purchase money therefore arose when it was received by the respondent, i. e. on 29th September 1931 (*see* 19 Cal 123[2] already referred to) and falls under S. 8 of the Act. The revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

---

[2] Hanuman Kamat v. Hanuman Mumdar, (1892) 19 Cal 123=18 I A 158=6 Sar 91 (P C).

A. I. R. 1940 Madras 796

WADSWORTH AND PATANJALI SASTRI JJ.

Chidambaram Iyer — Petitioner.

v.

Manekavasagam Pillai and another — Respondents.

Civil Revn. Petn. No. 49 of 1939, Decided on 26th April 1940, to revise the order of Sub-Judge, Tinnevelly, D/- 6th October 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 9 Proviso and S. 8 — Scaling down debt under S. 9 or S. 8 — S. 9 Proviso can be applied more than once until debt is traced back to original principal amount.

In scaling down a debt under S. 9 or S. 8, the proviso to S. 9 can be applied more than once, until the debt is traced back to the principal amount originally advanced. There is nothing in the language of the proviso to S. 9 to suggest that it can be applied but once in the process of scaling down. The object of the Legislature in enacting the proviso to S. 9 is plainly to require the Court to trace the debt back through various renewals to the principal sum or sums originally advanced and scale it down under S. 8 or S. 9 as the case may be. [P 796 C 2]

R. S. Srinivasachari and K. V. Rajagopalan — *for Petitioner*.

P. N. Marthandam Pillai — *for Respondents*.

Patanjali Sastri J. — The main question arising for decision in this civil revision petition is whether in scaling down a debt under S. 9 (1), Madras Agriculturists' Relief Act, the proviso to that Section can be applied more than once, until the debt is traced back to the principal amount originally advanced. The petitioner obtained a decree against the respendents in S. C. S. No. 447 of 1937 on the file of the lower Court on a promissory note executed on 9th April 1935. This promissory note was executed in renewal of an earlier debt incurred in April 1933 which itself was the result of a settlement in respect of dealings which commenced in June 1931.

The petitioner's learned counsel contends that in scaling down the decree debt in question under S. 9 (1) of the Act, the Court can have regard to the earlier debt of April 1933, but it cannot go further back to the commencement of the dealings in 1931 and scale down the debt under S. 8 with reference to the principal sums then advanced. We are unable to accept this contention. There is nothing in the language of the proviso to suggest that it can be applied but once in the process of scaling down. The Section makes provision for scaling down debts incurred on or after 1st October 1932 and directs that if any part of the debt sought to be scaled down is found to be a renewal of a prior debt, that part should be deemed to be a debt contracted on the earlier date and scaled down accordingly, but in doing so, if it is itself a renewal in part or in whole of a still earlier debt, the proviso comes into operation again, for it is an integral part of the mode of scaling down prescribed under the Section. We are of opinion that the object of the Legislature in enacting this provision is plainly to require the Court to trace the debt back through various renewals to the principal sum or sums originally advanced and scale it down under S. 8 or S. 9 as the case may be.

It was next urged that when the last promissory note on which the suit was brought was executed, there was an allocation of the prior payments towards interest and the note was taken only for the principal amount then found to be due and that there could be no question therefore of scaling it down. The respondents, however, denied such appropriation at the time and alleged on the other hand that the amount of the promissory note represented nothing but interest due on the original dealings. This is a question of fact on which the respondents' case has been accepted by the Court below, and we are not prepared to interfere with its finding in revision. The civil revision petition fails and is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 797

HORWILL J.

Jagannatha Ayyangar and others — Petitioners.

v.

Suppiah Chettiar — Respondent.

Civil Revn. Petn. No. 2262 of 1939, Decided on 17th April 1940.

(a) Madras Agriculturists' Debt Relief Act (4 of 1938), S. 14—Family debt—If debt is family debt it must be regarded as family debt with regard to every member.

It is wrong to say that if the manager of a family contracts a debt legally binding on the family, it is a family debt as far as the other members of the family are concerned but not as far as the manager is concerned. As the debt is a family debt it must be a family debt with regard to everybody. [P 797 C 2]

(b) Madras Agriculturists' Debt Relief Act (4 of 1938), S. 14—S. 14 cannot be interpreted so as to say that when there is one or more non-agriculturist members family property has to be split up into individual shares.

There is no reason to suppose that because one or more members of a family are non-agriculturists, the family property has to be split up into individual shares and that each individual share is liable only for its own share of the family debt. That is not how S. 14 reads. [P 797 C 2]

V. Ramaswamy Iyer — *for Petitioners.*

R. Sethurama Sastri — *for Respondent.*

Order. — A decree was obtained against defendants 1 to 5 personally on a promissory note executed by them for a debt binding on the family. Because it was binding on the family, the other two members, defendants 6 and 7, were made liable to the extent of their share of the family property. Defendants 3 to 7 filed an application in the Court below for scaling down the debt. The debt was scaled down in accordance with S. 8, Agriculturists' Debt Relief Act (Act 4 of 1938); and a question arose in view of the allegations that defendants 1 and 2 were not entitled to the benefit of the Act (defendant 1 being said to be an insolvent and defendant 2 to have no further interest in the family property) whether, under S. 14 of the Act, the creditor can proceed against each of the defendants only for his proportionate share of the debt. The lower Court held that S. 14 did not apply to the case of a contractual debt. Defendants 3 to 5 appeal. S. 14 affects

> a Hindu family . . . where some of the members liable in respect of a family debt are not agriculturists while others are agriculturists.

The case of the respondent, which has been accepted by the lower Court, is that this debt is not a family debt. It is argued that a debt can only be said to be a family debt when the debtors are made liable only because they are members of a family; for example, if the manager of a family contracts a debt legally binding on the family, it is a family debt as far as the other members of the family are concerned but not as far as the manager is concerned. It is difficult to appreciate this distinction; for, it appears to me that if a debt is a family debt it must be a family debt with regard to everybody. Moreover, I think the wording of cls. (a) and (b) of S. 14 indicates that this contention of the respondent cannot be correct; because it makes liable not only the debtors' shares of the family property but makes them liable personally for their proportionate share of debt; and they cannot be liable personally unless the debt is a contractual one. So I cannot agree with the lower Court that S. 14 has no application.

I do not however find any reason to suppose that because one or more members of a family are non-agriculturists, the family property has to be split up into individual shares and that each individual share is liable only for its own share of the family debt. That is not how the Section reads. Using the words appropriate to the present case "the creditor shall . . . be liable to proceed (a) against the non-agriculturist . . . members and . . . their share of the family property to the extent only of . . . their proportionate share of the debt which shall be scaled down in accordance with the provisions of this Act, and (b) against the agriculturist . . . members and . . . their share of the family property, to the extent only of ... their proportionate share of the debt." That would mean that, where, as in the present case, there are two non-agriculturists and five agriculturists, the non-agriculturists are liable for 2/7 of the unscaled debt while the agriculturists are liable for 5/7 of the scaled down debt. That is what one would expect the Legislature in justice to have done in order to overcome the difficulty that arises in dealing with a Hindu family, some of whose members are agriculturists and some not. In some Malabar families, for example, there is an enormous number of members and if a creditor could only proceed against the individual small fractions of the family property or the individual share of that member, very great hardship indeed would be entailed; and I do not think the Legislature intended by this Section to throw that great burden on the creditor. Moreover, the word 'share' would be incorrect if the petitioners' contentions were correct. The correct word would be 'shares.' It therefore follows that if the Act does not apply to defendants 1 and 2, defendants 3 to 7 would be liable for 5/7 of the scaled down debt.

It is contended that S. 21 of the Act, which excludes certain insolvents from the scope of the Act, does not apply to this case; for, there is no evidence whether a dividend has been declared or not. It is also argued that there is no evidence to show that defendant 2 has no longer any interest in the family property. In the view taken by the lower Court, it was not necessary to consider these questions. They will have to be considered in view of the above findings. The petition is allowed and the interlocutory application remanded for disposal on the lines indicated above. The costs of this petition will be provided for in the order to be made by the lower Court when disposing of the application.

C.R.K./D.S. *Petition allowed.*

✻ ✻ A. I. R. 1940 Madras 798

FULL BENCH

LEACH C. J. MOCKETT AND
KRISHNASWAMI AYYANGAR JJ.

Official Receiver of East Godavari at Rajahmundry — Appellant.

v.

Chava Govindaraju and another — Respondents.

Second Appeal No. 255 of 1937, Decided on 23rd April 1940, against decree of Sub-Judge, Rajahmundry, in A. S. No. 9 of 1933.

✻ ✻ **(a) Limitation Act (1908), Art. 142—Suit for ejectment by person out of possession—He cannot succeed unless he, in addition to title, proves that he has been in possession within 12 years of suit — Burden is not on defendant to prove adverse possession**: *21 M L W 398=A I R 1925 Mad 834=87 I C 386 and 25 M L W 127=A I R 1927 Mad 287=99 I C 312, Overruled.*

It is wrong to say that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for 12 years. The plaintiff is not entitled to succeed unless he shows in addition to title, that he has been in possession of the property within 12 years of the suit. The burden lies upon the plaintiff to prove that he was in possession within 12 years of suit; the onus is not upon the defendant to prove adverse possession for a period of 12 years: *21 M L W 398=A I R 1925 Mad 834=87 I C 386 and 25 M L W 127=A I R 1927 Mad 287=99 I C 312,* **Overruled.** *Observations in A I R 1923 Mad 160, Dissent.; Case law referred.* [P 801 C 2; P 803 C 1, 2]

✻ **(b) Limitation Act (1908), Art. 142—Suit by purchaser at Court auction in execution of mortgage decree for ejectment of person in possession of property is covered by Art. 142.**

When the owner mortgages his property part of his interest passes to the mortgagee, but when the property is sold at a Court auction the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him. Hence Art. 142 applies even where a purchaser at a Court auction held in execution of a mortgage decree sues for ejectment of a person in possession of the property which he has bought. [P 803 C 2]

K. R. Vepa — *for Appellant.*

A. Lakshmayya — *for Respondents.*

ORDER OF REFERENCE

Horwill J.—The plaintiff filed the present suit for possession on his title, alleging that defendant 1 was left in possession of the suit land by defendant 2 in 1909 and that he continued in possession of the land ever since with the permission of defendant 2. The land was brought to sale by the plaintiff in execution of a decree against defendants 2 to 5. When the plaintiff sought to obtain possession he was resisted by defendant 2. The plaintiff brought a claim petition which was dismissed; and hence this suit. The trial Court found that the title was with defendant 2 and that the plaintiff's case that defendant 1 was in permissive possession was true. The Appellate Court, while confirming the finding that the title was with the plaintiff, found that the plaintiff had not proved that defendant 1 was ever in possession with defendant 2's permission. He therefore allowed the appeal and dismissed the suit on the ground that the plaintiff had not proved that either he or defendant 2 had been in possession within 12 years of suit. The plaintiff appeals, contending that as his allegation was that defendant 1 was in permissive possession, the lower Appellate Court wrongly threw the onus upon the plaintiff, i. e., the lower Appellate Court should have applied Art. 144, Limitation Act, and not Art. 142. As the evidence of the defendants of their having been in adverse possession was not given much credit to by the lower Appellate Court, it is argued that if the burden had been rightly thrown on defendant 1, defendant 1's appeal would have been dismissed.

The argument of the plaintiff amounts to this: that even though he would ordinarily in a suit for ejectment have to prove that he was in possession within 12 years; yet he could get over this difficulty of limitation and displace the onus by a false declaration in his plaint. The decision of a Bench of this Court in 25 M L W 127[1] gives support to this argument. There the plaintiff's allegation was that he let the defendants into possession under an agreement of tenancy and that they would not give up possession when the tenancy was terminated. The lower Appellate Court had found that the agreement set up was not proved; but the learned Judges held that the plaintiff was not bound to prove possession. Although no reasons were given for this finding, yet the learned Judges definitely disagreed with the lower Appellate Court that the burden was upon the plaintiff to prove possession within 12 years of suit. The argument there seemed to have been that the frame of the suit determined the provisions of the Limitation Act to be applied and that it was immaterial what the actual findings on the questions raised in the pleadings were. Rustomji, at p. 1387 of his book on the 'Limitation Act,' (Edn. 5) says:

> when plaintiff comes into Court alleging that defendant's original possession was permissive, it is for the plaintiff to establish his allegation before defendant can be called upon to substantiate his plea of adverse possession.

He adds, at p. 1407:

> Decisions of the High Courts in India to the contrary, on the supposed authority of the Privy Council judgment in 39 Mad 617,[2] are not good law.

A somewhat similar point came up for decision in (1938) 1 M L J 113[3] and 25 M L W 127[1] and three other cases were referred to. In that case, Venkatasubba Rao J. disposed of 25 M L W 127[1] very briefly with these remarks:

> Mr. Rajah Ayyar for the appellant however relies on the following four cases; .... of which the first two are decisions of the same single Judge, the third was also decided by a Judge sitting singly, and the fourth (25 M L W 127[1]) contains no discussion of the principle involved. ... with great respect, we are unable to follow the four cases relied upon by the appellant.

In view of this conflict between the decisions of two benches of this Court, I direct that the papers in this case be put before my Lord the Chief Justice, for referring to a Full Bench, if he so pleases, the question whether, in a case where a plaintiff sets up a case of permissive possession and fails to prove it, the burden then lies upon the plaintiff to prove that he was in possession within 12 years of suit, or whether the onus is upon the defendant to prove adverse possession for a period of 12 years.

Judgment of the Full Bench.

Leach C. J. — The appellant is the Official Receiver of East Godavari and he has filed this appeal as the representative of the estate of one Adusumilli Venkatasubarayudu, who was adjudicated an insolvent during the pendency of the suit out of which this appeal arises. The insolvent was the plaintiff in the suit. On 29th November 1911 respondent 2 and his sons mortgaged certain land belonging to them and in 1922 the mortgagees filed a suit in the Court of the District Judge of Rajahmundry to enforce the mortgage. They obtained a decree which they assigned to the plaintiff, who caused the land to be put up for sale in execution proceedings. The plaintiff bought the land at the Court auction and in due course obtained a sale certificate. When he went to take possession of the property he was obstructed by respondent 1, who claimed it as his ancestral property. Thereupon the plaintiff applied to the Court for an order under O. 21, R. 98, Civil P. C. His application was dismissed and consequently he filed in the Court of the District Munsif, Rajamundry a suit for a decree declaring his title to the property and for the ejectment of respondent 1 therefrom. In his plaint he averred that in 1909 respondent 2, on being appointed a Village Munsif, entrusted the property to respondent 1, his nephew, who was to manage it for him. With the dishonest idea of defeating the mortgage, respondent 2 had, it was said, instigated respondent 1 to claim the property as his own. In addition to claiming the land as his ancestral property, respondent 1 averred that he had title to it by adverse possession.

---

[1] Ramanujachariar v. Sundarachari, (1927) 14 A I R Mad 287=99 I C 312=25 M L W 127.

[2] Secretary of State v. Chellikani Rama Rao, (1916) 3 A I R P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).

[3] Alam Khan v. Karupannaswami Nadan, (1938) 25 A I R Mad 415=183 I C 88=(1938) 1 M L J 113.

The District Munsif found for the plaintiff on all the issues and consequently decreed the suit. Respondent 1 then appealed to the Court of the Subordinate Judge of Rajahmundry. The Subordidate Judge held that the land was not the ancestral property of respondent 1, but belonged to respondent 2 and his family. He disagreed with the District Munsif however on the question whether the land had been entrusted to respondent 1. In his opinion this had not been proved, but without considering the question whether respondent 1 had been in adverse possession for 12 years he allowed the appeal on the ground that possession had been with respondent 1 since that date. The question which the Court is called upon to decide is whether Art. 142 or Art. 144, Limitation Act, applies to this case. The appellant contends that Art. 144 applies. Respondent 1 would have it that the proper Article is Art. 142. That respondent 1 had been in possession since 1909 is admitted and it is conceded by both sides that if Art. 142 applies the appeal must fail. It is also conceded that if Art. 144 applies the suit must be remanded to the Subordinate Judge to consider whether the evidence justifies respondent 1's contention that he has obtained a title by adverse possession.

Article 142 prescribes a period of limitation of 12 years for a suit for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. The period of 12 years runs from the date of dispossession or discontinuance. Art. 144 prescribes the same period of limitation for a suit "for possession of immovable property or any interest therein not hereby otherwise specially provided for." The period commences when the possession of the defendant becomes adverse to the plaintiff. Arts. 134, 134-B, 135, 136, 137, 138, 139, 140, 141 and 143 also deal with suits for possession of immovable property. Art. 144 is a residuary Article and therefore can only be applied if a suit does not fall within any of the earlier Articles. There has been much discussion in the Courts of India with regard to the application of Arts. 142 and 144. If a suit falls within Art. 142 the plaintiff must show that he has been in possession within 12 years of the suit. When Art. 144 applies the burden of proving adverse possession for this period is upon the defendant.

A discussion of the reported cases relating to Arts. 142 and 144 would be a most formidable task and in my opinion it is not unnecessary to undertake it. I consider that the Privy Council has indicated the application of these Articles in 16 Cal 473,[4] 17 Cal 137[5] and 25 M L J 95.[6] In 16 Cal 473[4] the plaintiffs had proved that formerly they were the proprietors of the land to which they alleged title, and from which they claimed to oust the defendants. They had however been dispossessed, or their possession had been discontinued, some years before the suit was brought by them and the land was occupied by the defendants, who denied their title. The Judicial Committee held that in these circumstances the burden was on the claimants to prove their possession at some time within the 12 years next preceding the suit. It was not sufficient for them to show an anterior title without proof of their possession within 12 years to shift the burden on the defendants of showing that they were entitled to remain in possession. In the judgment under appeal the Subordinate Judge who tried the case observed :

> When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands.

Their Lordships' comment on this observation was this: "That, as a proposition of law, is one which hardly meets with the approval of their Lordships." Their Lordships went on to say :

> This is in reality what in England would be called for an action for ejectment and in all actions for ejectment where the defendants are admittedly in possession; and a fortiori where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed and at some

---

4. Mohima Chander Mozumdar v. Mohesh Chunder Neoghi, (1889) 16 Cal 473=16 I A 23=5 Sar 321 (P C).
5. Mahamad Amanulla Khan v. Badan Singh, (1890) 17 Cal 137=23 P R 1890=16 I A 148=5 Sar 412 (P C).
6. Dharani Kanta Lahiri v. Gabar Ali Khan, (1913) 25 M L J 95=18 I C 17 (P C).

time within 12 years before the commencement of the suit, namely for the two or three years prior to the year 1875 or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed.

In 17 Cal 137[5] the Privy Council pointed out that Art. 144 only gives the rule of limitation where there is no other Article in the Schedule specially providing for the case. Although the proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished, where a claim comes within the terms of Art. 142, adverse possession is not required to be proved in order to maintain a defence. The plaintiffs' ancestors at the settlement in the Delhi District in 1843, declined to pay revenue in respect of a plot of land which had been held under rent-free tenure and had been resumed in 1838. The land was nevertheless assessed and the Government made an engagement with the villagers (the defendants in the suit) under which the villagers were to be put into possession. A revision of the settlement took place some 30 years later and the plaintiffs claimed possession on the strength of their title. According to the judgment under appeal to the Privy Council the plaintiffs were undoubtedly the proprietors before 1838, but the land had been since 1842 in the possession of the defendants, who had exercised all the rights of proprietors. There was no possession of any description in the plaintiffs or their ancestors since the period of the engagement, and under those circumstances the Judicial Committee held that whether any proprietary right existed did not matter. The question was whether there was a dispossession or discontinuance, and clearly there was. The proprietary right would undoubtedly continue to exist until by the operation of the law of limitation it had been extinguished; but, upon the question whether the law of limitation applied, it appeared to be clear that the case came within the terms of Art. 142. Therefore it was unnecessary to embark upon an inquiry whether there had been adverse possession. The decision in 25 M L J 95[6] was to the same effect. The suit was one for ejectment of persons who admittedly were at the date of suit in possession of the land. Their Lordships said :

> It lay upon the plaintiffs to prove not only a title as against the defendants to the possession; but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within 12 years immediately preceding the commencement of the suit. Their Lordships find that the plaintiffs failed to prove a title against the defendants to the possession of the lands in dispute or any part of them; they failed to prove that the lands, the possession of which they claimed, were not the lands covered by the sanad; and they failed to prove that they had been dispossessed or that their possession had been discontinued within 12 years before suit.

In view of these decisions of the Privy Council, it cannot in my judgment, be maintained that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for 12 years. The plaintiff is not entitled to succeed unless he shows, in addition to title, that he has been in possession of the property within 12 years of the suit. The Privy Council has declared that to be the effect of Art. 142 and that suits for ejectment come within that Article. It may be a hardship that a person who proves a title to property should lose it to a trespasser unless he can also show that he has been in possession within 12 years of suit, but that is what the Limitation Act says and the Court must administer the law. And drafting his plaint in a manner which disguises the real nature of the suit will not help a plaintiff. In 10 Cal 374,[7] Garth C. J. pointed out that a mere allegation of a tenancy will not relieve a plaintiff from the burden of proving that he or those under whom he claims had been in possession within 12 years. If it did, that device might always be resorted to for the purpose of evading the law of limitation.

I will now proceed to examine the decisions of this Court to which reference has been made in the course of the arguments. The first decision is that of Ayling and Venkatasubba Rao JJ. in 50 M L J 183.[8] A mortgagee filed a suit to enforce a mortgage created in 1897 and obtained a decree for sale. At the auction sale held on 5th September 1906 the mortgagee purchased the property and obtained symbolical possession. A third party was in possession and the mortgagee did not institute a suit to recover possession until 4th September 1918. The defendant who had been in possession from 22nd May 1905 then claimed he had been in adverse possession for more than 12 years. The Court held that the possession of the defendant, though adverse to the mortgagor, did not affect the rights of the mortgagee or of the auction-purchaser and consequently the suit was not time-barred. This principle had been settled by a Full Bench of this Court (Wallis C. J., and Sadasiva Ayyar and Srinivasa Ayyangar JJ.) in 39 Mad 811[9] where it was held that the possession of a trespasser who has dispossessed a mortgagor, the mortgage being a simple one within the meaning of the Transfer of Property Act, is not adverse to the mortgagee. In the present case, dispossession took place before the mortgage was created and therefore it differs materially from that decided by Ayling and Venkatasubba Rao JJ. The learned Judges went on to express the opinion that Art. 142 does not apply

---

[7] Gopal Chunder v. Nilmony Mitter, (1884) 10 Cal 374.

[8] Sundaram Ayyar v. Thiyagaraja Pillai, (1923) 10 A I R Mad 160=99 I C 831=50 M L J 183.

> when upon the facts proved or admitted, dispossession cannot possibly have occurred before 12 years of the institution of the suit

and to observe that:

> The plaintiff is entitled to say that the allegation relating to his possession may be treated as superfluous and that he may be allowed to rest his case upon the footing that his suit is within 12 years of the accrual of his right.

Madhavan Nair J. discussed the applicability of Arts. 142 and 144 in 21 M L W 398.[10] In that case a suit was brought by a dharmakarta of a devasthanam for possession of land which the devasthanam alleged had been leased to the defendants. The District Munsif who tried the suit found for the plaintiff but his decision was reversed on appeal by the Subordinate Judge who held that the alleged lease had not been proved and that Art. 142 applied. As the plaintiffs had failed to prove possession within 12 years of suit the Subordinate Judge allowed the appeal. On second appeal, Madhavan Nair J. held that the proper Article to apply was Art. 144 and based his opinion on the judgments of the Privy Council in 39 Mad 617[2] and in 44 Mad 883[11] and of that of the Allahabad High Court in 41 All 669.[12] In 39 Mad 617,[2] the question was whether the Secretary of State in Council was entitled to incorporate into a reserved forest under the Madras Forest Act (V of 1882) certain islands which had been formed on the bed of the sea near the mouth of the river Godavari within three miles of the main land. It was held that the islands belonged to the Crown and that the claimants had not proved adverse possession for a period sufficient to establish a right against the Crown. In the course of their judgment their Lordships said:

> Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great space of jungle lands, necessarily not under the close supervision of Government Officers, would disappear because there would be no evidence available to establish the state of possession for 60 years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

In 44 Mad 883[11] the Judicial Committee observed:

> Standing a title in "A" the alleged adverse possession of "B," must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly, when the holder of title proves, as in their Lordships' view he does with some fulness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

I do not regard these pronouncements of the Privy Council as deciding the question of the effect of Art. 142. I regard them as laying down principles which have to be applied when the issue is confined merely to a plea of adverse possession in particular circumstances. As I have already pointed out, the Privy Council had dealt with the application of Art. 142 in 16 Cal 473,[4] 17 Cal 137[5] and 25 M L J 95[6] which Madhavan Nair J. did not consider. The Allahabad High Court in 41 All 669[12] expressed the opinion that it was sufficient for the plaintiff in an ejectment suit to rest his case on title. There the plaintiff, who was a zamindar, sued to eject the defendant from certain land which he alleged the defendant was in possession of as his licensee. The defendant denied the license and set up a claim of adverse possession. The claim of adverse possession failed and the Court held that the plaintiff was entitled to succeed on the title which he had proved as zamindar. The question whether the license was ever granted or revoked was immaterial. This decision appears to be in direct conflict with the pronouncements of the Privy Council to which I referred at the outset. The next decision of this Court is that of Phillips J. in 49 M L J 788.[13] It was argued there that Art. 142 has no application to a suit for possession based on title, but having considered the decisions in 16 Cal 473,[4] 17 Cal 137[5] and 25 M L J 95,[6] Phillips J. rejected this argument.

---

[9] Vyapuri v. Sonamma Boi Ammani, (1916) 3 A I R Mad 990=31 I C 412=39 Mad 811=29 M L J 645 (F B).

[10] Jeeyanagarswami v. Mahomed Escof Sahib, (1925) 12 A I R Mad 834=87 I C 386=21 M L W 398.

[11] Kuttali Moothavar v. Peringati Kunharan Kutty, (1922) 9 A I R P C 181=66 I C 451=48 I A 395=44 Mad 883 (P C).

[12] Jai Chand Bahadur v. Girwar Singh, (1919) 6 A I R All 403=52 I C 366=41 All 669=17 A L J 814.

In 25 M L W 127[1] Devadoss and Wallace JJ. held that Art. 142 is applicable only to cases where the plaintiff alleges possession and dispossession in his plaint. They considered that notwithstanding that the plaintiff sets up a tenancy or license as the basis of the defendant's possession the Article applicable is still Art. 144. The learned Judges did not however consider any of the authorities. The latest decision of this Court is that of Venkatasubba Rao and Abdur Rahman JJ., in (1938) 1 M L J 113.[3] In that case the plaintiff was a mutawalli of a Mohamedan trust. He sued for possession of immovable property and alleged that the defendants had been his tenants. It was held that the tenancy was not proved. The defendants did not appear at the trial, but the plaintiff's witnesses themselves stated that the property had never to their knowledge been in the possession of the plaintiff. It was held that the suit was governed by Art. 142 and not by Art. 144 and that it should be dismissed as the plaintiff had not proved his possession within the statutory period. The learned Judges however considered that on the facts of the case it was unnecessary to deal with the broad question whether in a suit in ejectment where the plaintiff's title is proved there rests any duty upon him of shifting the burden on the defendants to prove adverse possession under Art. 144.

I have said sufficient to indicate that in my opinion a plaintiff who is suing for possession of property in the occupation of another cannot rest his case on title alone. He must show that he has exercised rights of ownership by being in possession within 12 years of suit. It follows that in my opinion the observations which I have quoted from the judgment in 50 M L J 183[8] cannot be accepted and that 21 M L W 398[10] and 25 M L W 127[1] were wrongly decided.

In the present case the appellant and his predecessors-in-title have admittedly been out of possession since 1909 and this disposes of the appeal but before I conclude it is necessary to deal with another argument advanced on behalf of the appellant. It is said that where the plaintiff is the purchaser at a Court auction held in execution of a mortgage decree his case does not fall within Art. 142. It is contended that that Article only applies when the plaintiff is suing on his own title or on the title of the previous owner of the property and does not apply when he is the representative of both the mortgagor and the mortgagee. In 16 Mad 140[14] and 22 Bom 945[15] it was held that the purchaser at a Court auction in execution of a mortgage decree is the representative of the mortgagor and the mortgagee having acquired both their interests in the property sold. But this cannot mean that he is outside Art. 142. When the owner mortgages his property part of his interest passes to the mortgagee, but when the property is sold at a Court auction the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him. S. 2 (8), Limitation Act, defines the word "plaintiff" as including any person from or through whom a plaintiff derives his right to sue. The appellant here derived his right to sue from the mortgagor. It is true that part of his interest in the property came to him from the mortgagor through the mortgagee but that does not warrant the assertion that different considerations apply when he is suing for the ejectment of a person in possession of the property which he has bought. In my judgment there is no substance in the last contention advanced on behalf of the appellant. For these reasons I would dismiss the appeal with costs.

Mockett J. — I agree.

Krishnaswami Ayyangar J. — I also agree.

C.R.K./D.S. *Appeal dismissed.*

---

[13] Kuppuswami Mudaliar v. Chockalinga Mudaliar, (1926) 13 A I R Mad 181=91 I C 454=49 M L J 788.

[14] Kunhiamma v. Kunhunni, (1893) 16 Mad 140.

[15] Maganlal v. Shakra Girdhar, (1898) 22 Bom 945.

* A. I. R. 1940 Madras 804

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Ambu Bai Ammal — Appellant.

v.

Soni Bai Ammal — Respondent.

Second Appeal No. 1152 of 1936, Decided on 23rd April 1940, against the decree of District Court, Tinnevelly, in A. S. No. 323 of 1935.

*** Hindu Law—Widow — Widowed penniless daughter — Widow is bound to maintain out of husband's estate his widowed penniless daughter.**

The rule of Hindu law that there is a moral obligation on a father to support his daughter, whether married or unmarried, applies to a widowed daughter who is penniless. Consequently a Hindu widow is bound to maintain out of her husband's estate her husband's widowed daughter when the daughter is without means and her husband's family is unable to support her : *11 All 194 (F B) and A I R 1934 P C 29, Rel. on ; Case law reviewed.* [P 804 C 1 ; P 807 C 1]

A. Swaminatha Iyer and S. Thaiyagaraja Iyer — *for Appellant.*

E. Vinayaka Rao — *for Respondent.*

Leach C. J. — The question which the Court is called upon to decide in this appeal is whether a Hindu widow is bound to maintain out of her husband's estate her husband's widowed daughter when the daughter is without means and her husbands' family is unable to support her. The appellant is the widow of one Sadasiva Rao, who died on 13th January 1930. The respondent is the daughter of Sadasiva Rao by his first wife, who predeceased him. The respondent married one Rama Rao, who died in the month of May 1932. Sadasiva Rao was a man of considerable property ; but Rama Rao was entirely without means and in consequence Sadasiva Rao was compelled to maintain the respondent and her husband from the time of her marriage up to the time of his death. Rama Rao never acquired property and his family had none. In 1934 the respondent filed a suit in the Court of the District Munsif of Tinnevelly for a decree for maintenance against her step-mother on whom had devolved her father's estate. The District Munsif held that the widow was bound to maintain her step-daughter out of Sadasiva Rao's property and gave a decree for maintenance at the rate of Rs. 10 per mensem, but he directed that if the parties lived together the respondent should receive only a sum of Rs. 5 per mensem. This decree was confirmed by the District Judge on appeal. The widow has now appealed to this Court. The ancient texts of Hindu law do not place upon a father a legal obligation to maintain his married daughter, but they do indicate that he is under a moral obligation to support her if she is in want. The original texts are all collected in the late Golap Chandra Sastri's work on Hindu law (Edn. 8, p. 522) but it is not necessary to quote them all. The following are sufficient to show that from the earliest times Hindu law has recognized that there is a moral obligation on a father to support his offspring :

(1) The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependents, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained—Manu cited in Srikrishna's commentary on Dayabhagha.

(2) It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds—Manu cited in the Mitakshara while dealing with gifts.

(3) (A widow inheriting her husband's estate) should honour with food and presents (for their benefit) the husband's paternal uncle, (and the like) venerable elderly relation, daughter's son, sister's son and maternal uncle, as well as aged and helpless persons, guests and females (of the family) — Vrihaspathi cited in Dayabhaga, XI, i. 64.

These translations are accepted as being correct. The texts carry the moral obligation far beyond the limit which could be accepted in modern times, but it cannot with reason be said that there is no moral obligation on a father to support a daughter who has no other means of support, even when she has left his family on marriage. A mere moral obligation, cannot, of course, be made the basis of a suit, but here the estate of the person on whom there was a moral obligation to support the respondent has passed to the appellant and the Court is called upon to decide whether the principle laid down in 11 All 194[1] extends to the case of a widowed daughter who has no means of subsistence. In 11 All 194[1] a Full Bench of the Allahabad High Court held that a father was under a moral, though not a legal, obligation to maintain his widowed daughter-in-law during his lifetime and to make provision out of his self acquired property for her maintenance after his death and that the moral obligation became by reason of his self-acquired property having come by inheritance into the hands of his surviving son a legal obligation, enforceable by suit against the son and against the property which he had inherited. The basis of this decision was that the son took the estate, not for his own benefit, but for the spiritual benefit of his father. This principle developed out of the discussions which had taken place in 2 Hyde 103[2] and 2 Beng L R A C 15.[3] The principle enunciated by the Allahabad High Court has been accepted by other High Courts of India and was regarded as settled law by the Privy Council in 61 Cal 221.[4] The doctrine that a moral obligation becomes a legal obligation when the estate of a person on whom the moral obligation lay comes into the possession of his heirs may be open to criticism, but it is too late in the day to indulge in it and the Court must confine itself to the question whether the principle should extend beyond the case of a widowed daughter-in-law.

---

[1] Janki v. Nand Ram, (1899) 11 All 194 = 1899 A W N 30 (F B).

There are two cases reported in Strange (The Edition published in 1830, pp. 83 and 90) and one in Macnaghten which support the respondent in her contention that she has a legal right to maintenance out of her father's estate. In the first of the two cases reported by Strange a Hindu left two widows, a widowed sister who had lived with him after the death of her husband, and his mother. The question was to whom should his estate go. The answer given was that the mother must be maintained and so must the sister, if left destitute by her husband. In the second case, the answer was given by the Pandit. There the deceased left two wives, his mother and a sister. The answer of the Pandit was that the mother of the deceased, being otherwise unprovided for, sufficient allowance must be set apart from his estate for her maintenance and that if the deceased's sister derived nothing from her husband, the widows should jointly contribute towards her support. Both these cases were decided in 1803. The case reported in Macnaghten, Vol. II pp. 117 and 118 was decided some 15 years later in Bengal. The question there propounded was this:

> A person died, leaving two sons by one wife (who died before him), and a widow and her two daughters, and subsequently to his death one of the sons died. There are now surviving a son of his first wife, and a widow and her two daughters and supposing the widow to have received no portion of the property from her step son, in this case, is she entitled to any share of the estate: and if so, what is the extent of her right ?

The answer was in these terms:

> The widow is only entitled to a proper maintenance from her step-son; and if her two daughters have not been disposed of in marriage, they will also have some share of their father's wealth to defray their nuptial expenses. Should they, after marriage, be in want of maintenance, in consequence of their husband's inability to support them, they must be provided with food and raimant by their half-brother. This is conformable to the Dayabhaga and other authorities.

If the sister of a deceased Hindu is entitled to maintenance out of his estate it is impossible to imagine on what principle maintenance can be denied to his daughter, and the case reported in Macnaghten directly supports the proposition that the daughter is entitled to maintenance, though married, when her husband is unable to support her. In 23 M L J 223,[5] Sadasiva Aiyer J. expressed himself strongly in favour of the view that there is a legal obligation on a Hindu father and his family to support his destitute widowed daughter when she has not recieved sufficient from her deceased husband's family for her maintenance. After expressing his dissent from the decision of the Bombay High Court in 23 Bom 291[6] to which I shall presently refer, Sadasiva Aiyar J. went on to say:

> I concur in the opinion of J. C. Ghose, West and Buhler, Macnaghten and Strange that there is a legal obligation on the father and his family to support a destitute daughter (though she had been married away) if she could not get sufficient provision from her deceased's husband's family for her maintenance. Bhattacharya also says (p. 400) that under the Hindu law texts, widowed daughters are entitled to maintenance and 'justice requires that their right should be recognised.' The argument that by marriage she becomes a member of another family and becomes so to say, 'dead' to her own family is merely carrying legal fictions to absurd lengths. A wife is half her husband's body but you cannot on that account give double rations to the husband for his meals and give none to his wife; nor does the daughter lose her consanguineness, blood relationship to her father and her right of inheritance to him and other similar rights, simply because she becomes attached by Pinda, Gotra and Sootaka to her husband's family by marriage.

I am not prepared to go to the extent of concurring in the opinion here expressed that there is under Hindu law a legal obligation on a father to support a daughter who has left his family and gone into another by reason of marriage, but I see no difficulty in extending the principle embodied in 11 All 194[1] to such a case, when she is in want. It will be convenient here to consider the decision of the Bombay High Court in 23 Bom 291.[6] There a Bench of the Bombay High Court, consisting of Parsons and Ranade JJ. held that under Hindu law only the unmarried daughter had a legal claim for maintenance out of her father's estate and that the married daughter must look to her husband's family for maintenance. If the husband's family is not able to maintain the widowed daughter and she returns to live with her father or brother, there is, it was said, a moral and social obligation on her father or brother, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heir. The judgment of the Court was delivered by Ranade J. who did not consider the principle laid down in 11 All 194.[1] This principle was accepted by Ranade J. sitting with Parsons J. in 23 Bom 608,[7] which is reported in the same volume of I L R as 23 Bom 291.[6] The principle in 11 All 194[1] has certainly an important bearing on the question. There are two Calcutta cases to which reference should be made. In 17 Cal 373,[8] Banerjee J. having accepted the principle in 11 All 194[1] went on to observe:

---

[2] Rujjomoney Dossee v. Shibchunder Mullick, 2 Hyde 103.

[3] Khetramani Dasi v. Kashinath Das, (1869) 2 Beng L R A C 15=10 W R 89 (F B).

[4] Rajanikanta Pal v. Sajanisundaree Dassaya, (1934) 21 A I R P C 29=147 I C 438=61 I A 29=61 Cal 221 (P C).

[5] Venkatarazu v. B. Kotayya, (1912) 23 M L J 223=16 I C 139.

[6] Bai Mangal v. Bai Rukhmini, (1899) 23 Bom 291.

> Each particular case, no doubt, has to be determined upon its own merits ; in each case it will have to be determined whether having regard to the relationship, the means and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of the Hindu law and to the usages and practice of the Hindu people, morally bound to maintain that party. It is not necessary for me to lay down any general rule on the point in this case. All that I am called upon to decide is whether the plaintiff in this case is a person whom, having regard to the circumstances of this case, her late father-in-law was morally bound to maintain.

In 27 Cal 555,[9] Amir Ali J. held that a sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs, but he added:

> There may be cases however where a father maintains the daughter and the daughter's husband in his own house, and does so upto the end of his life. Under those circumstances the fact of his marrying her to a person not possessed of means to maintain his wife would cast upon him the moral obligation of maintaining both her and her husband, and in the case of a widowed daughter of maintaining her and her children. If that moral obligation rested upon him in his lifetime, upon his death the moral obligation would, in my opinion, become a legal obligation on the part of those taking his property.

This case certainly falls within the exception which Amir Ali J. had in mind. His decision was approved of on appeal, 28 Cal 278,[10] but his reservation was not discussed. The Lahore High Court has held that a sister is bound to be maintained out of her deceased brother's estate in the hands of his heirs, 5 Lah 375.[11] The Court accepted a statement in Mulla which I shall quote in a moment as correctly representing the law. The text books on Hindu law with two exceptions support the respondent. In addition to quoting the two cases in the second volume of his work Strange expressly states that widowed sisters, not otherwise provided for, are entitled to be maintained. (Sir T. Strange's Hindu Law, Vol. I, p. 173). Macnaghten's view is to be gathered from the case which I have already quoted. Mulla says:

> An heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited subject to the obligation to provide for such maintenance. (Mulla's Principles of Hindu Law, 9th Edn., p. 582.)

Mulla also says:

> A father is bound to maintain his unmarried daughters. On the death of the father they are entitled to be maintained out of his estate. A daughter on marriage ceases to be a member of her father's family, and becomes a member of her husband's family . . . If she is unable to obtain maintenance from her husband, or after his death from his family, her father, if he has got separate property of his own, is under a moral, though not a legal obligation to maintain her. (Mulla's Principles of Hindu Law, 9th Edn., p. 584.)

Ghose states that a female is entitled to be maintained by her father's family, if her husband's family is extinct, or incapable on account of extreme poverty, to support her. (Ghose's Principles of Hindu Law, 10th Edn., p. 305). He also points out that the sonless widowed daughter and granddaughter and sister come back to the family of the father according to Medhatithi. (Ghose's Principles of Hindu Law, 10th Edn., p. 310.) As Mayne observes Medhatithi's work is the earliest commentary extant on Manu and is frequently referred to as of high authority and mentioned in the Mitakshara and Smritichandrika (Mayne on Hindu Law

---

7. Yamunabai v. Manubai, (1899) 23 Bom 608=1 Bom L R 95.
8. Kamini Dassee v. Ohandra Pode Mondle, (1890) 17 Cal 373.
9. Mokhoda Dassee v. Nandoo Lal Haldar, (1900) 27 Cal 555 = 4 C W N 669.
10. Mokhoda Dassee v. Nundoo Lall, (1901) 28 Cal 278 = 5 C W N 297 (F B).
11. Mt. Bholi Bai v. Dwaraka Das, (1925) 12 AIR Lah 32 = 84 I C 168 = 5 Lah 375.

and Usage, 10th Edn., p. 43). Sircar expresses the opinion that a married daughter is ordinarily to be maintained in her husband's family, but if they are unable to maintain her, she is entitled to be maintained in her father's family (Sircar's Hindu Law, 8th Edn., p. 534). West and Buhler quote with approval the decisions in the two cases reported by Strange (West and Buhler's Hindu Law, 4th Edn., p. 241.) Before the decision in 23 Bom 291,[6] Mayne was of the same opinion, but the learned author of the next edition accepted that decision as being correct and altered his opinion accordingly. This view has been maintained in the latest edition. (Mayne's Hindu Law and Usage, 10th Edn., p. 825.) Gour's Hindu Code also accepts the Bombay case as deciding the point (4th Edn., page 322.)

The decision in 11 All 194[1] must now be accepted as embodying a rule of Hindu law and as there is a moral obligation on a father to support his daughter, whether married or unmarried, I can see no valid reason for refusing to apply the rule to a widowed daughter who is penniless. The only distinction between a widowed daughter-in-law and a widowed daughter is that on her marriage the daughter passes into another family, but the moral obligation of the father to support her when in want still remains and the same reasoning which led to the rule in 11 All 194[1] being laid down applies. The decisions reported in Strange and Macnaghten provide additional reasons for applying it and most of the learned authors of works on Hindu law have accepted it. The right to maintenance which was claimed in the cases reported in Strange and Macnaghten was not based on the reasoning to be found in 11 All 194,[1] but the right was clearly recognized. It is not necessary to consider how far the rule extends, but obviously it could not be extended to the guru, guest, religious mendicant, or an aged and helpless person who is in no sense a member of the family and could only be the object of charity. There is however ample authority for applying the rule in this case. Consequently, I hold that a widowed daughter in the position of the respondent in this case is entitled to maintenance out of her father's estate in the hands of his widow and I would dismiss the appeal with costs.

Krishnaswami Ayyangar J. — I agree.

Somayya J. — I agree.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 807

HORWILL J.

Muhammad Sahib and another — Petitioners.

v.

C. Kunthanmal Sowcar —Respondent.

Civil Revn. Petn. No. 529 of 1939, Decided on 23rd April 1940, to revise decree of District Munsif, Poonamallee, in S. C. S. No. 987 of 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 9—It is wrong to say that interest calculated at 5 per cent. should be added to principal and from that sum should be deducted amount actually paid.

Under S. 9 it is wrong to say that interest calculated at 5 per cent. from the date when the debt was incurred should be added to the principal and from that sum should be deducted the amount actually paid. S. 9 (1) deals entirely with the question of interest. It says that interest shall be calculated up to the date of the commencement of the Act at 5 per cent. simple interest, that credit should be given for the interest already paid, and that the amount outstanding for interest should be added to the principal outstanding and the plaintiff should be given a decree for the amount so calculated. [P 807 C 2; P 808 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 12 — Plaintiff is entitled to interest only from date of decree.

Section 12 entitles a creditor to interest on any sum remaining outstanding after the debt has been scaled down from the date up to which it had been scaled down. That is to say, the plaintiff is entitled to interest only from the date of the decree. [P 808 C 1, 2]

Basheer Ahmed Syed — *for Petitioners.*

K. A. Chakravarthy — *for Respondent.*

Order. — On 4th March 1933 the petitioners executed a promissory note for Rs. 300 in favour of the respondent (plaintiff). In October of the same year he paid Rs. 100 towards the principal. On 18th November 1935 we find the endorsement "interest calculated up to date has been paid off in full." The plaintiff brings the present suit for the balance of Rs. 200 principal and Rs. 7-8-0 interest from 22nd March 1938 (the date on which the Madras Agriculturists' Relief Act came into force) to date of suit. Two questions arose and the one with which we are concerned is what is the amount due under Act 4 of 1938. It was held in favour of the plaintiff by the District Munsif of Poonamallee that the plaintiff was entitled to the amount claimed. It is strenuously argued by Mr. Chakravarthy that in applying S. 9 of Act 4 of 1938, interest should be calculated at 5 per cent. from the date when the debt was incurred; to that should be added the principal;

and from that sum should be deducted the amount actually paid. The plaintiff, it is contended, would be entitled only to the balance which would probably be something less than nothing in the present case. That however is not the correct interpretation to put on S. 9. S. 9 (1) deals entirely with the question of interest. It says that interest shall be calculated up to the date of the commencement of the Act at 5 per cent. simple interest, that credit should be given for the interest already paid and that the amount outstanding for interest should be added to the principal outstanding and the plaintiff should be given a decree for the amount so calculated. On 18th November 1935 the interest outstanding was paid off in full and the plaintiff has made no claim whatever for interest. As he is not bound to pay anything back, he cannot be given less than what he has claimed except for the small amount of Rs. 7-8-0 to which I shall presently refer.

It is further argued that if S. 9 (1) be deemed to deal only with the question of interest and that the amount paid by way of interest has not to be deducted from the principal as well as the interest calculated at 5 per cent. then there would be no meaning in S. 9 (2). I do not however agree; for, it is easy to conceive of a case in which the debtor had paid off the entire amount of principal due and also paid an amount of interest which was greater than that calculated at 5 per cent. In such a case, were it not for the provision of S. 9 (2), the debtor would be entitled to a refund. I have been asked to remand this civil revision petition because the trial Court says in disposing of this point :

> It is not open to me to re-open the adjustment arrived at between the parties before 18th November 1935.

I do not know what the learned District Munsif had in mind when he said this; but the Court is clearly entitled to consider what principal was paid in the first instance and what interest had been paid. The Court was entitled and was bound to have regard to the transaction from the date on which the debt was first incurred. However this point has no significance in view of my findings above; for the decree of the lower Court was right. The plaintiff has claimed interest from the date on which the Act came into force up to the date of suit and costs and subsequent interest; but I find that he is not entitled to so much. S. 12 entitles a creditor to interest on any sum remaining outstanding after the debt has been scaled down from the date up to which it had been scaled down. That is to say, the plaintiff is entitled to interest only from the date of the decree. With this slight modification, the petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 808

WADSWORTH J.

Dharba Sooryanarayana and another— Petitioners.

v.

Meduri Ramamma — Respondent.

Civil Revn. Petns. Nos. 1178 and 1179 of 1939, Decided on 22nd April 1940, to revise order of Sub-Judge, Masulipatam, D/- 11th April 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 21 — Object of S. 21 explained— Mortgagor adjudicated insolvent — Dividend declared before commencement of Act — Purchasers of parts of hypotheca who are agriculturists are entitled to benefit of Act.

The object of S. 21 is to prevent a double scaling down of the debt of an individual. If that debt has been subjected to the scaling down process of the insolvency law and dividends have been paid on the basis of that scaling down, it should not be subject to a fresh scaling down at the instance of the same person who has already had the benefit of one process of reduction. There is no reason to refuse these benefits to an entirely different person who has not had the benefit of the insolvency law and who is an agriculturist otherwise entitled to have his debts scaled down. Neither under the wording of S. 21 nor under the object of the Section can it be said that the exclusion of the debts of the insolvent should be extended to the same debts when due by another person who is not an insolvent. [P 809 C 1, 2]

Hence where a mortgagor became an insolvent and dividend was declared before commencement of the Act 4 of 1938 the purchasers of the parts of hypotheca who are agriculturists are not precluded from having the benefits of the Act : *A I R 1940 Mad 95, Applied; A I R 1939 Mad 186, Rel. on.* [P 809 C 1]

(b) Civil P. C. (1908), S. 115—Court holding that purchasers of parts of hypotheca are not entitled to benefit of Madras Agriculturists' Relief Act — High Court can interfere in revision.

Certain persons who were agriculturists purchased parts of hypotheca after the adjudication of mortgagor as insolvent. The Court held that these purchasers were not competent to apply for the benefits of the Madras Agriculturists' Relief Act:

Held that the Court refused to exercise jurisdiction and hence the High Court could interfere in revision : *A I R 1921 Mad 157 (F B) and AIR 1940 Mad 95, Rel. on.* [P 809 C 2]

K. Kottayya — *for Petitioners.*

P. Somasundaram and G. Balaparameswari Rao — *for Respondent.*

Order. — These two petitions raise a question under S. 21 of Act 4 of 1938. In each of the petitions the petitioners are purchasers of parts of the hypotheca and defendants in the suit on the mortgage which has been decreed. The mortgage was one of 1922. The original mortgagor became an insolvent in 1929 and it is said that a dividend was declared before the commencement of Madras Act 4 of 1938. The purchases by the petitioners in C. R. P. No. 1178 of 1939 were long after the adjudication. The purchase by the petitioner in C. R. P. No. 1179 of 1939 was after the presentation of the insolvency petition and before the adjudication. The Court below has held that by reason of the insolvency of the original mortgagor, S. 21 of Madras Act 4 of 1938 applies to the decree debt as a whole and none of the judgment-debtors can have the benefit of the Act. It would appear that the original mortgagor was an agriculturist, but now that he has become an insolvent he is clearly disentitled to the benefits of the Act. It has been held by the Bench which decided I L R 1939 Mad 218[1] that purchasers of the hypotheca in possession are debtors under the mortgage entitled to the benefits of the Act. That was a case in which the mortgagor himself was admittedly an agriculturist; but it seems to me that this does not affect the decision, for by the definition of 'debt' any liability, whether secured or unsecured, due from an agriculturist, is included and surely a debt secured on the land of an alienee will be a debt due from that alienee even though his liability is limited to his interest in the land.

In (1939) 2 M L J 745,[2] Pandrang Row J. held that the exclusion of the debts of an insolvent from the benefits of the Act under S. 21 was limited to those debts in so far as they were due from the insolvent himself and that the son of the insolvent liable to pay the same debts was, if an agriculturist, entitled to claim that the debts be scaled down. That decision seems to me precisely to apply to the facts of this case; and I respectfully agree with the reasoning upon which the decision is based. Clearly the object of S. 21 is to prevent a double scaling down of the debt of an individual. If that debt has been subjected to the scaling down process of the insolvency law and dividends have been paid on the basis of that scaling down, it should not be subject to a fresh scaling down at the instance of the same person who has already had the benefit of one process of reduction. There is no reason to refuse these benefits to an entirely different person who has not had the benefit of the insolvency law and who is an agriculturist otherwise entitled to have his debts scaled down. Neither under the wording of S. 21 nor under what I conceive to be the object of the Section can it be said that the exclusion of the debts of the insolvent should be extended to the same debts when due by another person who is not an insolvent.

It has been contended for the respondent by Mr. Somasundaram that this is not a matter for interference in revision, that the Court below had jurisdiction to decide whether or not the petitioners were agriculturists entitled to the benefits of the Act and that having so decided, the decision is a mere decision of law and not a refusal to exercise jurisdiction. It seems to me that this question is covered by authority. Apart from the decision of Pandrang Row J., just referred to, which was itself a decision in revision, I may cite the decision of the Full Bench in 44 Mad 554,[3] where it was held that when the Court below dismissed an application under O. 21, R. 89, Civil P. C., on the ground that the person who applied was not entitled to apply, the decision of the lower Court consisted in fact in a refusal to deal with the petition and to exercise its jurisdiction, and it was not a mere conclusion of law in which the question of jurisdiction was not involved. The same reasoning seems to me to apply to the present case. The Court below has held that these petitioners are not competent to apply for the benefits of the Act. In effect the lower Court has refused to exercise the jurisdiction which they invoked, and in my opinion has wrongly refused to exercise that jurisdiction. The petitions are therefore allowed and the matter will be remitted to the trial Court for disposal in the light of this judgment. The petitioners are entitled to their costs (one set).

C.R.K./D.S. *Petitions allowed.*

---

[1] Perianna v. Sellappa Goundan, (1939) 26 A I R Mad 186=182 I C 879=I L R (1939) Mad 218 =(1938) 2 M L J 1068.

[2] Vasantha Rao Sahib v. Narayanaswami Ayyar, (1940) 27 A I R Mad 95=(1939) 2 M L J 745.

[3] Sundaram v. Mamsa Mavuthar, (1921) 8 A I R Mad 157=63 I C 937=44 Mad 554=40 M L J 497 (F B).

* A. I. R. 1940 Madras 810

PANDRANG ROW AND ABDUR RAHMAN JJ.

Haji Muhammad Shadak Koyi Sahib — Petitioner.

v.

Burra Venkata Komaraju and others— Respondents.

Civil Misc. Petn. No. 2456 of 1939, Decided on 28th July 1939, for leave to appeal to His Majesty in Council against judgment and decree of High Court, in Appeal No. 330 of 1936, D/- 14th February 1939.

*** (a) Minor—Decree—Setting aside—Gross negligence of guardian-ad-litem can be basis.**

A minor can challenge a decree passed against him on the ground of the gross negligence of his guardian-ad-litem : *A I R 1939 Bom 66 (F B), Dissent.* [P 811 C 1]

*** (b) Civil P. C. (1908), S. 109 — Leave to appeal asked for raising for first time question not raised in trial Court or High Court—Leave cannot be granted.**

Leave to appeal cannot be given in a matter where leave is asked for for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending in India; that is to say, either in the trial Court or in the High Court. The resort to the provisions which permit a party to apply for leave to appeal for a purpose like this, namely, for raising a point for the first time after the whole case has been disposed of, would be an abuse which should not be encouraged. [P 811 C 1]

K. V. Krishnaswamy Iyer and P. Panini Rao — *for Petitioner.*

Y. Suryanarayana — *for Respondents.*

Pandrang Row J.—This is an application for leave to appeal to His Majesty in Council from the decree of this High Court made in Appeal No. 330 of 1936 on 14th February 1939. That decree merely confirmed the decree of the trial Court, the finding of both the Courts being concurrent on the main question in the suit, namely, whether there was gross negligence on the part of the Court guardian appointed to defend the suit in which a decree had been passed against the minor, the present litigation being one to have that decree set aside as against the minor. The entire litigation proceeded in the trial Court as well as in this Court on the basis that gross negligence, if proved, would be sufficient to entitle the plaintiff to have the earlier decree set aside, and neither in the grounds of appeal in this Court nor during the arguments at the hearing of the appeal was it stated that gross negligence by itself would not be sufficient in the absence of fraud and collusion. But it is this point and this point alone that is sought to be raised in the present application for leave to appeal. The petitioner wants an opportunity of having this question settled by the highest judicial tribunal and it would appear that they have been emboldened to do that by reason of a Full Bench decision of the Bombay High Court reported in A I R 1939 Bom 66[1] which appears to have been reported only after the High Court's judgment was pronounced. That however is a detail which need not affect our decision in this matter. Even in that case it is pointed out that there is a preponderance of authority among the High Court Judges in India in favour of the view that a minor can challenge a decree passed against him on the ground of the gross negligence of his guardian-ad-litem.

This majority view appears to have been dissented from by the Full Bench of the Bombay High Court on the ground that the majority view was based mainly on the consideration that such an action would lie under the English law, and the Full Bench of the Bombay High Court was of opinion that under the English law itself no such action would lie. We find, however, that apart from the dictum in 26 E R 1160[2] of Lord Hardwicke which is quoted in some of the reported cases in India, at least since 1874, when *In re Hoghton*[3] was decided by the Vice-Chancellor Malins, it has been understood to be well settled law in England that such an action would lie. It is sufficient to refer in this connexion to the passages quoted from Macpherson on Infants and Simpson on the Law of Infants in 48 All 44[4] at p. 53 and also to the passage from Halsbury's Laws of England, Vol. 17, page 138 on the same page. We find also in the later edition, i. e. the Hailsham edition of the Laws of England, the same proposition of law laid down; that is to say, that an infant is as much bound as an adult by a judgment unless there has been fraud or gross negligence on the part of his next friend.

We feel therefore some hesitation in expressing the view that under the English law an action would not lie in the case of gross negligence only of the guardian. We are unable to accept the position as being

---

1. Krishna Doss v. Vithoba, (1939) 26 A I R Bom 66=180 I C 51= I L R (1939) Bom 340 = 41 Bom L R 59 (F B).
2. Gregory v. Molesworth, 26 E R 1160.
3. (1874) 18 Eq 573=43 L J Ch 758=22 W R 854.
4. Brij Raj v. Ram Surup, (1926) 13 A I R All 36 =90 I C 749=48 All 44=23 A L J 901.

one in which any real doubt remains about the maintainability of a suit of this kind. We, however, do not base our final decision which is to dismiss the petition on this ground. It is enough for our purposes to say that leave to appeal could not be given in a matter like this for the simple reason that leave is asked for, for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending in this country; that is to say, either in the trial Court or in this Court. The resort to the provisions which permit a party to apply for leave to appeal for a purpose like this, namely, for raising a point for the first time after the whole case has been disposed of, would be, in our opinion, an abuse which should not be encouraged. It might also be mentioned that if this new point had been raised earlier, the plaintiffs would have had an opportunity of meeting this point by alleging as an additional ground of claim actual fraud and collusion. In the circumstances we feel that there is no other alternative than to refuse leave to appeal. The petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 811

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Sri Kallalagar Devasthanam, Madura, through its Executive Officer, K. N. Radhakrishna — Petitioner.

v.

District Collector, Madura — Respdt.

Civil Misc. Petn. No. 990 of 1940, Decided on 2nd April 1940.

Madras Hindu Religious Endowments Act (2 of 1927), S. 44-B (2) (a) and (2) (d) (i) — Collector dismissing application for resumption of temple inam — Appeal lies under S. 44-B (2) (d) (i) from order of dismissal to District Collector who has power to grant appropriate relief by confirming or cancelling it.

The words 'may . . . . pass an order confirming, modifying or cancelling the order of the Collector' in S. 44-B (2) (d) (i) are not intended to be confined to an order of resumption. An unqualified right of appeal is given, and if the Collector passes an order dismissing an application for resumption of a temple inam under S. 44-B (2) (a) an appeal lies under S. 44-B (2) (d) (i) to the District Collector who can confirm it or cancel it and grant appropriate relief: *10 Mad 179 (F B), Rel. on; A I R 1940 Mad 756, Disting.* [P 812 C 1]

V. V. Chowdhary, Sheshachalapathy, N. Koteeswara Rao and A. Venkatasami — *for Petitioner.*

T. Krishna Row for Government Pleader — *for Respondent.*

Leach C. J.—The petitioner is the trustee of the Sri Kallalagar Devasthanam, Madura. He applied to the Revenue Divisional Officer, Melur, for orders under S. 44-B, Madras Hindu Religious Endowments Act, 1926, directing the resumption of certain service inams granted by the temple. The Revenue Divisional Officer rejected the applications and the petitioner then filed appeals to the Collector of Madura who held that there was no right of appeal and consequently passed an order dismissing them all. The petitioner has now asked this Court to quash the order of the Collector and to direct him to hear the appeals. S. 44-B (2) (a), Madras Hindu Religious Endowments Act, states that the Collector may resume the whole or any part of an inam granted for the performance of a charity or service connected with a math or temple on one or more of the following grounds: (i) That the holder of the inam has made an exchange, gift, sale or mortgage of it or any portion of it or has granted a lease for a term exceeding five years; or (ii) that the holder of the inam has failed to perform or make the necessary arrangements for performing in accordance with the custom or usage of the math or temple the charity or service for performing which the inam had been made; or (iii) that the math or temple has ceased to exist or the charity or service in question has become impossible of performance. The allegation of the petitioner was that the holders of the inams had failed to perform the services required of them. Cl. (d) (i) of sub-s. (2) says that a party aggrieved by an order of the Collector under cl. (a) may appeal to the District Collector who may after giving notice to the parties concerned and after holding such inquiry as may be prescribed pass an order confirming, modifying or cancelling the order of the Collector. In dismissing the appeals the District Collector gave no reasons for holding that there was no right of appeal in these cases, but it must be assumed that in his opinion there could only be an appeal under the Section from an order of resumption.

If the orders of the Revenue Divisional Officer dismissing the applications were orders under cl. 2 (a) of S. 44-B appeals do lie. In 10 Mad 179[1] a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under S. 503, Civil

---

[1] Venkatasami v. Stridavamma, (1887) 10 Mad 179 (F B).

P. C., 1882, and was appealable under S. 588, clause 24 of that Code. While the Code expressly provided for an appeal against an order appointing a receiver nothing was said about an appeal from an order refusing to appoint one. The corresponding provision of the present Code to S. 503 is O. 40, R. 1, and S. 588 (24) is now embodied in O. 43, R. 1 (s). The decision of the Full Bench was that a negative order was just as much within the Section as an affirmative order and unless there is something in S. 44-B, Madras Hindu Religious Endowments Act, 1926, which prevents its application, the same principle must be applied here. I can see nothing in the Section which prevents the application of the principle. In my opinion, the words "may... pass an order confirming, modifying or cancelling the order of the Collector" are not intended to be confined to an order of resumption. An unqualified right of appeal is given, and if the Collector passes an order dismissing an application the District Collector can confirm it or cancel it and as he has the power to cancel an order refusing to resume an inam, it must follow that he has the power to grant appropriate relief.

For the respondent, the recent decision in App. No. 229 of 1937[2] has been relied on. In that case my learned brother and I held that a suit did not lie to set aside an order of the Hindu Religious Endowments Board refusing to settle a scheme for the administration of the endowments of a temple under S. 63 of the Act. There is nothing in common between S. 63 and S. 44-B. Sub-s. (1) of S. 63 empowers the Board to settle a scheme after inquiring into the question whether a scheme is necessary. Sub-s. (3) gives the Board power to modify or cancel a scheme which it has settled and sub-s. (4) gives the right to an interested party to institute a suit in the Court to modify or set aside an order of the Board modifying or cancelling a scheme. Before the Board can modify or cancel there must, of course, be a scheme and the right of suit only arises when the Board has decided to modify or cancel a scheme which it has settled under sub-s. (1). The wording of S. 63 makes it quite clear that the power of settling a scheme in the first instance vests exclusively in the Board which may refuse to exercise the power. The right of suit is given in order to provide a safeguard against improper modification or cancellation of a scheme already settled by the Board. The decision in App. No. 229 of 1937[2] did not turn on the question whether an order of the Board refusing to settle a scheme under sub-s. (1) was an order under that sub-section. That question did not really arise. The question was with regard to the interpretation of sub-ss. 3 and 4 and it was held that they only gave a right of suit in a case where the Board has modified or cancelled an existing scheme. Holding as I do that the principle in 10 Mad 179[1] is applicable to S. 44-B it follows that I am of opinion that the Collector of Madura ought to have heard the appeals and not have dismissed them on the ground that he had no jurisdiction to entertain them. His order should be quashed and he should be directed to hear and decide the cases according to law. I consider that the petitioner is also entitled to his costs.

Krishnaswami Ayyangar J.—I concur. At first sight it might seem that we are here accepting a construction of the words "an order . . . under cl. (a)" occurring in S. 44-B (2) (d) (i), different to that which we adopted in App. No. 229 of 1937.[2] In that case the Court distinguished the decision of the Full Bench in 10 Mad 179[1] and held in spite of the similarity of the language, that the same, or practically the same, words in S. 63 (4) should receive a different interpretation on account of the special considerations which we held were applicable in the context. As in S. 63 so in S. 44-B (2) the character of the order which the Section authorizes the Collector to make is positive, that is to make an order resuming the whole or any part of an inam of the nature specified in cl. (1). That order he may make on his own motion or on the application of the trustee, the Committee, the Board or any other person having an interest. Before making an order of resumption the Collector has to satisfy himself that one or more of the grounds mentioned in sub-s. 2 (a) are proved to exist. If no such proof is forthcoming, he cannot make the order, and must dismiss the application. The power to dismiss is self-evident, though not expressly mentioned. Cl. (b) makes it obligatory on the Collector to give notice of the inquiry to the trustee, the Committee, or the Board, and also to the inamdar concerned. It is somewhat curious that among the persons to whom notice is to go, mention is not made of an applicant whose right to apply is derived from his interest in the math or temple only. It is difficult to imagine that having taken the trouble to move the Collector he is to drop out and take no part in the inquiry which he himself set on foot. Clause (d) provides a right of appeal to any, that is every party, aggrieved by the order of the Collector under cl. (a). It is plain, that a party may be aggrieved as much by a negative as by a positive order, and unless there is good reason to the contrary, express or implied, both kinds of orders would be comprehended by the word 'under.'

---

[2] Pichu Iyengar v. Ramanuja Jeer Swamigal, *Reported in* (1940) 27 A I R Mad 756 = (1940) 1 M L J 882.

An applicant under S. 44-B comes forward with the case that an inam is being enjoyed by a person whose title to it has become extinguished. If an order of resumption is made, the inamdar may feel aggrieved by the order. On the contrary, if the inquiry results in a negative order, the applicant, or any of the persons specified in the Section, or to whom notice has gone may be dissatisfied with the order, or in other words may be an aggrieved party, and to him a right of appeal is expressly given. I find no difficulty in holding that the District Collector is empowered by cl. (d) (i) to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause under consideration, of sufficient amplitude, but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make. I agree that this case is not governed by the decision in App. No. 229 of 1937[2] which really proceeded on special grounds, which find no place in the present case. Memo of costs will follow.

C.R.K./G.N. *Order quashed.*

A. I. R. 1940 Madras 813

LAKSHMANA RAO J.

In re K. K. Kochu Saheb — Petitioner.

Criminal Revn. Case No. 761 and Petn. No. 724 of 1938, Decided on 25th July 1939, to revise judgment of Court of Session, South Malabar Division at Calicut, in Cr. A. No. 27 of 1938.

Government of India Act (1935), S. 270 (1) — Offence committed by Deputy Inspector of Schools held done in execution of his duty as servant of Crown and consent of Governor held necessary for his prosecution.

A Deputy Inspector of Schools committed an offence of cheating by inducing the District Educational Council to admit certain new school alleged to have been started by the other accused to aid and recognition in the resolution passed by that council. The deception was said to have been practised by giving false information with regard to the location, staff maintenance of registers in that school in applications for aid and recognition signed by the other accused and submitted through the Deputy Inspector and also by the Deputy Inspector by recommending the school for aid and recognition and also by making false averments in his reports. The deception was said to have been practised with a dishonest intent as the object of the Deputy Inspector and the other accused was to make the District Eductional Council to give a grant to the school which they would not grant if they knew the real facts :

Held that the acts constituting the offence were done by the Deputy Inspector in the execution of his duty as a servant of the Crown under S. 270, cl. (1), Government of India Act, 1935. No proceedings could therefore be instituted against him in respect of the acts except with the consent of the Governor of the province. [P 814 C 1]

B. Pocker — *for Petitioner.*

N. Somasundaram and A. S. Sivakaminathan for Public Prosecutor — *for the Crown.*

Facts. — The petitioner, the Deputy Inspector of Schools, Moplah Range, Palghat, and another accused, K. Raman Nayar, alleged to be the Manager of the Ambalapara New Moplah School, were charged for cheating on the allegation that they colluded and conspired together and committed the offence of cheating and the petitioner was alternatively charged of having abetted the other accused in the offence of cheating. The offence of cheating consisted in inducing the Malabar District Educational Council to admit the Ambalapara New Moplah Elementary School alleged to have been started by the other accused on 1st April 1936, to aid and recognition in the resolution passed by that Council. The deception is said to have been practised by giving false information with regard to the location, staff, maintenance of registers in that school in applications for aid and recognition signed by the other accused and submitted through the appellant and also by the appellant by recommending the school for aid and recognition and also by making false averments in his reports. The deception was said to have been practised with a dishonest intent as the object of the appellant and the other accused was to make the District Educational Council to give a grant to the school which they would not grant if they knew the real facts. The other accused, K. Raman Nayar, had absconded and the case was proceeded against the appellant alone and he was convicted under Ss. 417 and 109, I. P. C., by the Joint Magistrate, Malapuram. Against this order of conviction and sentence the appellant preferred an appeal to the Sessions Judge, South Malabar, who confirmed the conviction but reduced the sentence by two months. Against this order of the Sessions Judge, South Malabar, this criminal revision case is filed.

Order.—The petitioner was the Deputy Inspector of Schools, Moplah Range, Palghat and the acts constituting the offence were done by him in the execution of his duty as a servant of the Crown before the relevant date under S. 270, cl. (1), Government of India Act, 1935. No proceedings can therefore be instituted against him in respect of the acts except with the consent of the Governor of the Province of Madras and the present proceedings were not instituted with the consent of the Governor of Madras. The proceedings against the petitioner are therefore quashed, and his conviction and sentence are set aside.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 814

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Chaduragiri Kattari Nagayya Kamarajendra Ramaswami Kamaya Nayakkar — Appellant.

v.

Viralakshmi Ammal and another — Respondents.

Appeals Nos. 302 of 1934 and 9 of 1935, Decided on 23rd November 1938, against decrees of Sub-Judge, Madura, D/- 30th August 1934.

Impartible Estate — Acquisition of properties by holder out of income of zamindari would be separate property of zamindar unless he intended to incorporate it with zamindari.

There is no presumption that when properties are acquired by the holder of an impartible zamindari, he acquires them with a view to incorporate them with the zamindari. When the holder of an impartible zamindari purchases a property, if the acquisition is made out of the funds of the estate, prima facie, it would be property of the zamindari, but if the acquisition was made out of the income of the zamindari, it would prima facie be the separate property of the zamindar unless by express declaration or by acts and circumstances and by necessary implication the intention to incorporate the said property with the zamindari is made manifest. The intention can only be by the holder of the estate and not by a guardian and manager of the property on his behalf. Therefore when a claim is made to certain property on the ground that it was part of an impartible estate, it must be proved on the evidence adduced in the case that it was part of that estate and there is no presumption one way or the other. [P 816 C 1]

K. V. Krishnaswami Iyer, R. Ramasubba Iyer and M. V. Ganapathi — *for Appellant.*

K. Rajah Iyer — *for Respondents.*

Venkataramana Rao J. — These two appeals are from the judgment and decree of the learned Subordinate Judge of Madura giving possession of the suit property known as Bodinaickanur Zamin bungalow in the City of Madura, to plaintiffs 2 and 3. Appeal No. 302 of 1934 is by the defendant; appeal No. 9 of 1935 is by plaintiff 1. The substantial question for determination is whether the suit property forms part of the impartible zamindari of Bodinaickanur and the plaintiff, as the present proprietor of the zamindari, is entitled to it or was it the absolute property of one Kamalammal and on her death, did it devolve on plaintiffs 2 and 3 as her daughter's daughters. The facts necessary for its disposal may be briefly stated. The major portion of the site on which the building stands was purchased by Bangarasami Naicker, a former Zamindar, some time prior to 1870. He died in 1871 and was succeeded by his son, Kamaraju Naicker, who was then a minor. The Court of Wards was in management of the estate on his behalf. During the period of such management, in or about 1874, the Court of Wards purchased a site, adjacent to the site already purchased and constructed the bungalow in question on the entire site at a cost of Rs. 40,000 or Rs. 50,000 and maintained it.

The said Kamaraja Naicker died in or about 1888. On his death, disputes arose as to the succession to the zamindari. The widow Kamalammal claimed to succeed to the zamindari as his widow and also as a legatee under a will alleged to have been left by him. One Kandaswami Naicker claimed to succeed thereto as the paternal uncle's son of Kamaraju Naicker on the ground that the zamindari was joint family property and it devolved on him by lineal primogeniture. He filed a suit O. S. No. 16 of 1889 on the file of the Madura Sub-Court for recovery of possession of the zamindari against Kamalammal. The said suit was compromised by a razinama dated 8th May 1890, on the construction of which the decision in this appeal mainly rests. Under the terms of the said compromise, the zamindari and its appurtenances were to be held and enjoyed by Kamalammal during her lifetime and thereafter by the said Kandaswami Naicker and his heirs. The rest of the property claimed in the suit was to be enjoyed by Kamalammal with absolute powers of alienation. It is the case of plaintiff 1 that the suit bungalow was part of the impartible estate of Bodinaickanur and under the compromise, Kamalammal had only a life-interest therein and thereafter it passed to him. The said compromise was acted on and while Kamalammal was holding the zamindari, one Viswanatha Nayakkar, alleging himself to be the illegitimate son of Kamaraju Naicker, claimed both the zamindari and the separate property of Kamaraju Nayakkar. He filed a suit, O. S. No. 31 of 1902 on the file of the Madura Sub-Court, impleading therein Kamalammal herein and also the defendant herein who is the daughter's son of the said Kamalammal by one Minakshi Ammal. It is the case of plaintiff 1 that by the final decree in the said litigation, passed in A. S. No. 118 of 1906[1] on the file of this Court, it was determined that the suit bungalow was part of the impartible zamindari of Bodinaickanur and therefore, the title of the estate to the suit property is res judicata.

Plaintiff 1 therefore sought to recover possession of the suit bungalow on two grounds: (1) under the compromise in O. S. No. 16 of 1889 and (2) on the basis of the finding in A. S. No. 118 of 1906.[1] There was also an alternative claim in the plaint on behalf of plaintiffs 2 and 3. They are the daughters of one Minakshi who is the daughter of Kamaraju Nayakkar by Kamalammal. Plaintiff 1 has married plaintiff 2 and the defendant is also the son of Minakshi. It was submitted in the plaint that in case plaintiff 1 failed to substantiate his claim to the property and it be found that Kamalammal was entitled thereto, plaintiffs 2 and 3, as her daughter's daughters, are entitled to the property. Minakshi having died, this claim can only be rested on the basis of the compromise in O. S. No. 16 of 1889. The main defence to the suit was that under the said compromise, the property was agreed to be held as the separate property of Kamaraju Nayakkar and on the death of Kamalammal, the defendant was entitled to succeed to the property as his daughter's son. Even assuming that the said property was the absolute property of Kamalammal, the defendant would be entitled to succeed to the suit property after the death of plaintiffs 2 and 3. He also set up a title by gift under an alleged oral gift by Kamalammal in 1920 and a title by prescription.

The learned Subordinate Judge held that the suit property appertained to and formed part of the zamindari of Bodinaickanur and that the title to the estate was also res judicata ; but he held that under the compromise in O. S. No. 16 of 1889, Kamalammal acquired an absolute title to the suit bungalow and therefore on her death it devolved on plaintiffs 2 and 3. The pleas of the defendant in regard to the gift and title by prescription were both negatived. Mr. K. V. Krishnaswami Ayyar on behalf of the defendant urged three contentions before us : (1) The finding of the learned Subordinate Judge that the property forms part of the zamindari of Bodinaickanur and the title of the estate thereto is res judicata is wrong. (2) The defendant is not bound by the compromise in O. S. No. 16 of 1889 on the ground that neither Kamalammal nor Kamaraju Nayakkar had any right to deal with the suit bungalow. (3) The gift in favour of the defendant by Kamalammal ought to have been upheld. Dealing with the first contention, we may remark at the outset that the finding of the learned Subordinate Judge is vitiated by a wrong assumption of fact which is the foundation for his decision on res judicata and by a wrong assumption of law which is the foundation for his decision on the question of fact that the suit bungalow formed part of the zamindari. The assumption of fact is that in the prior litigation in A. S. No. 118 of 1906,[1] the High Court found that the suit bungalow was an appurtenance to the zamindari. The finding of the High Court in regard to the suit bungalow is to the following effect :

> Item 55 of Sch. A (the bungalow in the present suit) the next item claimed by the plaintiff is a bungalow in Madura built by the Court of Wards during the minority of the late zamindar at a cost of Rs. 60,000 on a site inherited by the zamindar and his brother from their father. Respondent 1 (the widow Kamalammal) contends that either the bungalow became the joint property of the two brothers as the site was joint property, or that it was built as a town residence for the zamindar and was intended to pass with the zamindari and that in either view the plaintiff's claim must fail. We agree with this contention.

It will thus be seen that the finding only negatives the claim made by the plaintiff in that suit that the property was the separate property of Kamaraju Nayakkar. The character of the property, viz. whether it is joint property inherited by Kamaraju Nayakkar and his brother or whether it formed part of the impartible zamindari of Bodinaickanur was left open. Therefore, it is not possible to understand on what basis the learned Subordinate Judge could have held that the finding in A. S. No. 118 of 1906[1] is res judicata in this present litigation. The presumption of law which the learned Subordinate Judge lays to himself is to this effect, namely that when properties are acquired by the holder of an impartible zamindari, he acquires them with a view to incorporate them with the zamindari. There is no such presumption and the learned Judge's view is entirely unsound. When the holder of an impartible zamindari purchases a property, if the acquisition is made out of the funds of the estate, prima facie, it would be property of the zamindari, but if the acquisition was made out of the income of the zamindari, it would prima facie be the separate property of the zamindar unless by express declaration or by acts and circumstances and by necessary implication the intention to incorporate the said property with the zamindari is made manifest. The intention can only be by the holder of the estate and not by a guardian and manager of the property on his behalf. Therefore, when a claim is made to certain property on the ground that it was part of an impartible estate, it must be proved on the evidence adduced in the case that it was part of that estate and there is no presumption one way or the other.

---

[1] Viswanathaswami Naiker v. Kamulu Ammal, *Reported in* (1916) 3 A I R Mad 39 = 31 I C 833 = 30 M L J 451.

Now let us see what is the evidence in this case. The facts as found by the learned Subordinate Judge are the following: (1) The site was purchased both by Bangaraswami Nayakkar and also by the Court of Wards. (2) An expenditure of about Rs. 40,000 was incurred by the Court of Wards in building the bungalow. (3) The expenses for the maintenance of the bungalow were incurred by the Court of Wards from and out of the income of the estate and all entries relating thereto were entered in the estate accounts. (4) The zamin business used to be transacted in the bungalow when either Kamaraju Nayakkar or Kamalammal occupied the bungalow.

None of the facts either singly or cumulatively will go to establish that the suit property forms part of the impartible zamindari. There is no evidence in the case to show with what funds the site was purchased by Bangaraswami Nayakkar or by the Court of Wards and with what moneys the cost of the building was defrayed. The zamindari was admittedly yielding an income of one lakh of rupees and it cannot be said that either the purchase of the site could not have been made or the cost of the building could not have been incurred from the income. The onus of proving that the property was purchased or the building was built out of moneys forming part of the corpus of the estate is on the plaintiff and he has not discharged that onus nor has he established that the property was incorporated with the zamindari. It is admitted that till two years before the death of Kamaraju Nayakkar the Court of Wards was in the management of the estate and during the period of their management, no question of incorporation can arise. The fact that entries relating to the maintenance of the bungalow were made in the accounts of the estate cannot be of any avail because the Court of Wards was managing both the zamindari and the self-acquired property of the zamindar. It was suggested the site must have been purchased by Bangaraswami Nayakkar with the intention of having a town residence in Madura and the Court of Wards must have carried out that object. There is absolutely no evidence on record to show that the site was purchased with that intention, and even assuming that there was such an intention, it does not necessarily follow that the zamindar intended to put up a building and incorporate it with the zamindari. Again from the fact that the zamin business was transacted on occasions when the zamindars used to occupy the building, it cannot be inferred that they wanted to use the bungalow for the zamindari office and therefore they intended to incorporate it with the zamindari. We must therefore find that it has not been established by plaintiff 1 that the suit property formed or became part of the impartible zamindari of Bodinaickanur.

* * * *

In the result, App. No. 302 of 1934 is dismissed with costs; App. No. 9 of 1935 is dismissed with costs of respondent 3.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1940 Madras 816

LAKSHMANA RAO J.

In re *Annapurni Ammal* — Petitioner.

Criminal Revn. Case No. 158 and Petn. No. 150 of 1940, Decided on 22nd February 1940, to revise order of Sub-Divisional Magistrate, Vellore, in Cr. A. No. 6 of 1940.

Madras Prohibition Act (10 of 1937), S. 4 (1) (a)—Ignorance of introduction of prohibition is no excuse.

An accused convicted for an offence under S. 4 (1) (a) cannot plead as an excuse that he was ignorant of the introduction of prohibition. [P 817 C 1]

A. Nagarajan and A. Viswanathan — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts.—Petitioner was convicted by the Sub-divisional Magistrate, Vellore, for an offence under S. 4 (1) (a), Madras Prohibition Act, on the allegation that on 21st December 1939 she was found in possession of a bottle of brandy in Katpadi Railway Station. The explanation of the accused was that she was coming from Kolar, where she had purchased the brandy bottle for being used for her sick child on medical advice, that the child had expired before the bottle could be opened and used. Against the conviction and sentence, the revision is filed on the ground that the petitioner had sufficiently accounted for the possession as provided in S. 4 (2) (a) of the Act and also on the ground that she was ignorant of the introduction of prohibition in Vellore.

Order.—The ignorance of the petitioner is no excuse and there is no ground for interference with her conviction under S. 4 (1) (a), Madras Prohibition Act. But the fine is excessive and it is reduced to Rs. 10. Otherwise this petition is dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 817

WADSWORTH J.

Mooriantakath Ammoo — Appellant.

v.

Matathankandy Vatakkayil Pokkan— Respondent.

Appeal No. 88 of 1936, Decided on 25th July 1939, against appellate order of Dist. Court, North Malabar, D/- 12th October 1935.

(a) Civil P. C. (1908), S. 148 — Compromise decree fixing time within which landlord to deposit value of improvement—Tenant to surrender property on aforesaid deposit—Deposit made after expiry of period fixed by decree but within three years of date of decree — Court cannot extend time under S. 148 — Decree held could not be executed by eviction of tenant.

When under a compromise decree, a certain time is fixed for the performance of an obligation under the decree the Court has by virtue of S. 148, no power to vary the terms of the decree by granting an extension of time, and if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature, there is no power in the Court to make a new contract for the parties fixing some other time than that which has been stipulated. [P 818 C 1, 2]

Therefore where a compromise decree in a suit for eviction of a tenant fixes a time within which on deposit by the landlord of a fixed sum for improvements effected by the tenant the latter is to surrender the property and the landlord deposits the amount after the expiry of the period fixed by the decree, he cannot execute the decree by evicting the tenant even though the deposit is made within the statutory period for execution of a decree: *1891 W N Ch 170, Rel. on: A I R 1916 Mad 1006 and A I R 1916 Mad 774, Expl.* [P 819 C 1]

(b) Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 6 — Applicability — Compensation for improvements fixed by decree deposited—Tenant claiming re-valuation—Immediate eviction is not barred.

Section 6 really operates only when the value of improvements is left to be finally determined as on the date of eviction. But any claim of re-valuation by the the tenant does not bar the immediate eviction of the tenant when compensation for improvements at the rate fixed in the decree has been deposited by the landlord. [P 818 C 2]

A. Atchuthan Nambiar—*for Appellant.*

D. A. Krishna Variar and K. Govindan—*for Respondent.*

Judgment.—This appeal is preferred by the decree-holder against the dismissal of his petition for the execution of a compromise decree. The decree is dated 10th December 1931 and it arose out of a suit for the eviction of a tenant under a Malabar marupat. The terms of the compromise decree may be summarized as follows: The amount due from the defendant for arrears of rent was fixed at Rs. 89-3-5, the plaintiff agreeing to relinquish the balance of his claim. The amount settled as due from the plaintiff for the value of improvements was Rs. 325-11-5. It was agreed that on the plaintiff depositing in Court before 31st August 1932 the sum of Rs. 236-8-0 (i. e., Rs. 325-11-5 — Rs. 89-3-5) the defendant should surrender the property and should thereafter up to the date of surrender pay rent at a stipulated rate; any arrears of rent to be adjusted against the amount due for improvements. There was also a term regarding the settlement of a promissory note dispute between the parties. Instead of making the deposit within the nine months allowed by the terms of the compromise decree the plaintiff did nothing until just before the date on which the decree would become barred under the ordinary law of limitation, the deposit being actually made in December 1934. Without any explanation for the delay or any application to extend the time he sought to execute the decree just as if it were an ordinary decree in an eviction suit passed after a full trial. The executing Court held that this was permissible. The lower Appellate Court has dismissed the petition.

It seems to me a self-evident proposition that when there is a decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of one only of the parties, but the consent of both parties to the original agreement would be necessary for its modification. The Court after all is doing nothing more than give judicial force to a contract and there is no basis for the decree other than the contract. It follows that the decree cannot be varied except by consent of the contracting parties. It seems to me that this principle must apply to the terms of contract which fixes a definite period for the performance of an obligation as an essential part of the contract. So much has been recognized in an English case, (1891) W N Ch 170.[1] But two Indian cases have been quoted under the impression that they embody a different principle. The earlier case, 2 M L W 537,[2] related to a compromise according to the terms of which a sum of money was to be deposited in Court, promissory notes which were then in Court were to be cancelled and both these things were to be done within a certain time. The deposit was made within time, but there was some delay in cancelling the promissory notes. The Court held that the provision for the cancellation of the promissory notes was intended merely as a safeguard against fraudulent negotiations. This was in fact prevented by their being in the custody of the Court and therefore the time fixed for the cancellation of the promissory notes must not be regarded as being part of the essence of the contract but a mere penal clause and the Court could relieve against the penalty. The later case, 2 M L W 635,[3] was also a case in which it was held that the Court could relieve against the enforcement of a penal clause in a contract which had been embodied in a decree of Court. Neither of these decisions purports to lay down any general rule that when under a compromise decree a certain time is fixed for the performance of an obligation under the decree the Court has by virtue of S. 148, Civil P. C., power to vary the terms of the decree by granting an extension of time. I am of opinion that the Court has no such power and that if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature, there is no power in the Court to make a new contract for the parties fixing some other time than that which has been stipulated.

Looking at the actual contract embodied in this decree, we find that a very generous time is given to the landlord for the deposit of the value of improvements, that value being fixed at a definite figure without any provision made for it being varied in case the value of the improvements increases before the actual eviction. Any delay on the part of the tenant in surrendering possession is met by the provision that the landlord can adjust the arrears of rent subsequently accruing due towards the amount of his deposit. But there is no corresponding provision for adjustment in case of delay on the part of the landlord resulting in an alteration in the amount due for improvements. It is suggested that the tenant has the right under S. 6, Malabar Compensation for Tenants' Improvements Act, to demand a revaluation as on the date of actual eviction and to recover the excess value. But that amounts to importing into this contract which contemplates a fixed valuation of improvements, a statutory provision which really operates only when the value of improvements is left to be finally determined as on the date of eviction. Moreover, under the prevailing view of this Court any claim of revaluation by the tenant would not bar the immediate eviction of the tenant when compensation at the rate fixed in the decree has been deposited. The position would therefore be that the plaintiff could utilize this compromise for his own purposes, that is to say, he might deposit only the amount originally fixed for improvements less the amount originally fixed as due for arrears as of rent less subsequent rents accrued due, the tenant being left to take proceedings through Court to recover any additional improvements the value of which would be payable owing to the delay on the part of the plaintiff. That is to say the whole idea underlying the compromise whereby the plaintiff should pay a fixed sum and the defendant should forthwith surrender possession is thrown overboard and the plaintiff seeks to execute the compromise so far as it is favourable to himself and to throw the defendant back upon the statutory remedy in order to recover anything additionally due owing to plaintiff's own laches.

---

[1] Australasian Automatic Weighing Machine Co. v. Walter, (1891) W N Ch 170.

[2] Bheema Venkataramana v. Gurappa, (1916) 3 A I R Mad 1006=28 I C 970=2 M L W 537 =28 M L J 488.

[3] Ramayanam Jogamma v. Ramalakshmi, (1916) 3 A I R Mad 774=30 I C 248=2 M L W 635.

It seems to me that having regard to the terms of the compromise fixing the value of improvements at a certain figure and allowing the plaintiff nine months to deposit the value, it must be inferred that the parties contemplated that the deposit must be made within the time fixed and that the defendant is entitled not to be prejudiced by a prolonged delay on the part of the plaintiff. To hold otherwise would amount to making out a fresh agreement between the parties the terms of which would be very largely inconsistent with the original basis upon which the suit was decreed. I find therefore that the date fixed for the plaintiff's deposit was an essential term of the compromise, that the Court has no power to vary it and that the plaintiff not having made the deposit within the time allowed cannot execute the decree. The appeal is therefore dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 819

WADSWORTH J.

Sri Rajah Vatchavaya Venkata Suryanarayana Jagapathiraju Bahadur — Appellant.

v.

Maddukuri Tirupatayya and others — Respondents.

Second Appeal No. 203 of 1938, Decided on 27th April 1939, against decree of Dist. Court, East Godavari at Rajahmundry, in A. S. No. 172 of 1936.

(a) Madras Local Boards Act (14 of 1920), S. 89 — Suit for recovery of cess under S. 89 — Suit falls under S. 77, Madras Estates Land Act — Limitation for suit is governed by Sch. A, Art. 8, Madras Estates Land Act — Limitation Act does not apply.

Where a landholder chooses to exercise the powers conferred upon him under S. 89, Madras Local Boards Act, and files a suit to recover cesses from an under-tenure holder treating him as a ryot under the Madras Estates Land Act by the procedure and in exercise of the powers and subject to the penalties laid down in that Act, then he voluntarily submits himself to the restrictions to the exercise of those powers which the Madras Estates Land Act prescribes. The suit falls under S. 77, Madras Estates Land Act, and limitation is consequently governed by Sch. A, Art. 8, Madras Estates Land Act. Limitation Act does not apply to such a suit: *A I R 1937 Mad 217 (F B), Expl.; C. R. P. No. 1886 of 1932, Held wrongly decided.* [P 820 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 89 — S. 89 does not bar suit against under-tenure holder for cess as rent.

The power conferred under S. 89 includes a power to file a suit against an under-tenure holder for a cess as rent and is not merely confined to the use of the same procedure : *A I R 1932 Mad 410, Rel. on.* [P 820 C 1]

P. Somasundaram — *for Appellant.*

V. Viyanna — *for Respondents.*

Judgment. — This appeal arises out of a suit brought in the Revenue Court by the appellant, a zamindar, to recover cesses paid by him under the Local Boards Act for Faslis 1338 to 1343. The defendants are Darmilla inamdars, that is to say, under-tenure holders within the zamindari. Both the Courts below have held that the plaintiff suing under the Madras Estates Land Act by virtue of the provisions of Ss. 88 and 89, Madras Local Boards Act, is bound by the rule of limitation laid down in the Madras Estates Land Act and cannot claim more than arrears for the three faslis immediately preceding the suit. The relevant provisions of law may be briefly summarized. S. 88, Madras Local Boards Act, gives to the landholder who has paid a cess power to recover from an under-tenure holder within his estate the proportionate amount of cess due on the latter's holding and gives to the under-tenure holder a similar power to recover from the cultivating tenants. S. 89 provides that

> every landholder shall in recovering any amount which may be due to him under the provisos to S. 88 be entitled to exercise the same powers as may, under any Act or Regulation which now is or hereafter may be, in force, be exercised by any landholder in the recovery of rent.

The Explanation to this Section is to the effect that

> a landholder shall, in recovering the amount due to him, under proviso 1 to S. 88 from the intermediate landholder referred to therein, be entitled to exercise the powers and be subject to the penalties specified in this Section, as if the intermediate landholder were a ryot with whom a putta and muchilika had been exchanged and the provisions of the Madras Estates Land Act, 1908, shall, so far as may be, be applicable thereto.

I assume that the word "thereto" refers to the powers and penalties just recited. Now turning to the Madras Estates Land Act, we find that the definition of rent in S. 3 (11) (a) includes any local tax, cess, fee or sum payable by a ryot as such in addition to the rent due in respect of land, etc. Applying to this definition the words of the Explanation to S. 89, it would seem to follow that, since the intermediate landholder is deemed for the purpose of recovering cess to be a ryot under the Madras Estates Land Act when the landholder exercises his powers of proceeding under that statute for the recovery of cesses, the cesses so recovered would for the purpose of that proceeding be included in the definition of rent. The suit therefore will fall under S. 77, Estates Land Act, and for a suit under S. 77, Sch. A to the Act, Art. 8 provides that the suit by the landholder to recover arrears of rent shall be filed within three years of the date when the arrear becomes due. Turning to S. 210, Madras Estates Land Act, we find that subject to the provisions of S. 211 every suit instituted after the period of limitation specified therefor in the schedule to the Act shall be dismissed and S. 211 provides that certain Sections of the Limitation Act shall not apply to suits under the Estates Land Act and that

> subject to the provisions of this chapter the provisions of the Limitation Act shall apply to all suits mentioned in the previous Section.

Reading these Sections together, it seems to follow that a suit for rent under the Madras Estates Land Act must be dismissed in so far as it relates to a claim for an amount falling due more than three years before the date of suit and the provisions of the Limitation Act cannot apply to such a suit for which there is a special provision in the schedule attached to the Estates Land Act. If therefore a landholder chooses to exercise the powers conferred upon him under S. 89, Madras Local Boards Act, and to recover cesses from an under-tenure holder treating him as a ryot under the Madras Estates Land Act by the procedure and in exercise of the powers and subject to the penalties laid down in that Act, then he voluntarily submits himself to the restrictions to the exercise of those powers which the Madras Estates Land Act prescribes. If instead of proceeding by one of the methods prescribed in the Madras Estates Land Act, he chooses to sue in the ordinary Courts, then different considerations will apply.

There is ample authority for the view that the power conferred under S. 89, Local Boards Act, includes a power to file a suit against an under-tenure holder for a cess as rent and is not merely confined to the use of the same procedure : *vide* 55 Mad 646.[1] There is an unreported case, C. R. P. No. 1886 of 1932, in which it was held that by virtue of the amendment to S. 89, Local Boards Act, Civil Courts had no jurisdiction to deal with such a suit. This decision purports to follow 55 Mad 646.[1] But it goes a good deal further than the scope of that decision which does not purport to exclude the jurisdiction of the Civil Courts but merely to include the matter within the jurisdiction of the Revenue Courts.

There is a Full Bench decision reported in I L R (1937) Mad 498,[2] in which it was held that a suit brought by a zamindar to recover cesses under S. 88, Madras Local Boards Act, from an intermediate landholder is governed by Art. 120, Limitation Act. This decision related to a suit filed in the District Munsif's Court and it is certainly authority for the view that the unreported decision just referred to was wrongly decided. But it is not to my mind authority for the view that, when the landholder instead of proceeding in the ordinary Civil Courts as he may do, elects to pursue the remedy through the Revenue Courts by invoking the powers conferred upon him by S. 89, Madras Local Boards Act, of treating the cess due from the under-tenure holder as if it were an arrear of rent due from a ryot, in such a case the law of limitation to be applied would be that prescribed by the Limitation Act. It seems to me apparent that when a landholder purports to exercise powers under the Madras Estates Land Act, extended by the operation of another statute, for the recovery of dues from a person who is not a ryot but may be treated as such for the special purpose, he must exercise these powers subject to the procedure, limitations and restrictions contained in the Madras Estates Land Act. At the conclusion of the arguments I was informed that there is an unreported decision of Venkataramana Rao J. to the contrary effect. I have not had the opportunity of perusing the judgment. But on the materials placed before me the decision of the learned District Judge seems to be clearly right. The appeal is therefore dismissed with costs of respondent 2. Leave to appeal granted.

C.R.K./G.N. *Appeal dismissed.*

---

[1] Bhoopathi Raju v. Subba Rao, (1932) 19 A I R Mad 410 = 141 I C 752 = 55 Mad 646 = 62 M L J 472.

[2] Rajah of Vizianagaram v. Thammanna, (1937) 24 A I R Mad 217=167 I C 490=I L R (1937) Mad 498=(1937) 1 M L J 91 (F B).

A. I. R. 1940 Madras 821

WADSWORTH J.

Syed Sabjumiah Hussain and others — Petitioners.

v.

Kalayigar Abdul Vahab Sab and another — Respondents.

Civil Revn. Petn. No. 174 of 1939, Decided on 22nd April 1940, to revise order of Dist. Court, Kurnool, D/- 2-9-1938.

(a) Court-fees Act (1870), S. 7 (v) (c)—Decision by Appellate Court holding land to be over-valued and determining annual income — No revision lies under Civil P. C., S. 115.

A decision by the Appellate Court holding that the land in suit had been over-valued and determining the annual income from it at a certain figure cannot be canvassed in revision under S. 115, Civil P. C. [P 821 C 2]

(b) Court-fees Act (1870), S. 7 (v) (c) — Under S. 7 (v) (c) Court has no option to consider whether or not net profits for year preceding presentation of plaint are exceptional or unusual.

Section 7 (v) (c) does not give to the Court any option to consider whether or not the net profits for the years preceding the presentation of the plaint are exceptional or unusual. A finding that the profits of the year previous to the filing of the suit can be excluded from consideration because they partake of the nature of a windfall, runs directly contrary to the wording of S. 7 (v) (c). [P 821 C 2]

(c) Civil P. C. (1908), S. 115 — Appellate Court making erroneous decision regarding lower Court's jurisdiction — Question of jurisdiction depending on decision of proper court-fee—Appellate decision is open to revision.

Where an Appellate Court acting in its admitted jurisdiction makes an erroneous decision regarding the jurisdiction of a Court below it and the question of jurisdiction raised expressly depends on a decision as to the proper court-fee, the appellate decision is open to revision by the High Court under S. 115: *A I R 1915 Mad 1223 (F B) and A I R 1929 Mad 396, Rel. on; A I R 1933 Mad 506 and A I R 1939 Mad 380, Disting.* [P 822 C 1]

V. Govindarajachari — *for Petitioners.*

P. Chandra Reddy — *for Respondents.*

Order. — The petitioners in this case were defendants in a suit for possession of 3.85 acres of inam land and two houses situated within a municipality. Of the 3.85 acres of land an extent of 2.35 acres was admittedly leased to the municipality during the year previous to the filing of the suit at an annual rental of Rs. 186 for use as a nightsoil dumping ground. The trial Court valued this portion of the land under S. 7 (v) (c), Court-fees Act, at 15 times the net profits, that is to say at Rs. 2790. The two houses were valued at Rs. 200 and the balance of the land was valued at Rs. 1770. On the basis of this valuation the trial Court held that the suit had been under-valued and that the true value was beyond the jurisdiction of the District Munsif and therefore returned the plaint for re-presentation in the proper Court after paying the deficient court-fee. This decision was the subject of an appeal before the District Judge. The learned District Judge held that the extent of 1·5 acres not occupied by the municipal manure depot had been overvalued and that the annual income from it would be approximately Rs. 75 per acre. This portion of the learned District Judge's decision cannot be canvassed in revision. He also held that the valuation of the houses was correct. With reference to the land occupied by the manure depot he held that the income from the land by reason of this use was in the nature of a windfall in a particular year and could not be taken as the true profit from the land and that in any case a deduction would have to be made on account of loss of value of the land by the removal of top soil when the manure was being carted away. I have gone through the evidence and find nothing whatever to justify the learned District Judge's conclusion that there would be any detriment to the land by reason of the process of storing manure upon it and carting it away. The decision that the profits of the year previous to the filing of the suit can be excluded from consideration because they partake of the nature of a windfall, seems to me to run directly contrary to the wording of S. 7 (v) (c), Court-fees Act, which prescribes

> where net profits have arisen from the land during the year next before the date of presenting the plaint, fifteen times such net profits.

This Section does not give to the Court any option to consider whether or not the net profits for the year preceding the presentation of the plaint are exceptional or unusual. On behalf of the respondents it has been contended on the basis of a decision in 28 All 411[1] that it must be positively proved that the rental amount for this manure depot was actually received during the 365 days preceding the presentation of the plaint. I find from the evidence and from the judgments of the lower Courts that it seems to have been conceded on both sides that this lease amount was paid within the year previous to the filing of the suit. At any rate there is no suggestion that it was not so paid, and it is too late to raise the point now.

---

[1] Ghasi Ram v. Har Gobind, (1906) 28 All 411 =3 A L J 244=1906 A W N 66.

It is, however, contended also that this Court has no power in revision to interfere with a decision in a matter of court-fee which is favourable to the plaintiff and the cases in 65 M L J 25[2] and (1939) 1 M L J 317[3] have been quoted before me. The answer to this contention is that we are not here concerned with the simple question of how much court-fee the plaintiff shall pay. The basic question is whether the District Munsif has jurisdiction to try this suit if it is properly valued. The order which was on appeal before the learned District Judge was one returning the plaint on the ground that the District Munsif had no jurisdiction to try this suit and requiring the plaint to be filed in a superior Court after paying the deficient court-fee. It has been argued that the District Judge certainly had jurisdiction to decide whether or not the plaint was rightly returned and that S. 115, Civil P. C., only empowers the High Court to interfere with a decision of a Court below which has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. The argument is that when an Appellate Court acting in its admitted jurisdiction makes an erroneous decision regarding the jurisdiction of a Court below, there is no ground for interference in revision. This contention runs directly contrary to the decision of a Full Bench of this Court in 39 Mad 195,[4] where Wallis C. J. held that such an order comes within the revisional jurisdiction of the High Court by virtue of S. 115 (c), Civil P. C. This decision has been followed by a Bench of this Court in 56 M L J 394[5] where the question of jurisdiction raised expressly depended on a decision as to the proper court-fee. It is needless to say that there are strong practical grounds for interfering to prevent the trial of a case by a Court which has no jurisdiction, when an Appellate Court has wrongly directed this Court to assume a jurisdiction which it has not got. In the result therefore I allow the revision petition with costs and hold that the proper valuation of the suit should be on a value of Rs. 3575 made up as set forth in the revision petition and that the trial Court's order returning the plaint for presentation in a Court having jurisdiction after paying the proper court-fee thereon is correct, subject to the alteration in the valuation of the suit hereby indicated.

C.R.K./G.N. *Petition allowed.*

---

[2] Secy. of State v. Raghunathan, (1933) 20 A I R Mad 506=144 I C 516=56 Mad 744 = 65 M L J 25.

[3] Manaithunainatha Desikar v. Gopala Chettiar, (1939) 26 A I R Mad 380=186 I C 153=(1939) 1 M L J 317.

[4] Atchayya v. Venkata Seetharama Chandra Rao, (1915) 2 A I R Mad 1223=18 I C 555=39 Mad 195=24 M L J 112 (F B).

[5] Kattiya Pillai v. Ramaswamia Pillai, (1929) 16 A I R Mad 396=119 I C 35=56 M L J 394.

A. I. R. 1940 Madras 822

LAKSHMANA RAO J.

In re Kollapalle Subramanyam
Petitioner.

Criminal Revn. Cases Nos. 740 and 741 and Petns. Nos. 697 and 698 of 1939, Decided on 16th November 1939, to revise order of Joint Magistrate of Ongole, D/- 28th June 1939.

Penal Code (1860), S. 486—Parcel of beedies consigned by *A* to *B*—Forwarding note bearing *A's* signature—Counterfeit trade-mark detected at place of delivery — *A* held could not be convicted under S. 486.

A parcel of beedies was consigned by *A* to *B*. The forwarding note bore *A's* signature. The counterfeit trade-mark was detected at the place of delivery when *B* was claiming delivery:

Held that the signature of *A* in the forwarding note did not necessarily prove that he was in possession of the goods. Hence he could not be convicted under S. 486. [P 823 C 1]

A. S. Sivakaminathan — *for Petitioner.*

K. Venkataraghavachariar for Public Prosecutor — *for the Crown.*

Facts.—The petitioner A-1 and another A-2 were charged for being in possession of goods with counterfeit trade-mark, the offence being that the petitioner consigned a parcel of beedies to A-2 and the forwarding note bore his signature. At the time of A-2 claiming delivery at the destination station the counterfeit trade-mark was detected and the goods were detained and the accused were charged under S. 486, I. P. C. The Sub-Magistrate convicted and sentenced both of them as being the owners of the goods. On appeal the lower Appellate Court acquitted A-2 on the ground that he not having taken delivery he was not in possession of the goods and there was no offence committed by him under S. 486, I. P. C., but confirmed the conviction of A-1, the petitioner, on the ground that he was in possession of the goods because he had signed the forwarding note when he consigned the goods and possession by the railway was on his behalf as his servant.

Against this conviction A-1, the petitioner, has preferred this revision petition.

Order.—The signature of the petitioner in the forwarding note does not necessarily prove that he was in possession of the goods and his conviction under S. 486, I. P. C., cannot be sustained. It is therefore set aside and the fine if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1940 Madras 823

KING J.

C. Thiruvengada Mudaliar—Appellant.

v.

M. Rajabadar Mudaliar and others—Respondents.

City Civil Court Appeals Nos. 54 and 55 of 1938, Decided on 2nd April 1940, against decrees of City Civil Court, Madras, in O. S. Nos. 1095 and 1130 of 1935, respectively.

(a) Religious Endowments Act (1863), Ss. 6 and 14—Trustee can be dismissed only on good and sufficient grounds—Mere disobedience by trustee of Committee's order directing his co-trustee to take joint charge is not sufficient reason for his dismissal.

The status of a trustee is not that of a servant and he can be dismissed only on good and sufficient grounds and after an enquiry into the facts, and a dismissal which is not so justified may be set aside by the Courts of law. Mere disobedience by trustee of Committee's orders in the matter of his colleague's taking over charge is not sufficient reason for his dismissal: *21 Mad 179, Foll.* [P 824 C 1, 2]

(b) Religious Endowments Act (1863), S. 4—Temporary appointment of trustee is not invalid.

The Act does not lay down that the appointment of trustee must be for life. Hence, a temporary appointment of trustee for some years is not invalid: *Case law referred.* [P 825 C 2]

V. Ganapathy Aiyar and A. Venkatasubba Mudaliar — *for Appellant.*

T. R. Srinivasa Ayyangar, S. G. Rangaramanujam and T. Pattabhirama Iyer — *for Respondents.*

Judgment.—These appeals are concerned with the affairs of the Sri Thiruvateeswarar Devasthanam in Madras. It is common ground that it has been the usual custom for two trustees or Dharmakarthas to be in joint management of those affairs. They are appointed under Act 20 of 1863 by the Madras Hindu Devasthanam Committee, and are subject to whatever control is given to the Committee by that Act. Appellant was thus appointed in 1929. In 1934 the appellant's colleague died, and his vacancy was finally filled up by the appointment of one M. N. Rajabathar Mudaliar (hereinafter to be referred to as respondent 2) on 18th November 1935, the appointment being expressly limited to a period of three years. On 27th November respondent 2 informed appellant that he proposed to take charge of his office at the temple the next morning. Appellant refused however to recognize the validity of respondent 2's appointment on the ground that a trustee could be appointed only for life and so did not permit respondent 2 to assume joint charge with him. After waiting some days respondent 2 on 4th December affixed his own lock and seal to the temple office. On 5th December appellant filed the first of his two suits (1095 of 1935) in the City Civil Court. In that suit he prayed for a declaration that respondent 2 was not a lawfully appointed trustee, and an injunction to restrain him from interfering with appellant's management. An interim injunction was granted, but was revoked on 12th December.

Meanwhile, on 9th December, a notice was sent by the Honorary Joint Secretaries of the Committee to appellant informing him that an urgent meeting of the committee would be held on the 11th to consider his conduct in disobeying the Committee's orders to give joint charge of the temple management to respondent 2, and calling upon him to attend that meeting if he wished to show cause against the proposal to remove him from his office. Appellant sent a lawyer's notice protesting against the Committee's actions and procedure, and refused to attend the meeting. The meeting was held, and the five members who attended it (out of a total strength of fourteen) unanimously resolved to dismiss the appellant. Appellant thereupon filed his second suit (1130 of 1935) in which he prayed for a declaration that his dismissal was illegal, and that he was therefore entitled to continue in office, and for an injunction restraining the Committee and respondent 2 from interfering with his possession and management. The two suits were tried together by the learned City Civil Judge and were both dismissed. These are appeals against the decrees in the two suits. There are three questions for determination in these appeals: (i) What are the powers of the Committee in the matter of the dismissal of a trustee? Can it dismiss him at its own pleasure, or must a dismissal be only for good and sufficient cause? (ii) If the latter, did such good and sufficient cause exist? and (iii) Has the Committee power to appoint respondent 2 (or any other trustee) for a limited period?

The learned City Civil Judge held that there must be good and sufficient cause; that the conduct of appellant afforded that good and sufficient cause; and that the appointment of respondent 2 for three years was within the Committee's powers. The learned advocate for the respondents attempted to argue that a trustee is a mere servant of the Committee who can be dismissed at the Committee's will and pleasure, and cited 61 Cal 80[1] in support of this proposition. It is however too late in the day for any such argument to be upheld by a Judge sitting singly in Madras. Ever since 21 Mad 179[2] it has been uniformly held by a long series of decisions in this Court that the status of a trustee is not that of a servant, that he can be dismissed only on good and sufficient grounds and after an enquiry into the facts, and that a dismissal which is not so justified may be set aside by the Courts of law. I am bound by these decisions and must agree with the learned City Civil Judge in finding for the appellant on this point.

The second point now therefore arises. It must be stated at the outset that the sole reason pleaded by the Committee for the dismissal of the appellant was his disobedience of its orders in the matter of respondent 2's taking over charge and that in the arguments before me on this question it was very properly conceded by respondents' learned advocate that the dismissal must stand or fall according to whether that reason is found sufficient or not. The question has, however, been somewhat complicated by the admission during the trial of evidence on the general conduct of the appellant as a trustee — even though that evidence was confined to the cross-examination of appellant himself—and there certainly appear from appellant's own admissions plausible grounds for the view that he has been inefficient and negligent in his care of the temple property. This evidence, it seems to me, is irrelevant except in so far as it bears upon appellant's motive in disobeying the Committee's orders, and it is significant that the learned City Civil Judge does not specifically accept the Contention of the respondents that appellant's purpose was to remain as long as possible in sole charge of the temple. It is also unfortunate for the appellant that he should have thought fit in the circumstances of the present case to have exasperated the Committee by action which I can only characterize as misguided and unnecessary.

Appellant had no personal complaint to make against the Committee's choice and *ex hypothesi* was willing to be associated with respondent 2 in the management of the temple for the rest of their lives. He was evidently determined to bring the question of the validity of respondent 2's appointment before the Civil Court and it could not have prejudiced that case for him to have made a dignified protest and accepted respondent 2 as his colleague for the time being. But when all this has been said I am unable to hold that mere disobedience in the circumstances of this case will justify dismissal. It does not, I think, fall within the grounds set out in S. 14 of the Act. A careful perusal of the correspondence in this case will show that appellant's principal motive was to make a formal protest against the terms of respondent 2's appointment and he may well have thought that the interest of logic and consistency required the extension of that protest to the refusal to permit respondent 2 to assume charge. Nor do I think he acted from any unworthy motive to continue for his own private ends as sole trustee unhampered and unchecked by the surveillance of any colleague. Appellant filed his suit with commendable promptitude, and by asking for a temporary injunction made it certain that the Court itself would provide an urgent solution for the immediate deadlock. In these circumstances, whether appellant's objection to the terms of respondent 2's appointment be one which the law will uphold or not, I hold that his action was not mala fide, and that it does not afford good and sufficient cause for his dismissal. Appeal No. 55 will therefore be in part allowed, and appellant given a declaration that his dismissal was wrongful and that he is entitled to continue in office. He cannot, however, have any injunction restraining the respondents in general terms from 'interference' with his possession and management.

There now remains the third question which is the subject-matter of Appeal No. 54. In support of his contention that an appointment of any trustee for only three years in the case of this temple is invalid,

---

1. Ghulam Hussain Shah v. Altaf Hussain, (1934) 21 A I R Cal 328=149 I C 1215=61 Cal 80=38 C W N 214=58 C L J 333.
2. Seshadri Ayyangar v. Nataraja Iyer, (1898) 21 Mad 179.

appellant's learned advocate is unable to point to any provision in the Act itself but he argues that that proposition must necessarily follow from a study of some of the decided cases. In this, as I shall show, I am unable to agree with him. 21 Mad 179[2] is a case which is concerned with the validity of an order of suspension. It was no doubt necessary in that case to consider what powers of dismissal a Committee possessed and under what restrictions they should be exercised, but it was not necessary to consider its powers of appointment. The learned Chief Justice certainly does say on p. 220 that a trustee holds his office 'permanently' but that word must, I think, be read in its context and be contrasted not with a definite limited period, but with a period which can be arbitrarily terminated by dismissal. The next case is 29 Mad 534,[3] which deals with the appointment of two temporary additional trustees to the Srirangam Temple. That appointment was held invalid on two grounds, (i) because it radically altered a scheme settled by the Board of Revenue for the temple in 1842, and (ii) because it was 'altogether temporary' and to permit such appointments would give the Committee a control over the management inconsistent with the policy of the Act.

The first ground does not apply to the present case. There is here no concrete scheme, and as the learned City Civil Judge has pointed out, no sufficient proof of a custom so rigid that it compels the appointment of a trustee for the rest of his life. Neither appellant nor respondent 2 had any vested right (such as existed in Srirangam in members of certain families) to be appointed at all, and unless the Act lays it down that an appointment must be for life I cannot see that either of them can object to a limited term. It is not without significance in this case that respondent 2 does not so object. The second ground is more to the point, but it must be remembered that the appointments in Srirangam were interim and provisional rather than for a definite term, and the distinction between the two kinds of appointment is an important one. 39 Mad 700,[4] the next case, continues the history of the Srirangam Temple. It was there held that though the Committee had no power to modify the 1842 scheme, the Court had such power under S. 92, Civil P. C., and it is interesting to observe that in framing the new scheme the Court provided for the appointment of additional trustees to hold office for five years only. Finally, of the Madras authorities, comes, 13 M L W 153.[5] There the validity of the appointment of temple trustees came up for consideration, though a final adjudication on that question was not necessary. Sir John Wallis C. J. held that such appointments were legally permissible and Sadasiva Ayyar J. agreed to the extent that Committees might make temporary appointments in certain emergencies or exceptional cases.

This analysis of the Madras cases shows (i) that no case is precisely in point, and (ii) that the latest pronouncement is that a 'temporary' appointment (if that word can be held to apply to the present case) cannot be held to be void in all circumstances. I do not consider therefore that the Madras authorities compel me to hold that the appointment of respondent 2 was invalid. On the other hand, 61 Cal 80[1] is a direct authority on this point to the contrary. Appeal No. 54 accordingly fails and is dismissed. There will be order for costs throughout in either appeal.

C.R.K./D.S. *Order accordingly.*

---

[3] Ganapathi Iyer v. Vedavyasa Alasinga Bhattar, (1906) 29 Mad 534=16 M L J 435.

[4] Seetharama Chetty v. Subramania Iyer, (1917) 4 A I R Mad 551=32 I C 211=39 Mad 700=30 M L J 29.

[5] Govindaraja Mudaliar v. Sabapathi Mudaliar, (1921) 8 A I R Mad 114 = 61 I C 783 = 13 M L W 153.

A. I. R. 1940 Madras 825

HORWILL J.

Vennavilli Lakshminarasimha Rao — Petitioner.

v.

Garapati Muneyya — Respondent.

Civil Revn. Petn. No. 88 of 1939, Decided on 24th October 1939, to revise order of Dist. Munsif, Kovvur, D/- 14th December 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 20—Sale in execution of money decree confirmed — Execution does not terminate until delivery of property to purchaser — S. 20 can be applied to stay delivery proceedings.

The terms of S. 20 are wide enough to cover a case where after confirmation of a sale in execution of a simple money decree an application for the delivery of the property is pending. Where the property purchased by the decree-holder at a sale in execution of his money decree has not been delivered to him, execution is not at an end and S. 20 can therefore be applied to stay a delivery proceeding. [P 826 C 1]

K. Ramamurthy and K. Someswara Rao — *for Petitioner.*

N. Bapiraju — *for Respondent.*

Order. — This is a petition against the order of the District Munsif of Kovvur dismissing an application under S. 20 of Madras Act 4 of 1938 praying for stay of delivery of property in execution of a decree. A simple money decree had been passed against the petitioner ; and in execution of that decree certain property of his was brought to sale and the sale was confirmed. A petition was put in for delivery of the property ; and at the time when this application under S. 20 was made no orders had been passed on the delivery petition. The District Munsif, without giving any reasons for his opinion, stated that no execution petition was pending and dismissed the petition. There would be a very serious hiatus in Madras Act 4 of 1938 if there was no provision to stay delivery pending an application under Ss. 19 and 23 of the Act ; but I am satisfied that no such hiatus exists. The terms of S. 20 are wide enough to cover a case of this sort. Delivery of property is the most important stage of execution, and merely because full satisfaction has been entered up, it does not mean that execution is at an end. If the property purchased by the decree-holder has not been delivered to him, then execution is not at an end and S. 20 can therefore be applied to stay a delivery proceeding. Some question has been raised whether in fact the petitioner has put in an application under S. 23 and whether, in case he has not, his proceedings under S. 19 would be infructuous. That question however does not arise at this stage, and the original petition under S. 19 asking the Court to stay the decree and set aside the sale and an amendment petition to make it clear that the application was also under S. 23 are still before the lower Court, and I do not wish to express any opinion on their merits. The petition is therefore allowed and the interim order of stay passed at the time of admission made absolute pending disposal of the petitions in the Court below. The respondent will bear the costs of the petitioner in this Court.

C.R.K./G.N. *Petition allowed.*

---

* A. I. R. 1940 Madras 826

WADSWORTH J.

V. S. A. R. M. Annamalai Chettiar

v.

Vellayan Chettiar and others.

Civil Revn. Petn. No. 197 of 1937, Decided on 29th March 1940, to revise order of Sub-Judge, Devakottai, D/- 14-4-1936.

*** Civil P. C. (1908), S. 73—*A*, *B* and *C* obtaining decrees against son and insolvent father —Court permitting Official Receiver in execution of *A*'s decree to sell entire property within certain time and to pay son's share into Court —Official Receiver selling property but paying son's share of sale proceeds into Court after execution petitions by *B* and *C* — *B* and *C* held entitled to rateable distribution.**

A, *B* and *C* had obtained decrees against *D* and his father *E* who became insolvent. *A* applied for execution of his decree and the Court permitted the Official Receiver to sell the entire property within certain time and deposit into the Court the share of the non-insolvent son *D*. The Official Receiver after the expiration of the time within which he was allowed to sell, sold the property. *B* and *C* then applied for execution of their decrees. Subsequently the Official Receiver paid into the Court the son's share of the sale proceeds. *B* and *C* applied for rateable distribution :

Held that the receipt by the Official Receiver in contravention of the rules under which he should have been operating, could not, by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court. It could not be said that there had been, at the time when these two execution petitions of *B* and *C* were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sale by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. Hence the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. *B* and *C* were therefore entitled to rateable distribution : *A I R 1917 Cal 740, Expl.* [P 827 C 2; P 828 C 1]

R. Rangaswamy Iyengar — *for Petitioner.*

K. Rajah Ayyar — *for Respondents.*

Order.—This petition raises a question relating to rateable distribution which is not, so far as I am aware, covered by any precise authority. The petitioner, respondent 1 and respondent 2, all had decrees against respondent 3 and his father who became an insolvent. Respondent 1 executed his decree on 15th October 1934 and on 5th January 1935 the Court ordered sale of the entire properties of the father and the son. This order was modified by a later order restricting the sale only to defendant 2's half share and after this order, the Official Receiver was impleaded and when he did not appear, the order was again revised directing that the entire properties should be sold. At this stage the Official Receiver wrote to the Court pointing out that if he were permitted to sell the entire property as the agent of the Court and deposit into Court the share of the non-insolvent son, this procedure would be for the benefit of the attaching decree-holder. The Court on 13th February 1935 passed an order permitting the Official

Receiver to sell the entire property as desired by him and directing him to hold the sale within three months. The Official Receiver did not hold the sale within the time allowed and the executing Court was approached to withdraw the sale from the Official Receiver and sell through the Court. While correspondence between the Court and the Official Receiver was proceeding with reference to this proposal, the Official Receiver actually sold the property on 28th October 1935, the price being received by the Official Receiver in two instalments, on 29th October 1935 and 7th November 1935. It is common ground that on the latter date the execution petitions of the petitioner and respondent 2 had not yet been filed. The petitioner's execution petition was filed on 30th November 1935 and that of respondent 2 on 20th December 1935. After the Official Receiver's sale was concluded, there was further correspondence and no sale deed was drawn up until on 30th March 1936, the Official Receiver paid the son's share of the sale proceeds into Court and on 8th April 1936 the sale was finally ratified by the Court.

Quite clearly, if the date of the payment of the sale proceeds to the Official Receiver is the date of the receipt of the assets by the Court, for the purpose of S. 73, Civil P. C., the petitioner and respondent 2 have no right to share rateably in these assets. If, on the other hand, the date of the receipt is the date when the money was actually paid by the Official Receiver into Court, then both the petitioner and respondent 2 are entitled to rateable distribution. The learned Subordinate Judge has taken the view that the date of the receipt of the assets is the date of the receipt by the Official Receiver acting as the agent of the Court. He rests his view largely on the decision in 44 Cal 789[1] which can hardly be said to be a case exactly covering the facts with which we now have to deal. That was a case of the sale of moveable property by the Court and with reference to moveable property the rules prescribe that the price of each lot shall be paid at the time of the sale, presumably to the officer who holds the sale. The learned Judges, distinguishing a case relating to immovable property, point out that if the entire purchase money was paid by the purchasers into the hands of the auctioneers in one instalment, it was immaterial for the purpose of S. 73 whether the purchase money was actually paid into the treasury or into the hands of the person employed by the Court to hold the sale.

The present case however presents certain special features. At the time when the Official Receiver held this sale, he was not authorized to hold it. He had failed to hold it within the time allowed and when he actually held the sale, the Court had apparently decided to withdraw from him the power to hold the sale. Presumably, he must be regarded as having been appointed in the first instance as the selling officer under O. 21, R. 65. But it does not appear that there was any regular proclamation by the Court, though the value for the purpose of the proclamation had been settled at an earlier stage. Assuming that the Official Receiver was the selling officer appointed by the Court under R. 65, his proceedings would necessarily be governed by the provisions of O. 21. In accordance with those provisions he would have authority to receive a deposit of 25 per cent. of the purchase price, but the balance would under R. 85 be payable into Court. Assuming that the lack of authority of the Official Receiver to sell at the time of the sale and the lack of regularity in the manner of the sale have been condoned by the subsequent ratification of the Court and by the absence of any objection to the irregularities of the procedure, it seems to me difficult to hold that the Official Receiver was the agent of the Court to receive this money when, in the case of sales of immovable property, the rules under which the Official Receiver was authorized contemplate only the power of the officer to receive 25 per cent. of the purchase price, the balance being payable into Court. When there is clearly no authority given to the agent to receive the full amount of the purchase price, I find difficulty in holding that the receipt by the agent in contravention of the rules under which he should have been operating, can, by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court; and there is the further difficulty that the adoption of such a view would deprive the other decree-holders of their accrued rights of sharing in any assets which might be received by the Court after the date on which their execution petitions were filed.

It cannot, in my opinion, be said that there had been, at the time when these two execution petitions were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sale by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from this sale and there was at the time when these execution petitions were filed no subsisting authority to the Official Receiver to sell. We are not now concerned with the final validity of the sale. That has been accepted by the Court and no one has objected. But it does seem to me apparent that this subsequent ratification by the Court cannot transmute the unauthorized receipt of this money by the Official Receiver into a receipt by the Court. My attention has been drawn to numerous cases relating to the receipt of assets by Collectors executing decrees under Sch. 3, Civil P. C. I do not propose to discuss those cases, for it seems to me that they depend upon the special statutory provisions which give to the Collector functions to some extent analogous to those of executing Courts and have no real bearing on the facts of the present case. It is clear that the Official Receiver in this case must have been either the officer appointed by the Court to sell under R. 65, or a party selling with the permission of the Court under R. 83, if the sale is to have any validity so far as the son's share was concerned. In the Court below it was not suggested that he acted under R. 83 and it seems to me unnecessary to consider the case from this aspect.

---

[1] Galstaun v. Woomesh Chandra Banerjee, (1917) 4 A I R Cal 740=35 I C 850=44 Cal 789=25 C L J 308.

In the result therefore I am of opinion that the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The petition is therefore allowed with costs here and in the Court below. The petitioner and respondent 2 will be entitled to share rateably in the proceeds of the sale of respondent 3's share in the property.

C.R.K./D.S. *Petition allowed.*

---

* A. I. R. 1940 Madras 828

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Alapati Anandarao and others

v.

President Co-operative Credit Society, Pedatadepalli and others.

Appeal No. 334 of 1937, Decided on 10th April 1940.

*** Hindu Law—Debts—Father—Father lawfully receiving money but subsequently misappropriating it—Liability is civil for which son would be liable under pious obligation rule.**

Where a father has lawfully received money the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt : *Case law referred ; A I R 1934 P C 238 (P C), Expl.* [P 829 C 1, 2]

V. Suryanarayana — *for Appellants.*

A. Lakshmayya and M. Sriramamurthy — *for Respondents.*

Leach C. J. — The appellants are the sons of respondent 4 and are all minors. They filed a suit through their maternal grandfather as their next friend in the Court of the Subordinate Judge of Ellore for partition of the family properties and the setting aside of certain alienations made by their father. They attached to their plaint three schedules. Sch. A contained the descriptions of ten items of immovable property belonging to the family. Sch. B was a list of the family's moveable properties, and Sch. C a list of the debts owed by the family. Of the immovable properties items 1 to 9 had been mortgaged by their father and item 10 had been sold. These alienations were said to be invalid so far as the interests of the appellants were concerned and it also was alleged that some of the debts were not binding on them. The mortgage of items 1 to 9 was in favour of the Co-operative Credit Society of Pedatadepalli, which is represented by its President, respondent 1. The appellant's father had been employed as Secretary of the Society and it was his duty to collect moneys from its debtors. Out of his collections he misappropriated amounts totalling Rs. 8073-4-8. As security for Rs. 5490-4-8 he executed a mortgage of items 1 to 9 in Sch. A and for the balance of Rs. 2583 he gave a letter acknowledging his liability. Item 10 was sold by the father to respondent 2 who has transferred his interest in the property to respondent 3. The respondent society averred that all the immovable properties were the self-acquired properties of the father. After considering the evidence adduced by the parties, the Subordinate Judge found that items 1 and 9, half of item 2 and a quarter of item 10 represented ancestral properties, the rest being the separate estate of the father.

The Subordinate Judge also held that the interests of the appellants in the ancestral properties were liable for the debts of the father to the respondent society. The finding of the Subordinate Judge that items 1 and 9, half of item 2 and a quarter of item 10 formed the ancestral properties is accepted by all the parties. The appellants, however, say that the Subordinate Judge erred in holding that the other properties belonged to their father separately. They further say that the Subordinate Judge erred in holding that their interests in the ancestral properties are liable for their father's debts. These are the only two questions which arise in this appeal. The finding of the Subordinate Judge with regard to the father's separate properties is not really open to serious question. When the father separated from his brothers about the year 1916 his share in the family estate was confined to the properties which the Subordinate Judge has held to be ancestral properties and the income merely sufficed to maintain himself and his wife. The evidence of the father's own brother establishes this. The father, however, held the office of village karnam and was in receipt of its emoluments. He also entered into contracts for the construction of works for Local Boards and acted as a schoolmaster. The non-ancestral properties could only have been acquired out of the income he received from these occupations. We have no hesitation in concurring in the finding of the Subordinate Judge on this question. The alienations of items 3 to 8, half of item 2 and three-quarters of item 10 therefore cannot be challenged.

The contention of the appellants, with regard to the finding of the Subordinate Judge, that their shares in the ancestral properties are liable for their father's debts, is this. Inasmuch as their father misappropriated moneys of the respondent society he committed a crime and in these circumstances they say that the resultant debt is not binding on them. This argument ignores a long line of decisions of this Court to the contrary. This Court has always held that where a father has lawfully received money the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt : *see* 16 Mad 99,[1] 31 Mad 161,[2] 19 M L J 759,[3] 37 Mad 458,[4] 9 M L W 1,[5] 44 Mad 214[6] and 21 M L W 606.[7]

In 27 Mad 71[8] White C. J. and Subramania Aiyer J. held that the sons of a Hindu father who had committed criminal breach of trust were not liable for the father's debt. The father was a cashier and he took out of his employer's cash box, which was in the employer's custody, moneys for his own purposes. This was not a case of lawful receipt of money. The act of taking the money out of the cash box constituted an offence. There was here no antecedent civil liability and the decision in 16 Mad 99[1] was distinguished on this ground. In 31 Mad 472[9] White C. J., sitting with Wallis J., delivered a judgment which at first sight suggests that where a father has made himself amenable to the criminal law the pious obligation rule cannot apply even when a criminal liability arises subsequent to a civil liability, but it is to be doubted whether the learned Judges there intended to depart from the rule laid down in the other cases which I have cited. I agree with the remarks of Venkatasubba Rao J. in 21 M L W 606,[7] where he said with reference to the decisions of this Court :

> It cannot be gainsaid that there is absolute want of harmony, so far as the decisions were made to rest upon particular grounds. But if the facts of the cases are examined, the conflict is only apparent and the true principle appears to be that the sons are not liable, where the moneys were originally obtained by the father by the commission of an offence; the son's liability is, on the other hand, recognized where, in its origin, the debt was not immoral, but there was a supervening dishonest act of the father.

That I regard as being not only an accurate summary of the decisions of this Court, but as correctly stating the law. Mr. Soma-

---

1. Natasayyan v. Ponnusami, (1893) 16 Mad 99 =3 M L J 1.
2. Kanemar Venkappayya v. Krishnacharla, (1908) 31 Mad 161=17 M L J 613.
3. Thirumalayappa Mudaliar v. Veerabhadra, (1909) 19 M L J 759=4 I C 1090.
4. Venugopala Naidu v. Ramanadhan Chetty, (1914) 1 AIR Mad 654=14 I C 705 = 37 Mad 458=23 M L J 61.
5. Sanyasayya v. Muthamma, (1919) 6 AIR Mad 943=48 I C 740=35 M L J 661=9 M L W 1.
6. Venkatacharyulu v. Mohana Panda, (1921) 8 A I R Mad 407=61 I C 530=44 Mad 214=39 M L J 586.
7. Ramasubramania Pillai v. Sivakami Ammal, (1925) 12 A I R Mad 841 = 90 I C 165 = 21 M L W 606.
8. McDowell & Co. v. Raghava Chetty, (1904) 27 Mad 71.
9. Gurunathan Chetty v. Raghavalu Chetti, (1908) 31 Mad 472=8 Cr L J 147.

sundaram has however contended that the decision of the Privy Council in 56 All 548[10] has in effect overruled the decisions of this Court. An examination of the judgment does not support this contention. In fact it shows that the Judicial Committee left this Court's decision untouched. In that case the Hindu Secretary of a School Committee was in charge of a fund deposited at a bank and was authorized to draw upon it only for specific purposes connected with the school. He drew on it for his own purposes and thereby committed criminal breach of trust. The Privy Council held that as the father had committed a crime the sons were not responsible for the resultant loss. Lord Blanesburgh delivering the judgment of the Board expressly pointed out that until the moment of the withdrawal from the fund the father had been guilty of no breach of duty, civil or otherwise, and later observed:

> In view of the powers and duties prescribed for Dhianpal, (the father) in relation to the Rupees 62,000 there was as their Lordships have already shown, in relation to the moneys misappropriated by him, no antecedent duty in respect of which any similar liability was either created or survived.

This judgment in effect accords approval to the decision of this Court in 27 Mad 71,[8] but leaves entirely unaffected the line of cases which say that the sons are liable where there was lawful receipt of money and subsequent misappropriation. In this case the father had received moneys lawfully on behalf of the Society and the fact that he had at a later stage used them for his own purposes does not alter the liability of the sons. The appeal fails and will be dismissed with costs, one set to be divided among respondents 1, 3 and 6 according to the values of their respective claims. As the appeal was filed in forma pauperis the appellants will pay the court-fee due to Government.

Krishnaswami Ayyangar J. — I entirely agree, but I shall, however, add a few words expressing the result of the decisions of this Court on the question argued before us. That the sons are bound by reason of their pious obligation to discharge a debt arising out of a civil liability of their father is well settled. The application of this principle is beset with difficulty in cases where the father receives or retains money with a duty to apply it for the benefit of a third party but omits so to apply it. Where the original taking or the receipt of the money amounted in itself to a criminal offence the sons are not bound. The reason is quite plain and easily understood. A liability resulting through the commission of a crime is necessarily a tainted liability in its origin. Such would be the case where as in 27 Mad 71[8] the cashier took for his own purposes money out of the cash chest of his employer and in the Privy Council decision in 56 All 548,[10] where the secretary after having properly lodged the money in the bank drew it out for his own purposes. The position will be different where the father is guilty of no misconduct or crime in receiving or withdrawing the money in the first instance though he might be civilly liable to account for it. The civil liability will attach the moment the money is received without any impropriety, and with it will also attach the liability of the sons to relieve the father from the burden of the debt. The pious obligation which thus springs into existence simultaneously with the receipt or withdrawal, subsists, so long as the debt itself subsists. Once the liability is thus established it is irrelevant to consider whether the money received or retained by the father lawfully in the first instance was subsequently misappropriated by him. The subsequent misconduct of the father will not be allowed to prejudice the rights already accrued in favour of the third parties on the receipt of their money by the father.

This distinction runs through all the decisions of this Court and it is quite apparent that it rests on a logical, intelligible basis. I can see little reason for considering that any doubt has been cast on the rationale of the decisions of this Court by anything said by the Privy Council in 56 All 548.[10] It will be found on an examination of the case that their Lordships considered that the case fell within the class of cases where the original taking or withdrawal itself amounted to an offence. Referring to the conduct of the father in that case in withdrawing the money from the Bank and misappropriating it, their Lordships observed :

> With reference to these balances (at the Bank) he was under no further obligation unless and until their application was otherwise directed by the Committee. No such direction was ever given. Accordingly if, and to the extent to which Thakur Dianpal Singh (the father) withdrew those moneys and applied them for his own purposes, he was guilty, as from the moment of withdrawal of a criminal breach of trust. But until the moment of withdrawal he had been guilty of no breach of duty, civil or otherwise, in relation to them.

---

[10] Toshanpal Singh v. District Judge of Agra, (1934) 21 A I R P C 238=151 I C 33=61 I A 350=56 All 548 (P C).

Their Lordships then proceeded to declare that this statement furnished the key to the decision of the appeal, and held that the sons were not liable, as up to the moment of the misappropriation, the father had completely fulfilled his duty, and there was therefore no antecedent liability established as against him. Their Lordships noticed the argument of the respondents in the case before them, which is identical with the case of the respondents here, but held that that "difficult and doubtful question of law" did not call for decision in the view that the father was, in relation to the moneys withdrawn from the Bank guilty of a criminal breach of trust simpliciter. The question may be difficult but a solution has been found and consistently acted upon in this Court, and so long as it is not declared erroneous by a higher authority, it must govern our decision.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1940 Madras 831

PANDRANG ROW AND HORWILL JJ.

Kuppu Govinda Chettiar — Appellant.

v.

Uttukottai Co-operative Society — Respondent.

Appeals Nos. 352 and 353 of 1937, and Civil Misc. Petns. Nos. 2268 and 2269 of 1939, Decided on 5th April 1940, against decrees of Dist. Court, Chingleput, in O. S. Nos. 1 and 12 of 1935, respectively.

(a) Pleadings — Amendment—Arguments in appeal before High Court heard—Application for amending cause title of plaint held could not be allowed.

It would be highly undesirable from every point of view to allow applications for amendment of the cause title of the plaint which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. [P 832 C 1, 2]

*** (b) Civil P. C. (1908), Ss. 2 (17) (h) and 80 —Word "service" in S. 2 (17) (h)—Meaning — Liquidator appointed by Registrar of Co-operative Societies is not public servant.**

The word "service" in S. 2 (17) (h) must necessarily mean something more than being merely subject to the orders of Government or to control by Government. A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the pay or service of the Government and therefore is not a public servant. Even in the case of a liquidator appointed by the Government, it cannot be said that because the liquidator is given quasi judicial powers, the duties which he performs must necessarily be regarded as being public duties nor can every person who is appointed by the Government to perform public duties be regarded as a public officer : *A I R 1934 Nag 201, Expl.; A I R 1939 Nag 232, Not approved.* [P 833 C 1]

(c) Madras Co-operative Societies Act (6 of 1932), S. 48 — Liquidator appointed — Suit against Society — Leave of Registrar not obtained—Suit must be dismissed.

In view of the clear provisions of S. 48 a suit against a Co-operative Credit Society instituted without the leave of the Registrar when a liquidator has been appointed must be dismissed. [P 834 C 1]

(d) Co-operative Society — Membership — Resignation by member — Membership ceases immediately letter of resignation reaches Society —Resigning member refusing to receive copy of Society's resolution not accepting his resignation and subsequently attending meeting of Society— Aforesaid conduct cannot restore membership.

In the case of a resignation by a member of a Co-operative Society his membership ceases immediately his letter of resignation reaches the Society, and there being no provision for withdrawal of any resignation in the Act or in the by-laws, he can become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive a copy of the resolution not accepting his resignation and that he attended a meeting of the Society subsequently has no legal effect in the sense that the subsequent circumstances cannot possibly restore him to his membership or make him a member after he had ceased to be one: *(1896) 1 Ch 409 and (1907) 2 Ch 370, Rel. on; 1932 M W N 18; A I R 1924 Mad 396 and (1885) 14 Q B D 908, Disting.* [P 835 C 2]

(e) Co-operative Societies Act (1912), Section 42 (2) (b) and (6) — Contribution payable by past member — Determination of, by liquidator — Determination can be questioned in Civil Court.

An order passed by a liquidator determining the amount of contribution payable by a past member to the Co-operative Society can be questioned in a Civil Court: *A I R 1936 Mad 574; A I R 1933 Lah 442 and A I R 1937 Lah 931, Foll.; A I R 1937 Mad 241, Disting.* [P 836 C 1]

K. Bhashyam Ayyangar and T. R. Srinivasan — *for Appellant.*

C. S. Venkatachariar and D. Ramaswami Ayyangar — *for Respondent.*

Pandrang Row J. — These are appeals from the decree in two connected suits O. S. Nos. 1 and 12 of 1935, on the file of the District Court of Chingleput. The plaintiff was the same in both the suits and the defendant also was the same. The plaintiff is the appellant and the defendant, who is the respondent in these appeals, was described as the Uttukottai Co-operative Society by its liquidator. The suits were for a declaration that certain orders made in 1933 and 1932 by the liquidator of the Co-operative Credit Society in question determining the contribution payable by the plaintiff in the suits at Rs. 8000 and Rs. 2000 respectively were illegal and void and of no effect whatever as against the plaintiff. The suits were resisted on various grounds and they were tried together and disposed in one and the same judgment by the District Judge. It is an unfortunate feature that in this case judgment was pronounced by the Court below more than a year after case had been closed. On all the points except one, the findings of the Court below were in favour of the plaintiff. But the suits were dismissed, though without costs, on the sole ground that no notice had been given as required by S. 80, Civil P. C. In other words, it was only on the ground of want of notice that the suits were found to be not maintainable, and in other respects the findings were in favour of the plaintiff.

The only point therefore argued in these appeals in the first instance, so to say, on behalf of the appellant is that the finding of the lower Court on the question of notice is wrong. S. 80, Civil P. C., requires that unless notice is given at least two months before the suit, no suit can be instituted against the Crown or against any public officer in respect of any act purporting to be done by him in his official capacity. In this case no notice whatever was given, and the contention on behalf of the plaintiff-appellant is that no notice is required because the defendant in the suit is not a public officer as defined in the Civil Procedure Code: *vide* Section 2 (17).

It has been contended that even assuming that the defendant in the suit is the liquidator and not the society, he cannot be regarded as a public officer within the meaning of the Civil Procedure Code. In this connection perhaps it is desirable first to deal with two applications presented at a very late stage, namely, after the hearing of the appeal was over and just before judgment was to be delivered, one application in each appeal to amend the cause title so as to show the defendant as "the liquidator of the Society" instead of "the Society by its liquidator." It is enough to say as regards the oral application for permission to withdraw the suits, that it is now withdrawn, and there is no need to pass any other order on it except to dismiss it as it is withdrawn. As regards the first application for amendment of the cause title of the plaint, it would be highly undesirable from every point of view to allow applications of this kind which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. It is not as if this objection to the maintainability of the suit in view of S. 48, Co-operative Societies Act, was not raised in the trial Court, and the application to amend the cause title should have been put in much earlier. There is really no explanation forthcoming for the delay in making the present application. We are therefore not prepared to allow that application and it is accordingly dismissed. We may add however that the application to amend is absolutely contrary to what is alleged in the grounds of appeal, where it is contended that the defendant in the suit was the Co-operative Society and not the liquidator and therefore the question of notice did not arise at all. In other words, the main ground on which the finding of the Court below, which is against the appellant, was attacked was that the Court below failed to notice that the defendant in the suit was the Co-operative Society and not the liquidator, and of course, it was nobody's case that the Co-operative Society is a public officer.

Apart from the fact that the suit is really directed against the Society who is represented by the liquidator because the Society has been ordered to be wound up and a liquidator has been appointed by the Registrar, the question remains whether even a liquidator appointed by the Registrar can be regarded as a public officer within the meaning of the Code of Civil Procedure. It is contended that he is a public officer because he is an officer in the service of the Crown. It is obvious however that qua liquidator he is not an officer in the service of the Crown, and it is not the case of either side that the liquidator as such receives any pay from the Crown or receives any remuneration for his duties as liquidator. The liquidator in this case is the Deputy Registrar of Co-operative Societies who, of course, in that capacity is a public officer. But that does not mean that when he is actually acting in the capacity of a liquidator of a Co-operative Society, he is an officer in the pay of the Crown or in the service of the Crown.

The only decision which has been relied upon by the Court below is the one reported in A I R 1934 Nag 201.[1] Apart from the fact that in that decision it is merely stated without any discussion that a liquidator should no doubt be considered a public officer within the meaning of S. 2 (17), Civil P. C., the actual facts of the case show that it was not necessary in that case to give any notice to the liquidator because the suit was not brought against the liquidator, in respect of any action of his. In other words, the observation was an obiter dictum. Another case which has been cited to us is the one reported in A I R 1939 Nag 232[2] in which Pollock J. refers to the earlier decision of the Nagpur Court as one in which it was assumed without discussion that a liquidator is a public officer as defined in S. 2 (17), Civil P. C. The reason given by Pollock J. for holding that the liquidator is a public officer is that the liquidator was appointed by the Government and his duties are quasi judicial. In other words, the proposition as put forward in the case is that as the liquidator is appointed by the Government and performs public duties, he is an officer in the services of the Government when acting as the liquidator and therefore a public officer as defined in the Code of Civil Procedure.

---

[1] Yedha Society, Nemar v. Prag Das Mahesri, (1934) 21 A I R Nag 201=148 I C 714=30 N L R 240.

In the present case, the liquidator is not appointed by the Government but by the Registrar of Co-operative Societies. Even otherwise, we find it difficult to accept the general proposition that because the liquidator is given quasi-judicial powers, the duties which he performs must necessarily be regarded as being public duties. Nor are we prepared to accept the proposition that every person who is appointed by the Government to perform public duties is a public officer. If that view were accepted, it would follow that even a member or chairman of a local body appointed by Government would be a public officer. The word "service" must necessarily mean something more than being merely subject to the orders of Government or to control by Government. We are unable to accept the view that a liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is an officer in the service of the Government, and this is the only gound on which it has been sought on behalf of the respondent to support the finding of the Court below. We are therefore of opinion that the present suits cannot be rightly defeated on the plea that no notice was given as required by S. 80, Civil P. C. The decrees however of the Court below dismissing the suits have been supported on the ground that the findings on other points by the Court below in favour of the plaintiff-appellant are wrong. The main point is whether the suit is maintainable in view of the provisions of S. 48, Co-operative Societies Act, which runs as follows :

> Save in so far as is expressly provided in this Act, no Civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose.

Considerable reliance is placed on behalf of the appellant on the Bench decision in 59 Mad 895.[3] That however was a case which had to consider a similar provision in the Imperial Act, namely S. 42 (6) which runs as follows :

> Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

In construing that provision, it was held by the learned Judges that the liquidator in the case before them acted without jurisdiction and that therefore the Civil Court's jurisdiction was not ousted by S. 42 (6), Co-operative Societies Act of 1912. That was a case which is otherwise on all fours with the present case, because there also the question arose whether a person who had once been a member of a Co-operative Society could be rightly made to pay a contribution by an order of the liquidator when he had not admitted his liability. In the case before them the contention was that the appellants had ceased to be members five years before the liquidation and it was held that it cannot be said that they had no right to ask the Civil Court to decide whether they were under any liability to contribute at all. That decision as well as the other decisions which have been mentioned to us were all of them with reference to the Act of 1912 and S. 42 (6) thereof. As will be seen from the words of the provisions of the law with which we have to deal, namely S. 48 of the Madras Act 6 of 1932, cl. (2) thereof is far more precise in its language than the provisions in the earlier Imperial Act. For, it says that when a liquidator has been appointed (as in this case) no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar. There was no provision of this kind in the earlier Imperial Act for a suit being filed with the leave of the Registrar against a society after a liquidator was appointed.

---

[2] Sangakheda Kalan Co-operative Bank, Hoshangabad v. Ayodhyaprasad Shiamlal, (1939) 26 A I R Nag 232=182 I C 514.

[3] Vaikunta Bhat v. Sarvothama Rao, (1936) 23 A I R Mad 574=170 I C 312=59 Mad 895=70 M L J 604.

In this case it is admitted that the Registrar refused leave when leave was asked for, and we find it impossible to find any reason for ignoring the plain words of the provisions of law which are applicable to the present case and in particular cl. (2) of S. 48 of the Act which is as clear as possible. It says that no suit can be instituted against a society when a liquidator has been appointed except by leave of the Registrar. This provision appears to us to stand in the way of the present suits, and though this point was not prominently placed before us in the argument and was certainly not referred to in the Court below, we are not able to find any way out of the situation created by the new law. This finding, namely that the suits are not maintainable in view of the provisions of S. 48 of Madras Act, 6 of 1932, is sufficient to dispose of these appeals. Nevertheless, as the other point, namely the question of liability of the plaintiff-appellant has been argued at considerable length before us, it is perhaps desirable that we should briefly express our opinion thereon and all the more so because a special request has been made on behalf of the appellant that we should express our opinion on this point.

The point really is a simple one because the facts are practically undisputed. The plaintiff-appellant sent his resignation on 4th June 1930 to the Secretary of the Society and there is no doubt that that resignation was received by the Society and a meeting was held in the next month to consider the resignation. A copy of the letter of resignation appears also to have been sent to the Co-operative Department. The Society in its resolution dated 1st July 1930 (*vide* Ex. 2) resolved that the resignation should not be accepted. A copy of the resolution was sent to the plaintiff-appellant by registered post, but he appears to have declined to receive it. There can be no doubt that he was aware of the contents or at least of the fact that his resignation had not been accepted. On 24th January 1931 at a general body meeting of the Co-operative Society the plaintiff was present as a member and took part in it for some time, though he later on was asked to go out by the Chairman who presided at the meeting. It is argued on behalf of the respondent that these facts show that the resignation did not take effect and that the plaintiff-appellant really continued to be a member in spite of the letter of resignation sent by him on 4th June 1930. This argument assumes first that unless a resignation is accepted, it does not take effect in a case of this kind, and secondly, that the subsequent conduct of the plaintiff-appellant amounts to a withdrawal of his letter of resignation. As regards the first assumption, it appears to be really without foundation. In the case of an office in a private body like a Co-operative Society the law does not require that resignation should be accepted by the Society or anyone else before it takes effect. The by-laws of the Society are altogether silent as regards the mode in which a member ceases to be a member, and there is no reference to resignation in the Act or in the by-laws. There are one or two references in the Act to the withdrawal of members from the Society, and it is not contended that there can be no withdrawal or cessation of membership by means of resignation of membership.

On the side of the plaintiff-appellant, reliance has been placed on two English cases, (1896) 1 Ch 409[4] and (1907) 2 Ch 370.[5] (1896) 1 Ch. 409[4] was a case which related to the membership of the Bermondsay and Totherhithe Licensed Victuallers and Beer Sellers' Trade Protection Association and though the member who had resigned wanted subsequently to withdraw his resignation, the Society declared that he had ceased to be a member by reason of the resignation and it was held that he had really ceased to be a member as soon as his letter of resignation had been received by the Committee of the Association. In that case also the rules of the Association contained nothing as to the right of members to retire, this matter being left to be governed by the ordinary principles of law. In those circumstances, it was held that he could withdraw from the Association at any moment of his own pleasure and without the consent of his fellow members or the Association and therefore that immediately the letter of resignation reached the Association, the member who sent in his letter of resignation ceased to be a member and he could again become a member only by following the rules regarding election of members framed by the Association and not by any withdrawal. In the latter case (1907) 2 Ch 370[5] it was a director of a limited company who resigned his office as managing director. On the very day on which the letter of resignation came up for consideration before the special meeting of the directors an attempt was made to withdraw the resignation. But the meeting resolved that the office of managing director had been vacated. In this case, however, the matter of resignation was provided for in two articles of the company, which provided that the office of managing director should be vacated on the happening of any of the contingencies mentioned therein, whereby the office of director should be vacated. The provision regarding the latter subject was to this effect :

---

[4] Finch v. Oake, (1896) 1 Ch 409=65 L J Ch 324 =73 L T 716=60 J P 309.

[5] Glossop v. Glossop, (1907) 2 Ch 370 = 76 L J Ch 610 = 97 L T 372 = 14 Manson 246 = 51 S J 606.

> The office of director shall be vacated (inter alia) —if by notice in writing to the company he resigns his office, provided that, the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that he had vacated his office within six months from the happening of the event whereby such director had vacated his office.

In these circumstances, it was held that the managing director could not withdraw his resignation without the consent of the company and that he had vacated his office by his letter of resignation and that the resolution of the board at the special meeting was effective and valid. On the side of the respondent, reliance has been placed on two decisions, namely those in 45 M L J 798[6] and 1932 M W N 18.[7] The latter case does not contain any discussion of the question but is important in view of the fact that it deals with the very letter of resignation with which we are concerned in this case, though the decision therein was in respect of the resignation of the office of the president of the Society, the petitioner being also the president of the Society and the letter of resignation being in respect of both his office as president as well as his membership.

We are not concerned in the present case with the office of president but only with the question of membership and therefore the decision in 1932 M W N 18[7] is not very helpful. The discussion of the point is contained in 45 M L J 798[6] where the same learned Judge, namely, Sir Vepa Ramesam, relies to a great extent on certain passages from the text books on elections. The case with which the learned Judge had to deal was one in which the question for decision was whether a certain person had ceased to be an Honorary Magistrate prior to a certain date on which he was elected as a member of a local body. In that case it was held that an Honorary Magistrate does not cease to hold his office by his resignation but only on the acceptance of his resignation. That decision is certainly supported by the extracts from the text books on elections which relate to public offices or offices in local bodies in England which cannot be ordinarily given up without either the consent of some authority or the payment of a fine for non-acceptance. That case was one similar to (1885) 14 Q B D 908[8] which was decided in the light of the statutory provision in S. 36 of the Municipal Corporation Act, 1882, which provided that a person elected to a corporate office may, at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof. The reasoning which would apply to resignation of a public office of this kind cannot be applied to resignation of the membership of a society with which we have to deal in the present case. We are therefore inclined to the view that the membership of the plaintiff-appellant ceased immediately his letter of resignation reached the Society, that is to say, early in June 1930. There was thus an immediate cessation of his membership, and there being no provision for withdrawal of any resignation in the Act or in the by-laws, he could become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution sent to him in July 1930 and that he attended a meeting of the Society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. It follows from this that the plaintiff-appellant ceased to be a member more than two years prior to the orders complained of in the present suits and to the liquidation.

---

[6] **Sudarsana** Rao v. Christian Pillai, (1924) 11 A I R Mad 396=76 I C 813=45 M L J 798.

[7] **Kuppu Govinda Chetti** v. Secretary Co-operative Central Bank Conjeevaram, (1932) M W N 18.

[8] Reg v. Corporation of Wigan, (1885) 14 Q B D 908=54 L J Q B 338=52 L T 435=33 W R 547=49 J P 372.

The only other point which perhaps deserves some reference is the question whether the liquidator acted within his jurisdiction in these circumstances. So far as this point is concerned the decision of the Bench in 59 Mad 895[3] appears to us to hold the field and, being a case clearly in point, has to be followed unless it is declared not to lay down the law correctly. Reliance has also been placed on two decisions of the Lahore High Court which are to the same effect, namely 14 Lah 703[9] and 18 Lah 649.[10] In view of the fact that these decisions relate exactly to the present point, whereas the other cases, and in particular I L R (1937) Mad 211[11] and cases of that description, deal with other enactments, it does not seem necessary for us to consider in detail the question whether the cases dealing with other enactments really affect the present question having regard to the decisions which deal with the exact point which arises in these cases. On these points we are inclined to decide in favour of the plaintiff-appellant. Nevertheless his appeals must fail and the suits must stand dismissed because of the absence of leave from the Registrar for the institution of the suits which, in our opinion, is required by the provisions of S. 48, Madras Co-operative Societies Act, 6 of 1932. Having regard to the circumstances of these cases, we think the just course to follow with regard to costs is to direct the parties to bear their own costs in this Court, the appeals being dismissed and the memorandum of cross-objections also.

C.R.K./G.N. *Appeals dismissed.*

---

[9] Mukund Lal v. Malhotra Bank, Hafizabad, (1933) 20 AIR Lah 442=144 I C 264=14 Lah 703=34 P L R 717.

[10] Anjman Imdad Qarza Bahami Bafindgan Amritsar v. Mehr Din, (1937) 24 A I R Lah 931=175 I C 840=40 P L R 422=I L R (1937) 18 Lah 649.

[11] Secretary of State v. Mayyappa Chettiar, (1937) 24 A I R Mad 241=170 I C 49=I L R (1937) Mad 211.

A. I. R. 1940 Madras 836

WADSWORTH AND PATANJALI SASTRI JJ.

N. Krishnaswami Iyer — Petitioner.

v.

T. N. Nagalinga Mudaliar — Respondent.

Civil Revn. Petns. Nos. 1115 and 1106 of 1939, Decided on 10th April 1940, to revise orders of Small Cause Court, Madras, D/- 24th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 9 and 3—Subsequent debt merely renewal of prior debt— Suit on subsequent debt — For applicability of S. 9 both debts must be shown to be "debt" within meaning of S. 3.

Both the debt sued on and the prior debt which it is found to have superseded must, if S. 9 is to have any application, fall within the definition of the term 'debt' in S. 3; that is to say, both the prior debt and the debt sued on must be debts due from an agriculturist. [P 836 C 2]

Therefore, where a promissory note in suit is executed by *A* and *B* in supersession of an earlier promissory note executed by *A* alone who is found not to be an agriculturist within the meaning of the Act it is not open to *B* to call in aid as an agriculturist S. 9 on the ground that the debt on which he is sued is in renewal of a prior 'debt.' [P 836 C 2; P 837 C 1]

S. Ramachandra Iyer—*for Petitioner.*

N. Muthuswami Iyer and N. Ramanatha Iyer — *for Respondent.*

Wadsworth J. — This petition raises a question under the Madras Agriculturists' Relief Act. The petitioner was defendant 2 in a suit on a promissory note dated 8th October 1934 executed by himself and by his brother defendant 1. This promissory note was in supersession of an earlier promissory note executed by defendant 1 alone on 28th May 1930. Defendant 1 is admittedly not an agriculturist within the purview of the Act. Defendant 2 claims to be entitled to the benefit of S. 9 of the Act, on the basis that the debt upon which he has been sued is in renewal of a prior debt so far as he is concerned. It seems to us unnecessary to decide the question whether, when there is a debt incurred by *A*, superseded by another debt incurred by *A* and *B*, *B* can contend that his liability is in renewal of a prior debt. So far as the facts of this case go, it is clear to us that the original debt is not a debt as defined by S. 3 (iii) of the Act which defines a debt as "any liability in cash or kind, whether secured or unsecured due from an agriculturist." The proviso to S. 9 deals with any part of a debt which is found to be a renewal of a prior debt. Both the debt sued on and the prior debt which it is found to have superseded must, if this section is to have any application, fall within the definition of the term 'debt' in S. 3; that is to say, both the prior debt and the debt sued on must be debts due from an agriculturist. In the present case, admittedly the original debt was not due from an agriculturist and it is therefore not open to the petitioner to call in aid S. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt. This petition is therefore dismissed with costs.

C. R. P. No. 1106 of 1939.—This petition need not be decided on the merits in view of our decision in C. R. P. No. 1115, for it only seeks to canvass by means of a new trial application the question upon which we have given a finding adverse to the petitioner. The petition is therefore dismissed but there will be no order as to costs.

C.R.K./G.N. *Petitions dismissed.*

A. I. R. 1940 Madras 837

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Pr. N. Sm. Chokkalingam Chettiar — Appellant.

v.

Official Assignee, Madras—Respondent.

O. S. Appeal Nos. 68 and 82 of 1937, Decided on 16th October 1939, from judgment and order of Wadsworth J. in Petn. No. 264 of 1925 and Appln. No. 453 of 1936, D/- 23rd August and 21st July 1937, respectively.

(a) Principal and Agent — On insolvency of Hindu sons, deceased father's assets in British India vesting in Official Assignee — Official Assignee through agent taking out letters of administration in respect of deceased's Ceylon assets—Supreme Court of Ceylon passing consent decree to which agent was party—Decree held binding on Official Assignee.

The sons of a deceased Hindu were adjudicated insolvents and the entire assets of the deceased in British India vested in the Official Assignee. In order to get at the Ceylon assets of the deceased the Official Assignee applied through his agents to the Ceylon Court for the grant of letters of administration with a copy of the wills annexed. The Ceylon Court intended that the letters should be issued to the Official Assignee in British India though they were actually issued to the agents who thereafter functioned as administrators and got themselves substituted as defendants in the action by a creditor of the deceased in the Ceylon Court in which a compromise decree was passed against them:

Held that the consent decree passed against the agents must be taken to have been passed against them as the agents of the Official Assignee and it was not open to the Official Assignee to say that he was not a party to the consent decree at all. [P 842 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 46—Word "subject" in S. 46 — Meaning—Debt which insolvent is liable to pay out of property in his hands is provable in insolvency — Insolvent liable to pay debt out of joint family property in his hand or separate property inherited by him from father — Liability is debt provable in insolvency—Personal liability of insolvent is not necessary condition for debt to be proved under S. 46.

The word 'subject' in S. 46 means 'liable', i. e., liable personally or in respect of property. Where the debtor is liable to pay a debt or satisfy a liability from and out of the property in his hands, it would be a provable debt in insolvency. Therefore, if on the date of the order of adjudication, the insolvents are under a liability to pay a debt from and out of the joint family property in their hands or from and out of the separate property inherited by them from their father, such a liability is a debt provable in insolvency. Consequently, a Hindu father's debt is provable in the insolvency of the son under S. 46. Though a personal liability is a necessary foundation for an order of adjudication, it is not a necessary condition for a debt provable in insolvency. It is enough if there is a proprietary liability: *(1888) 20 Q B D 120; (1899) 2 Q B 62; A I R 1935 Mad 1058; Appln. Nos. 294 and 295 of 1938 in C. S. No. 79 of 1936, Rel. on.* [P 843 C 2; P 844 C 1]

(c) Insolvency — Compromise decree passed in Ceylon against agents of Official Assignee in British India whereby creditor was to share pro rata insolvent's assets in Ceylon and was entitled to proceed for balance against assets out of Ceylon—Creditor held entitled to prove balance of debt in insolvency proceedings in British India against aforesaid insolvents but could not claim priority over other creditors.

A compromise decree to which the agents of the Official Assignee in British India were parties was passed by the Court at Ceylon whereby the creditor was to share pro rata with all the other creditors the assets of the insolvents in Ceylon and was entitled to proceed for the recovery of the balance from the assets that may exist out of Ceylon. On the date of the aforesaid decree the assets of the insolvents were in the hands of the Official Assignee in British India:

Held that the creditor was entitled to prove the balance of the debt in insolvency proceedings in British India against the aforesaid insolvents. [P 845 C 1, 2]

Held further that it was not open to the creditor to claim priority over other creditors in the insolvency proceedings in British India. [P 845 C 2]

(d) Hindu Law—Debts — Father — Separate property — There is no difference between nature of obligation of sons and other heir inheriting aforesaid property — But ancestor's debts are not charge on estate inherited.

In regard to the separate property of the Hindu father inherited by the sons there is no difference between the nature of the obligations imposed on them and any other heir inheriting the property from his ancestor. The heir takes the property subject to the obligation of paying his ancestor's debts and in so far as he is unable to satisfy that he has applied the property in the discharge of the ancestor's debts, he will be personally liable. The theory is that he takes only the residue after payment of the debts: *A I R 1938 P C 169, Ref.* [P 846 C 1]

But the debts do not form a charge on the estate so that if the heir alienates it to a bona fide purchaser for value or if a creditor of the heir seizes and sells it, the ancestor's creditor cannot reach it. So far as the Hindu law is concerned, this principle is undoubted: *2 W R 296, Rel. on.* [P 846 C 1]

(e) Hindu law—Debts—Father—Son becoming insolvent after father's death—Father's debt

is not charge on property in hands of son — Father's creditor cannot claim priority over son's creditors in insolvency proceedings — Insolvency Act does not recognize priority in favour of father's creditor.

Where after the father's death the son becomes the sole owner of the property and the creditor becomes entitled to get satisfaction from it, no distinction can be drawn between a father's creditor and a son's creditor, and neither during the father's lifetime nor after his death can the son's interest in the joint family property be said to be charged for the father's debt, in the sense that it is hypothecated for the debt so as to make a father's creditor a secured creditor. The father's creditor cannot claim priority over the son's creditors in the insolvency proceedings against the son after his father's death. The insolvency law is a special law having for its object the distribution of the insolvent's available assets among his creditors pro rata. The father's debt is not one to which a right of priority is given by the Act. The Official Assignee can only administer the assets and distribute them in accordance with the provisions of the Act. If a father's creditor chooses to prove in the insolvency of the son as a provable debt of the son, he must submit himself to the provisions of the Act which does not recognize any priority in his favour: *A I R 1929 Mad 609; A I R 1939 Mad 276; A I R 1918 Mad 512; 26 All 28 and A I R 1916 Mad 645, Approved; A I R 1927 Mad 471, Expl.; A I R 1930 All 552, Disapproved.* [P 847 C2 ; P 848 C 2]

(f) Insolvency — Provable debts — Interest ceases from date of adjudication — Official Assignee cannot consent to payment of interest after adjudication.

Interest on the creditor's debt ceases from the date of the adjudication of the debtor. The Official Assignee is governed by the insolvency law and it is not open to him to disregard the provisions of the Act and consent to payment of interest after the debtor's adjudication contrary to the Act. [P 849 C 2]

N. T. Shamanna and T. V. Ramiah — *for Appellant (in Nos. 68 and 82, respectively.)*

T. V. Ramiah and N. T. Shamanna — *for Respondent (in Nos. 68 and 82, respectively.)*

Venkataramana Rao J. — These two connected appeals are against the order of our learned brother Wadsworth J. on the application made by Pr. N. Sm. Chokkalingam Chettiar the appellant in O. S. A. No. 68 of 1937 to recover a sum of Rupees 1,61,127 and 22 cents and interest thereon less a sum of Rs. 47,573 and 80 cents from and out of the estate of the insolvents in the hands of the Official Assignee of Madras. The learned Judge allowed the said Chokkalingam Chettiar to prove the balance of his debt as claimed by him subject to certain limitations specified in para. 2 of the order disallowing all claims to priority in respect of any portion of the assets in the hands of the Official Assignee. O. S. A. No. 68 of 1937 is by the said Chokkalingam Chetti against the order in so far as it disallowed his claim to priority and O. S. A. No. 82 of 1937 is by the Official Assignee against the order allowing the said Chokkalingam Chetti to prove the claim in the insolvency. Before dealing with the contentions advanced in the appeals the relevant facts may be stated.

One Ar. Ar. Sm. Somasundaram Chettiar and his sons Arunachala, Ramanatha, Sundaresa and Lakshmana were members of a joint family and doing extensive business in money lending and rice in British India, Burmah and Ceylon. In 1919 an arrangement was entered into between them, in and by which it was agreed that each of the sons should get a sum of Rs. 51,000 that with the sum so obtained they should establish separate businesses of their own and that the father himself should be entitled to certain businesses exclusively. It was further stipulated that Arunachala should be the guardian of Lakshmana and Ramanatha should be the guardian of Sundaresa. In regard to the rights and obligations with respect to the rest of the properties no change was effected and the family must therefore be deemed to have continued undivided. In pursuance of the said arrangement, Ramanatha and Sundaresa carried on business at Colombo and Kumbakonam; so also Arunachala and Lakshmana together in those two places. The joint family ceased to do any business in Colombo except rice business at Bankshall. The father carried on business exclusively in Jaffna and Rangoon. Ramanatha died in November 1919 and thereupon the two businesses at Colombo which were carried on by the two sets of brothers were amalgamated into one and an arrangement was come to providing that the combined businesses should be carried on by the father on behalf of the sons and it was accordingly carried on until the date of his death in July 1923. It is also in evidence that the businesses at Jaffna and Rangoon which were carried on by the father were carried on by the adult sons until August 1925 when they were adjudicated insolvents both in Madras and in Colombo. On 15th July 1925 Arunachala and Sundaresa were adjudicated insolvents in Madras.

On 25th August 1925 the firm which was carried on by the sons at Colombo was adjudicated insolvent in the Colombo District Court. Arunachala and Sundaresa before they were adjudicated insolvents applied through their Attorneys Messrs. Subbayya Naidu and Lakshmanan Chettiar for letters of administration in regard to the estate of their father in Ceylon on the basis that the father died intestate whereas in fact he had left two wills dated 2nd October 1922 and 23rd October 1922. The District Court of Jaffna to which the application was made issued letters of administration on 9th June 1925 to Messrs. Subbayya Naidu and Lakshmanan Chettiar and they were therefore constituted administrators of the Ceylon assets of the father Somasundara. As these were not properly functioning, one B. Emmanuel, Secretary of the District Court of Jaffna was later appointed administrator to act with them and he seemed to have administered the assets solely until 1929 when he was transferred to another Court. On 17th August 1925 P. R. R. S. M. Somasundaram Chetti, the father of the said Chokkalingam Chetti, filed a suit in the District Court of Colombo, against all the sons of Somasundara for recovery of a sum of Rupees 1,60,531 and 47 cents alleging that that sum was borrowed by them between 4th January 1923 and 9th August 1925. On 29th August 1925 the said Somasundaram Chetti got an affidavit filed before the Official Assignee of Madras through his son claiming a sum of Rs. 53,367-0-3 in respect of the transactions he had with the insolvents at Madras and a sum of Rs. 1,60,501 odd as due from them at Colombo. On 4th February 1926 the plaintiff withdrew the suit which he filed in the District Court of Colombo with liberty to bring a fresh action.

Even before the said suit was withdrawn, Somasundaram filed a suit on 19th January 1926 against the said Emmanuel, Secretary of the District Court of Jaffna as official administrator of the estate of Somasundara for Rs. 1,61,127 and 22 cents on the ground that the money was lent to the father Somasundara between 4th January 1923 and 30th June 1923 and that the said defendant as administrator was bound to pay the said sum. (*See* plaint No. 18800 District Court, Colombo, dated 19th January 1926 subsequently amended on 12th October 1926.) His Proctor also wrote to the Official Assignee informing him that he withdrew his claim against the insolvents for the sum of Rs. 1,60,531, as it was misconceived and as the said debt was contracted by Somasundaram Chetti the father of the insolvents. By reason of the insolvency of the sons Arunachala and Sundaresa, all the property which they were possessed of vested in the Official Assignee. The properties which they were possessed of on the date of the insolvency would be their shares in the entire joint family properties of the family in addition to their separate property. But the share of Lakshmana and the shares of the sons of Arunachala and Sundaresa were not vested in him but by a compromise entered into with the latter all the property possessed by the joint family became vested in the Official Assignee by an order dated 6th August 1928. It is rather extra-ordinary that such an order should have been passed especially when there were minors but it is unnecessary to go into the validity or otherwise of the said order because it must be taken for the purpose of these appeals that the entire joint family property and the separate property of the sons in so far as they were situate within British India vested in the Official Assignee.

It must also be stated that by an order passed on 3rd August 1925 by this Court in insolvency the District Court of Jaffna and the District Court of Colombo were directed to act in aid of the Madras Insolvency. The Colombo Court agreed but the Jaffna Court did not, so that the Official Assignee had control over all the assets of the insolvents whether in British India or at Colombo but in regard to the other Ceylon assets left by Somasundara they were under the control of the administrator of the Jaffna Court. According to the Roman-Dutch law it is stated that the property standing in the individual name of Somasundara must be taken to belong to him absolutely, and neither the theory of joint family nor the rights and obligations which flow out of that status including the pious obligation of the sons for payment of their father's debts are recognized by that law. The position therefore was that so far as, at any rate, the immovable property which stood in the name of Somasundara was concerned, the widow was entitled to a half and the children of Somasundara, that is, the three sons Arunachala, Sundaresa and Lakshmana and four daughters left by him were entitled to the remaining half and each of them thus had 1/14th share. The three sons of Somasundara according to that law would only be entitled to a 3/14th share in the immovable property standing in the name of Somasundara in Ceylon subject to the payment of his debts. But as a fact both the moveables and immovables appear to have been treated by the Jaffna Court on the same footing. Under the will of Somasundara of 23rd October 1922 Somasundara purported to divide all the properties which he was possessed of barring a few exceptions into four shares to be taken by the sons after his death and if that will were to be given effect to, the sons would be entitled to get the entire property to the exclusion of the widow and daughters. The Official Assignee of Madras apparently wanted to get at the assets of the Jaffna Court and in order to enable him to do so, he applied to this Court for letters of administration with the two wills of Somasundara annexed so that on the strength of letters so obtained he might get himself appointed administrator of the Ceylon assets of Somasundara in the Jaffna Court. Letters were issued by this Court on 15th November 1928. On 18th February 1929 the Official Assignee made an application through his power of attorney agent one M. J. Harding for the grant of letters of administration in respect of Ceylon assets and the allegations in paras. 4 and 5 of that petition were as follows:

> 4. That the deceased A. R. A. R. S. M. Somasundaram Chetti left behind properties in Ceylon to the value of Rs. 84,188,48 according to the papers filed by the administrator in this case.
>
> 5. That for the purpose of administering the estate of the said deceased in Ceylon, it is necessary that letters of administration should be taken out.

But the application was rejected by the District Court of Jaffna on the ground that a probate of a foreign Court could not be accepted under S. 3 of the Ceylon Ordinance 7 of 1921. This order was passed on 21st May 1929. An appeal was preferred against the said order. On 25th July 1929 the Official Assignee executed a power of attorney in favour of Messrs. H. D. Thornton and M. J. Harding empowering them to apply for letters of administration in Jaffna after complying with the formalities of Ceylon law. By that time Mr. Emmanuel who was functioning as administrator seems to have been transferred to another District Court and on 16th September 1929 Messrs. Harding and Thornton as attorneys of the Official Assignee made an application for an interim grant of letters to them pending decision of the appeal which they had preferred. Para. 6 of the petition runs thus:

> The petitioner as Official Assignee as aforesaid is not only a representative of the said heirs but is also a creditor to the extent of 7 lakhs, due to the said heirs from the late A. R. A. R. S. M. Somasundaram Chettiar.

By an order dated 16th December 1929 it appears that letters of administration with copies of the will annexed were directed to be issued to Messrs. Thornton and Harding as attorneys of the Official Assignee of Madras, if before 19th December 1929 nobody shows sufficient cause to the contrary. This order was passed by Mr. Rock the District Judge but it also appears from another order passed by him on 16th April 1930 wherein it was stated that he saw no objection to the granting of a limited power of probate to the Official Assignee. At any rate, it is clear that letters of administration were actually issued on 19th May 1930 to Messrs. Thornton and Harding constituting them administrators. There can be no doubt that it was issued to them as agents of the Official Assignee of Madras and they were functioning as such. After obtaining the letters they seemed to have applied to the District Court of Colombo in the suit brought by Chokkalinga Chetti's father and got themselves substituted as defendants in the place of the original defendants on record. After contest a decree was passed against them in the said suit and the decretal portion runs thus:

> It is ordered and decreed that the substituted defendants as administrators of the intestate estate of the late A. R. A. R. S. M. Somasundaram Chettiar deceased do pay to the substituted plaintiff as administrator of the estate of the late P. R. N. S. M. Somasundaram Chettiar deceased the sum of Rs. 1,61,127 and 22 cents with interest thereon at the rate of 9 per cent. per annum from 20th January 1926 till payment in full and costs of suit.

So far as the scope of this decree is concerned, there can be no doubt that Chokkalingam Chetti who was substituted as plaintiff in the place of his father who had died in the meanwhile obtained a decree against the administrators Messrs. Thornton and Harding as administrators of the Ceylon assets of Somasundara. Though the decree is against the said administrators, it may be taken that it was against the Official Assignee of Madras as administrator of the Ceylon assets of Somasundara. We are not inclined to agree with the view taken by our learned brother Wadsworth J., that the decree in the Colombo District Court is a decree which binds the sons represented by the Official Assignee with personal liability to the extent of the assets of the father in their hands. Against the said decree, an appeal was preferred to the Supreme Court of Ceylon. In the meantime, Chokkalinga applied to execute the decree in his favour by attaching a sum of Rs. 2 lakhs in the

District Court of Jaffna and applied for a transfer of the said moneys to the credit of the suit. This was opposed by the Official Assignee as the creditor of the estate of the Somasundara on the ground that the firm of the plaintiff was not registered according to the Ceylon law and was not entitled to the relief claimed in the application. The ground on which the said attorneys of the Official Assignee preferred the appeal against the decree was that the case was disposed of by the trial Judge without giving sufficient opportunity to adduce necessary evidence in support of his plea. The plea that was raised by the Official Assignee in the trial Court was that Chokkalinga's father was not a creditor of the father but a creditor of the sons and he was entitled to prove only in the insolvency of the sons and could not claim any moneys from and out of the exclusive property of the father and therefore he was not entitled to claim any moneys from and out of the Jaffna assets. One object of the Official Assignee was to get as much money as possible for the son's creditors in the Jaffna Court as the estate of Somasundara was indebted largely to the firm of the sons whose property had been vested in the Official Assignee. A compromise was arrived at and the terms of the settlement were as follows :

> Substituted plaintiff is to be paid his taxed costs incurred in 18800, D. C. Colombo, such costs not to exceed Rs. 9000. He agrees to share pro rata with all the other creditors the assets of the deceased. He is entitled to proceed for the recovery of any balance that may be due to him in action No. 18800 D. C. Colombo from assets that may exist out of Ceylon. The Official Administrator undertakes to withdraw his appeal in 18800, D. C. Colombo.

Thereupon a decree was passed on 17th November 1933 by the Supreme Court of Ceylon as follows :

> On consent it is considered and adjudged that the decree made in this action by the District Court of Colombo and dated 12th January 1933, be and the same is hereby affirmed and this appeal is dismissed subject to the terms of settlement arrived at between the parties and filed herewith. And it is further ordered and decreed that each party do bear his costs of this appeal.

The appellant Chokkalingam Chetti received from the Administrator Jaffna a sum of Rs. 47, 573 and 80 cents as his pro rata share and after receiving the said sum he preferred a claim before the Official Assignee, Madras, for the balance due to him under the decree and the claims made on the basis of the compromise arrived at with the Official Assignee. The grounds of his claim are set out in paras. 7 and 8 of his affidavit dated 12th September 1936 thus :

> By an arrangement however come to on or about 21st October 1933 and sanctioned by the District Court of Jaffna with the Official Administrator and the said defendants, it was agreed that I should take a share pro rata with all the other creditors of the assets of the deceased in the hands of the said Official Administrator, Jaffna and that I should be at liberty to recover the moneys due to me under the said decree from the assets that may exist out of Ceylon. The Official Administrator of Jaffna paid me as my share out of the assets then in his hands Rs. 47, 573 and 80 cents. The said assets in the hands of the Official Administrator of Jaffna never formed and do not form part of the assets of the above mentioned insolvents and did not and could not vest in the Official Assignee. I say that so far as it is the liability of the joint estate the same has to be paid before the creditors of the insolvents are paid.

The Official Assignee rejected the claim and the reasons for doing so were stated by him thus in his order dated 16th November 1936 :

> The debt was contracted by Ar. Ar. Sm. Somasundaram Chetti in Ceylon and is repayable in Ceylon from out of the assets of the said Somasundara in the hands of the Administrators. Under the Ceylon law the sons are not liable for the debts contracted by the father. Further the claimant having elected to proceed against Somasundara's estate in the hands of the Administrators and obtained a decree against the said estate should be deemed to have waived his right to proceed against the sons' estate assuming he had the right which I do not admit. This claim is therefore disallowed.

Thereupon Chokkalingam Chetti preferred an appeal to the Court for rescinding the order of the Official Assignee. In the report submitted by the Official Assignee to the Court he denied that he was a party to the action in the District Court Colombo and submitted that the consent decree passed by that Court could not have any validity and binding force so far as he was concerned. He went so far as to say that the letters were issued to Messrs. Harding and Thornton by the Jaffna Court in their individual capacities i. e., as assignees of the Ceylon insolvency of the firm Ar. Ar. Sm. and not in their character as his attorneys. It is rather surprising that the Official Assignee should have taken the stand which he did. The various affidavits and reports filed in the case conclusively show that Messrs. Harding and Thornton were appointed by Mr. Wilson as his attorneys for the specific purpose of getting letters of administration on his behalf with the wills annexed of Somasundara in the Jaffna Court. In fact the judgment of Mr. Rock dated 16th April 1930 makes it clear that it was intended by him that the letters of administration should be issued to Mr. Wilson though the letters were actually issued to Messrs. Harding and Thornton. Therefore it must be taken that Messrs. Harding and Thornton were functioning as administrators in the Jaffna Court as agents of Mr. Wilson. He obtained letters of administration in this Court with the wills annexed for the purpose of getting letters of administration in the Ceylon Court, so that he could get at the Ceylon assets which were being administered by the Court at Jaffna. In fact the petition on which final orders for letters of administration were issued was filed by Mr. Wilson through his attorneys Messrs. Harding and Thornton and as already stated Mr. Wilson in that petition applied as Official Assignee as representing the heirs and creditors of the sons. The power of attorney issued to Messrs. Harding and Thornton gave them complete power to compromise and settle all claims against the estate. Therefore it does not lie in the mouth of Mr. Wilson to say that he was not a party to the action in the Ceylon Court and that the consent decree does not bind him. There can be no doubt that Messrs. Harding and Thornton were acting as the agents of Mr. Wilson in entering into a compromise in the capacity of administrators. It must also be said that Mr. Wilson in his capacity as the Official Assignee opposed the application of Chokkalingam Chetti to have the moneys attached by him transferred to the Jaffna Court. Therefore, though it does not appear on record that the Official Assignee was a pro forma party to the compromise, the compromise could not have been entered into without reference to the Proctor who was functioning on his behalf and without the Official Assignee being apprised of the terms on which the consent decree was passed by the Supreme Court of Ceylon. I think it is in view of this that the concession which appears to have been made before Wadsworth J. should be considered. The concession which is alleged to have been made by Mr. Wilson is thus stated by the learned Judge in the judgment under appeal :

> It was first contended that this decree against the administrator of the estate of the deceased Somasundara was not in fact a decree against the sons to the extent of the assets of their father in their hands nor a decree against the Official Assignee to the extent to which he was in possession of those assets. This contention has now been abandoned.

Mr. T. M. Krishnaswami Ayyar on behalf of the Official Assignee says that the concession was not made in the manner stated by Wadsworth J., but that the second part of the concession as recorded by the learned Judge was confined to the separate assets. We will have to examine the scope and effect of the compromise decree and the nature of the concession that was made by the Official Assignee at some length, but it is sufficient at this stage to say that the consent decree passed against Messrs. Harding and Thornton must be taken to have been passed against them as the agents of the Official Assignee and it is not open to Mr. Wilson to say that he was not a party to the consent decree at all. The learned Judge on a consideration of the entire evidence on record and on a construction of the compromise decree and in view of the concession made by the parties before him came to the conclusion that Chokkalingam Chetti must be placed in the same position as any of the creditors of the insolvent's father (Somasundara) in British India in proceeding against the assets, whether joint family assets or the separate assets of the father, in the hands of the Official Assignee as representing the sons but that Chokkalingam Chetti was not entitled to priority either in respect of what are deemed to be the separate assets of the father or the joint family assets wherein Somasundara and his sons were interested and the proper course according to him would be to treat the creditors of the father to the extent of the father's assets in the hands of the sons as creditors of the sons entitled to rank rateably to that extent with the sons' subsequent creditors. As we have already said, both the Official Assignee and Chokkalingam Chetti have preferred appeals.

The contentions on behalf of the Official Assignee are thus formulated by Mr. Krishnaswami Ayyar : (i) The claim of Chokkalingam Chetti is a claim made by him as a creditor of the father of the insolvents and such a claim cannot be proved in the insolvency of the sons and his application was therefore incompetent. (ii) Assuming that an application lies, he could only prove his claim to the extent to which he could establish a personal liability of the sons, i. e., a liability which could be enforced against the sons' entire property including their separate property. (iii) Assuming that such personal liability could be established there must be an inquiry as to how much of the debts that were subsisting on the date of the death of the father were binding on the joint family and were discharged by the insolvents and to that extent so much of the property as represented the value of the debts which have been discharged or taken over by the sons must be eliminated in coming to a conclusion as to what property would be available for distribution among the creditors. (iv) In any event Chokkalingam Chetti cannot claim any interest and the interest must be taken to have ceased to run from the date of the order of this Court adjudging the sons insolvents. The appeal on behalf of Chokkalingam Chetti was mainly on the ground that the learned Judge ought to have allowed priority in respect of his debt in preference to the creditors of the sons both in respect of the separate assets of the father and in respect of the joint family assets.

The first question therefore that falls to be decided is whether the application of Chokkalingam Chetti was competent. Mr. Krishnaswami Ayyar's contention is that on a debt of the father which under the Hindu law the son may be under a pious obligation to pay the son could not be adjudicated insolvent because under the law of insolvency whether in British India or in England a person can be adjudicated insolvent in respect of any debt only if he was under a personal liability to pay it, that is to say, personal liability is a necessary foundation for an order of adjudication and if therefore a debt could not be made the foundation for an order of adjudication it is not a provable debt in insolvency. Mr. Krishnaswami Ayyar relied strongly on 50 Mad 981,[1] (1893) 2 Q B 113[2] and (1895) 1 Q B 328[3] at p. 332. In 50 Mad 981[1] Odgers and Venkatasubba Rao JJ., took the view that where a decree has been passed against a person as the legal representative of another (in that case the decree was against the son for the debt of his deceased father to the extent of the assets in his hands) he could not be adjudged insolvent unless a personal decree was obtained under S. 52, Civil P. C. Venkatasubba Rao J., in the course of the judgment remarked thus:

> The proposition that any person who happens to be a debtor in his representative capacity is liable to be adjudicated an insolvent cannot be seriously argued, for in that case any executor or administrator may be so adjudicated by reason of his occupying that limited capacity.

Then he concluded as follows: "If the debts could not be personally enforced the debtor could not be adjudicated an insolvent." A similar view was taken in English cases namely that if the debtor could not be called upon personally to pay, bankruptcy notice cannot be issued: *vide* (1895) 1 Q B 328[3] at p. 332. This position is canvassed by Mr. Rajah Ayyar for the appellant (Chokkalingam Chetti) and he went to the length of contending that the view taken in 50 Mad 981[1] is wrong but it seems to us that it is not necessary to deal with this contention because a debt, though it may not be made the foundation for an order of adjudication, may still be a debt provable in insolvency. In other words, though a personal liability is a necessary foundation for an order of adjudication, it is not a necessary condition for a debt provable in insolvency. It is enough if there is a 'proprietary liability' to use the language of Lord Bown, in (1888) 20 Q B D 120,[4] i. e., a liability in respect of property. Under S. 46, Presidency Towns Insolvency Act, 1883, which is word for word S. 37, English Bankruptcy Act of 1883,

> All debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

What is therefore required is, there must be a debt or liability to which the debtor was subject on the date of the receiving order or order of adjudication. 'Subject' means 'liable,' i. e., liable personally or in respect of property. Therefore if the debtor is liable to pay a debt or satisfy a liability from and out of the property in his hands, it would be a provable debt in insolvency. In (1899) 2 Q B 62,[5] Wright J., held that the damages awarded to a petitioner in a Divorce Court against a co-respondent, though they will not support a bankruptcy petition against the co-respondent, are nevertheless a debt provable in insolvency. The same view was taken in 69 M L J 818[6]

---

1. Nagasubramania Mudaliar v. Krishnamacharlar, (1927) 14 A I R Mad 922=104 I C 642=50 Mad 981=53 M L J 403.
2. In re Lines: Ex parte Lester & Co., (1893) 2 Q B 113=62 L J Q B 372=4 R 416=68 L T 739=41 W R 488=10 Morrell 124=58 J P 5.
3. In re Hewett: Ex parte Levene, (1895) 1 Q B 328=64 L J Q B 185=72 L T 60=43 W R 237=15 R 162.
4. Scott v. Morley, (1888) 20 Q B D 120=57 L J Q B 43=57 L T 919=52 J P 230=4 Morrell 286=36 W R 67.
5. In re O'Gornon: Ex parte Bale, (1899) 2 Q B 62=68 L J Q B 650=80 L T 501=47 W R 543=6 Mason 204.
6. Official Receiver, Tinnevelly v. Krishna Pillai, (1935) 22 A I R Mad 1058=159 I C 88=69 M L J 818.

unreported Judgment of 4th May 1938 in Applications Nos. 294 and 295 of 1938 in C. S. No. 79 of 1936, High Court by Beasley C. J. Therefore if on the date of the order of adjudication, the insolvents were under a liability to pay a debt from and out of the joint family property in their hands or from and out of the separate property inherited by them from their father, such a liability would be a debt provable in insolvency. We understand that our learned brother Gentle J., has taken the view that a father's debt can be proved in the insolvency of the son: *vide* Applications Nos. 294 and 295 of 1938 in C. S. No. 79 of 1936. We are therefore of opinion that the father's debt is provable in the insolvency of the son under S. 46, Presidency Towns Insolvency Act, and that the application of Chokkalingam Chetti is competent. In this view, the contention of Mr. T. M. Krishnaswami Ayyar that there should be a personal liability on the part of the son before a debt can be proved in insolvency must be negatived.

The next contention of Mr. Krishnaswami Ayyar is that assuming that the father's debt can be proved in the son's insolvency, in this case the joint family property which vested in the Official Assignee on the order of adjudication could not be deemed to be assets against which Chokkalingam Chetti could have any right. The contention is that the debts were incurred in Ceylon where the Roman-Dutch law prevails and that that law does not recognise the theory of pious obligation and therefore the debt could not be enforced against the sons. Further, Chokkalingam Chetti's father, having elected to obtain a decree against the administrators of the estate of the insolvents' father, could not now seek to recover any monies from and out of the joint family properties in the hands of the sons as the assets of the father available for the payment of his debt. The contention of Mr. Rajah Ayyar is that the Roman-Dutch law must be treated as applicable only with reference to immovable property situated in Ceylon and cannot apply to any moveable property left by the deceased either in Ceylon or in British India, that any creditor foreign or British Indian can realise his debt from and out of such property which can be made available for the payment of the debt and therefore the remedies available to a foreign creditor for realising the debt from and out of the property of a deceased which is situated in British India are not taken away by the Roman-Dutch law.

It seems to us that it is unnecessary to go into contentions based on the Roman-Dutch law in the view we take of the consent decree passed by the District Court of Colombo. Though the decree was passed against the administrators who were administering the assets in Ceylon, still a creditor will be entitled to come and claim in the administration of the assets in British India, from the administrator who would be functioning in British India. In the light of this principle the consent decree that has been passed by the Supreme Court of Ceylon must be considered. The first protion of the compromise is that Chokkalingam Chetti should share pro rata with all the other creditors the assets of the deceased. Prima facie that would apply to the assets of the deceased in Ceylon. The next portion of the compromise decree is that he is entitled to proceed for the recovery of any balance that may be due to him from the assets that may exist out of Ceylon. On the date of that order, the assets of the deceased out of Ceylon must be said to have been in the hands of the Official Assignee whether as the administrator of the estate of Somasundara or as Official Assignee in the insolvency of the sons of Somasundara. If the agreement is deemed to relate to assets in the hands of the Official Assignee as Administrator of British India assets by virtue of the grant of letters of administration to him by this Court, it means that the right of Chokkalingam Chetti to prove in the administration here is recognized, i. e., he will be entitled to recover pro rata from the assets of the father in the hands of the administrator, the Official Assignee. In this connexion it must not be forgotten that when the Official Assignee made an application to this Court for letters of administration with the wills annexed of Somasundara, he appeared to treat the joint family properties in the hands of the insolvents as the assets of Somasundara. In the affidavit filed by him in this Court dated 19th December 1928 he deposed as follows:

> So far as I am able to gather, the position of the estate of the late Ar. Ar. Sm. Somasundaram Chettiar is this. The assets that were in the hands of the insolvents at the time of their adjudication aggregate to Rs. 60,08,399-7-8 in British India and Burma, Rs. 4,74,807-15-9 in Colombo and Rs. 7,17,067-4-0 in Jaffna, thus totalling Rupees 72,00,274-11-5.
>
> As against the said assets, according to the account books of the insolvents and according to their valuation, the liabilties amount to as follows:

> Rs. 54,71,782-5-2, in India and Burma, Rupees 17,65,846-0-10 in Colombo and Rs. 3,78,065-6-0 in Jaffna, thus totalling Rs. 76,15,693-12-0.
>
> The above is an estimate as per the insolvents' schedule. Whatever that may be, the said estate of Ar. Ar. Sm. Somasundaram Chettiar is insolvent and I have so far declared a dividend of an anna in the rupee and I may declare a further dividend of two or three annas. I therefore state that for the purpose of the above petition, the net assets are nil.

It is clear from this that he purported to treat the property which vested in him by virtue of the order of adjudication in the insolvency of the sons as the assets of Somasundara, i. e., not only the joint family property but also the separate property of the sons is treated as the assets of the father. Whether the Official Assignee was in law right in so treating such assets is another matter. The fact remains that he was not administering such assets as the administrator of the father because before any grant was made to him in the testamentary matter such property vested in him by virtue of the provisions of the insolvency law and he was only administering such assets in the capacity of Official Assignee. Therefore, the question arises whether 'assets' in the compromise petition should not be understood as meaning assets in the hands of the Official Assignee in insolvency. It may be contended that the power of Messrs. Harding and Thornton to settle any debt could only be in their capacity as administrators and that any compromise arrived at by them beyond the scope of the power conferred upon them may not be binding upon the Official Assignee in his capacity as Assignee or upon the creditors of the sons in the insolvency of the sons. But it seems to us that the letters of administration were obtained both here and in the Ceylon Court by the Official Assignee not only as representing the insolvents but also the creditors of the insolvents in his capacity as Official Assignee, and no distinction was made by him between the fathers's assets and his liabilities and the sons' assets and liabilities. Further he must be deemed to have been a party to the compromise because he was a party to the proceeding in the Supreme Court which resulted in the compromise. It is hardly likely that without reference to him any compromise was entered into.

Therefore, it must have been the understanding between the parties, that after getting such amount as he could get from the assets in the Jaffna Court, the claimant Chokkalingam Chetty should be allowed to proceed to recover the balance from the British Indian assets in the hands of the Official Assignee in whatever capacity he might hold them. If this was the understanding, it could only be on the footing that Chokkalingam Chetti should share pro rata with all the creditors who are entitled to participate in the assets in the hands of the Official Assignee without any preference. The word 'proceed' can only be understood in the light of the circumstances then existing as referable to a claim to be made before the Official Assignee. In the light of these facts one can understand the concession alleged to have been made by the Official Assignee before Wadsworth J. and we are not inclined to accept that the concession was only confined to the separate assets. Whether the Official Assignee and his agents were within their powers to enter into such a compromise so as to bind the sons' creditors in the insolvency of the sons is another matter; but what we have to decide is whether the Official Assignee has agreed to the terms of the compromise in the Supreme Court and thus agreed to Chokkalingam Chetti proving in the insolvency of the sons. On the evidence on record we hold that he did agree. In this view the concession alleged to have been made by the Official Assignee may be understood. The decree certainly does not bear the interpretation which the concession of the Official Assignee as stated by our learned brother Wadsworth J. seems to suggest. The concession warrants the inference that he agreed to Chokkalingam proving his claim before him and sharing in the assets being administered by him. Therefore in the circumstances of this case Chokkalingam Chetti must be allowed to prove for the balance of the debt, after crediting the amount realised by him in the Jaffna administration, in the insolvency of the sons.

Now we shall deal with the question of priority. In the view we have already expressed of the terms of the compromise arrived at between Chokkalingam and administrators in Ceylon and the Official Assignee, it would not be open to Chokkalingam Chetti to contend that he ought to be given a priority over the other creditors. The understanding seems to us to be that he should share pro rata along with other creditors entitled to share in the insolvency of the sons. Having regard to the first portion of the compromise where pro rata distribution was agreed to, it must also be taken that the understanding between the parties then was that pro rata distribution was the foundation and essence of the agreement irrespective of the fact against which assets the applicant would be entitled to put forward his claim for the recovery of the amount due.

Apart from the compromise, the question is whether as a matter of law Chokkalingam Chetti is entitled to claim priority on the ground that he was the father's creditor and was therefore entitled to be paid in preference to the creditors of the sons in the insolvency of the sons from and out of the separate property of the father which devolved on the sons by inheritance and from and out of the joint family properties which vested in the sons by survivorship. The separate property in British India left by the father was the business in Rangoon and its assets. The rest of the properties were owned by the father and sons as joint family property. It was the contention of Mr. T. M. Krishnaswami Ayyar on behalf of the Official Assignee that the father died heavily indebted and that the sons discharged a major portion of the father's debts before they became insolvents, so that on the date of the insolvency no property of the father was available for payment to any creditor who was not paid and that an account should be directed on the debts which the sons discharged for ascertaining from what assets the claimant could get his claim satisfied. In regard to the separate property of the father inherited by the sons there is no difference between the nature of the obligations imposed on them and any other heir inheriting the property from his ancestor. The heir would take the property subject to the obligation of paying his ancestor's debts and in so far as he is unable to satisfy that he has applied the property in discharge of the ancestor's debts, he will be personally liable. The theory is that he takes only the residue after payment of the debts: 13 Luck 494[7] at p. 502. But the debts do not form a charge on the estate so that if the heir alienates it to a bona fide purchaser for value or if a creditor of the heir seizes and sells it, the ancestor's creditor cannot reach it. So far as the Hindu law is concerned, this principle is undoubted. It was thus stated in a very early case:

> We do not find nor can the pleader show us from any text of Hindu law, that the property of a deceased person is so hypothecated for his debts, as to prevent his heir from disposing of it to a third party or to allow a creditor to follow it and take it out of the hands of a third party who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt if he has alienated the property but he cannot, we think, follow the property: 2 W R 296.[8]

Thus, there is nothing to prevent a creditor of the son getting satisfaction out of the father's property which devolved on the son. Therefore, questions have arisen both under S. 73, Civil P. C., and the law of insolvency in regard to the preferential claims of a father's creditor. Where there was a decree against a son as a legal representative of his father and also a decree obtained against the son personally by a creditor of his, our High Court took the view that the holders of both decrees are entitled to share rateably, (1917) M W N 859,[9] though a different view has been taken by the Allahabad High Court: 26 All 28.[10] In 30 I C 256[11] under the law of insolvency Oldfield and Sadasiva Ayyar JJ. took the view that a father's creditor must only share rateably with a creditor of the son. But a different view was taken in A I R 1930 All 552[12] where an ancestor's creditor was held to have priority over the creditor of the heir. Mr. Rajah Iyer laid considerable emphasis on the later decision. In that case the parties were governed by Mahomedan law and the learned Judges took the view that under that law a creditor of a deceased Mahomedan has a general charge upon the assets left by the deceased and that it partakes of the nature of an equitable lien, so that in effect he becomes a secured creditor in the insolvency of the heir. How far this view is tenable under the Mahomedan law is open to doubt, but at any rate it is not the Hindu law. Even with reference to Mahomedan law, our High Court has adopted the view that no such charge exists and that the creditor of the deceased is not a secured creditor but must share rateably along with the creditors of the heir: *vide* the observations of

---

[7] Kazim Ali Khan v. Sadiq Ali Khan, (1938) 25 A I R P C 169=174 I C 977=65 I A 219=13 Luck 494=32 S L R 772 (P C).

[8] Unnopoorna Dassee v. Gunga Narain Paul, (1865) 2 W R 296.

[9] Vadlamany Venkatesam v. M. Viswanadham, (1918) 5 A I R Mad 512=42 I C 897 = 1917 M W N 859.

[10] Bhola Nath v. Maqbulnnissa, (1903) 26 All 28 =1903 A W N 184.

[11] Lakshmi Narsimham v. Jaganadha Rao, (1916) 3 A I R Mad 645=30 I C 256.

[12] Shankar Lal v. Muhammad Ismail, (1930) 17 A I R All 552=125 I C 28=1930 A L J 989.

Odgers and Madhavan Nair JJ., in A I R 1929 Mad 609[13] at pp. 610 and 611. The learned Judges followed the decision of Oldfield and Sadasiva Aiyar JJ., decided with reference to the Hindu law and reported in 30 I C 256.[11] In that case a creditor of a Hindu father obtained a decree against his sons for an amount payable by them from and out of the assets of the father in their hands. Before any proceedings were taken to realize the money, the sons became insolvents and the entire property owned by them including the property which once belonged to their father vested in the Official Receiver. Subsequently, the creditor who had obtained the decree wanted to attach the said property in the hands of the Official Receiver. It was contended on the creditor's behalf that he being a creditor of the father was entitled to attach and sell the property and that the son's insolvency could not affect him. Dealing with this contention the learned Judges remarked :

> The property of a deceased Hindu is not so hypothecated for his debt as to prevent his heir disposing of it or to allow a creditor to follow it in the hands of a third party. There is therefore no question of respondent's right to a lien or charge on Balarama Doss's (the ancestor) property in the first and seventh defendants' (the sons) hands or in those of the Official Receiver who derived it from them — Balarama Doss's estates must accordingly be treated as having vested in the Official Receiver like defendants 1 and 7's other assets and as being immune from execution proceedings under S. 16 (2), Provincial Insolvency Act, respondents being left to prove their debts like other unsecured creditors,'

that is just like any other unsecured creditor of the sons. The view is, as we shall presently show, in strict accordance with the provisions of the Insolvency Acts both Provincial or Presidency. This principle if adopted with reference to the separate property of the father devolving on his sons would apply with greater force to the joint family property which has devolved on the son by survivorship. Under the Mitakshara law by which the parties in this case are governed, the cardinal principle is that the ownership of the father and the son is equal in every item of joint family property possessed by them. The son has by birth an interest in the said property and he can deal with and dispose of it for value. On the death of the father his interest in the property becomes augmented, but the nature of the rights possessed by him as owner thereof remains unchanged. No doubt the interest of the son during his father's lifetime is liable to be dealt with by the father or seized by a father's creditor for the satisfaction of the father's debt because by virtue of his relationship the Hindu law casts upon the son a pious obligation to discharge his father's debts but it is not a personal liability and is only incidental to the property. So long as such property remains in the hands of the son, the same obligation continues even after the death of the father. The son who was the owner of an undivided share during the lifetime of his father becomes on the latter's death the sole owner of the whole and not merely of the net residue of the property after deduction of the debts as in the case of inherited property. There can be therefore no question that the property is the individual property of the son and a creditor of his can seek satisfaction of the debt from the entire property possessed by the son, that is, his interest in the joint family property after it has been augmented by the death of the father. If such a creditor therefore in execution of a decree seized that property and got it sold, the alienee would get a complete title and it would not be open to any creditor of the father to come and say that the alienee is liable to pay his debt.

It cannot be contended that there is any charge on the joint family property for the father's debt in the sense that it is hypothecated for the debt so as to make a father's creditor a secured creditor. The pious obligation does not fasten any such charge on the property so that he who takes the property takes it subject to that charge. It is one thing to say that a son is under an obligation to discharge the debt; it is quite another to assert that the property is charged in the sense that it is hypothecated for the debt. Where after the father's death the son becomes the sole owner of the property and the creditor becomes entitled to get satisfaction from it, it seems to us on principle that no distinction can be drawn between a father's creditor and a son's creditor. It is sufficient for our present purposes to note that neither during the father's lifetime nor after his death the son's interest in the joint family property can be said to be charged for the father's debt. Mr. Rajah Ayyar relied upon certain authorities for the position that the father's debts constitute a charge upon the inheritance and relied on the following passage in Mayne's Hindu Law :

---

[13] **Nainar Rowthen v. Pichai Rowthen, (1929) 16 A I R Mad 609=120 I C 889.**

> A father's debts are a first charge upon the inheritence and must be paid in full before there can be any surplus for the division. (Para. 339.)

He also relied upon the decision in 50 Mad 535[14] for the position that before partition can be effected the father's debts must be provided for and only the residue after making such provision can be divided. But neither the passage in Mayne's Hindu Law, nor the decision in 50 Mad 535[14] supports the contention of Mr. Rajah Ayyar. It is no doubt true that before a partition of joint family property can be effected, the obligations imposed by law on all the members must be provided for and one of such obligations relates to the father's debts. The theory is that if it were not so done the father would continue to be a debtor and it is incumbent upon the sons to see that he does not and thus save his soul from unhappiness in the next world. This is what Narada says:

> What remains of the paternal estate after paying off the debts of the father shall be divided among the brothers. Otherwise the father continues a debtor. (Vyavasta Chandrika, Vol. 1. p. 238.)

It is in this sense of obligation that the word "charge" is used in the passage in Mayne's Hindu Law and not in the sense of the properties being hypothecated for the debt. It is one thing to say that before partition the debts of the father shall be provided for, and it is another thing to say that when the son becomes the sole owner on the father's death entitled to dispose of the property as his own, there is any restriction imposed on his powers for disposing it for his own debts though he is equally under an obligation to satisfy the demand of his father's creditors. Again, the obligation imposed by the Hindu law being incidental to the property so long as the property remains in the hands of the son the property cannot escape liability, whether there is a charge or no. But once the property has been alienated to a bona fide alienee, the obligation cannot be pursued against the property. It seems to us that the same principle would apply where the son is divested of his ownership therein by operation of law. Bankruptcy is an involuntary alienation and by the provisions of the insolvency law there is a statutory conveyance of alienation of the said property in favour of the Official Assignee in trust for the creditors for distribution among them according to the provisions of the said law. Having regard to these principles the question of priority has to be viewed.

Under S. 52 (2) of Presidency Towns Insolvency Act all property as may belong to or be vested in the insolvent at the commencement of the insolvency will vest in the Official Assignee. The principle is the same under the Provincial Insolvency Act and under the English law. It cannot be denied that the separate property of the father devolving on the son and the joint family property owned by the son at the date of the insolvency which has been augmented by the father's share devolving upon the son by survivorship on account of the father's death before the date of the insolvency, will be property which belonged to the insolvent. But once that property vests in the Official Assignee, it would have to be governed by the provisions of the insolvency law. One of the provisions of that law is S. 49 (5) which provides that subject to the provisions of the Act all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference. Of course under S. 49 certain unsecured debts have to be paid in priority and it is in respect of them that a preference is accorded by the Act. The insolvency law is a special law having for its object the distribution of the insolvent's available assets among his creditors pro rata. The father's debt is not one to which a right of priority is given by the Act. The Official Assignee can only administer the assets and distribute them in accordance with the provisions of the Act. If a father's creditor chooses to prove in the insolvency of the son as a provable debt of the son, he must submit himself to the provisions of the Act which does not recognise any priority in his favour. In a recent decision reported in 1939 M W N 107[15] our learned brother Abdur Rahman, J., took this view and held that the unrealized debts of the father and the debts of the son stood on the same footing and that a father's creditor would not get priority over the son's creditor. In the course of the judgment the learned Judge observed thus:

> If one looks to the provisions contained in S. 61, Provincial Insolvency Act, it would be found to provide in sub-cl. 5 that all debts entered in the schedule have to be paid rateably according to the amount of such debts without any preference except to those which have been otherwise specified

---

[14] Venku Reddi v. Venku Reddi, (1927) 14 AIR Mad 471 = 100 I C 1018 = 50 Mad 535 = 52 M L J 387 (FB).

[15] Thimmiah v. Officer Receiver, Bellary, (1939) 26 A I R Mad 276 = 183 I C 693 = (1939) 1 M L J 158 = 1939 M W N 107.

> by the Provincial Insolvency Act . . . . . The learned counsel for the petitioner has not been able to point to any provision in the Provincial Insolvency Act under which he could claim priority for the debt in question and so far as proceedings in insolvency are concerned, the petitioner must, as provided in sub-cl. 5, share rateably without any preference. It is obviously the policy of the Insolvency Law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt it must necessarily be held to fall within the sub-clause and no priority can legitimately be claimed in regard to the same. Viewed in the light of this section the unrealized simple debts of the father and that of the son would stand on the same footing.

If we may say so with respect we think that this view is sound. The learned Judges of the Allahabad High Court in A I R 1930 All 552[12] on which Mr. Rajah Ayyar relied would seem to support their decision as to priority on S. 4, Provincial Insolvency Act. We are unable to understand how it can be done because that section itself says "subject to the provisions of this Act." S. 49 is one such provision. So long as a debt is not a charge upon a particular property and the obligation to pay the debt out of a particular property is imposed on the owner personally, an obligation which is not transmissible to his alienee except when the alienation is not in good faith, it cannot be said that the Official Assignee who is a statutory alienee of the property can be bound by any such obligation. Such priority if any must be deemed to have been abrogated by the provisions of the Insolvency Act. We are therefore of opinion that the contention of Mr. Rajah Ayyar that his client must be paid in preference to the creditors of the sons must be overruled.

The next question relates to the contention raised by Mr. Krishnaswami Ayyar that an account should be directed in regard to the question of separate assets and joint family properties available to satisfy the claim of the said Chokkalingam Chetti. Though this question was argued before our learned brother Wadsworth J., it was not raised in any of the reports of the Official Assignee, nor did he allege and prove the facts to enable the Court to pronounce an opinion thereon. We therefore do not propose to go into it. Further, in the view we have taken of the scope of the compromise decree and Chokkalingam Chetti's right to priority, this question does not arise.

There remains only the question relating to interest. The contention of Mr. Krishnaswami Ayyar on behalf of the Official Assignee is that from the date of the insolvency of the sons the claimant is not entitled to claim any interest. It is conceded by Mr. Rajah Ayyar that if the provisions of the Insolvency Act were to be applied, his client would not be entitled to interest. But what Mr. Rajah Ayyar says is that under the compromise it was stipulated that his client should get the balance of the amount under the decree in the Colombo District Court after giving credit to the amounts received by him in the Jaffna Court and therefore it was agreed that he should get interest on the decree amount. We are not inclined to agree with him in this contention. As we have already remarked, what was agreed to by the Official Assignee was that Mr. Rajah Ayyar's client could prove his claim before him. The amount payable in respect thereof must be subject to the provisions of the Insolvency Law by which the Official Assignee is governed and it is not open to him to disregard the provisions of the Act and consent to anything which is contrary to the Act. We must therefore hold that interest on the claimant's debt will cease from the date of the adjudication of the sons. In the result, we confirm the decree of our learned brother Wadsworth J., subject to the modification as to interest as declared above and dismiss both the appeals with costs.

C.R.K./G.N. *Appeals dismissed.*

A. I. R. 1940 Madras 849

WADSWORTH J.

K. Munusami Chetti and others — Appellants.

v.

Chenchu Naidu and another — Respondents.

Appeal No. 108 of 1936, Decided on 31st July 1939, against appellate order of Dist. Court, Chingleput, D/- 31st March 1936.

Madras Co-operative Societies Act (6 of 1932), S. 51, Rules under, R. 15—Award under R. 15 filed in Civil Court for enforcement may be executed on application of assignee of award.

An award under R. 15 of the Rules under S. 51 of the Act may, after it has been filed in the Civil Court for enforcement under R. 15 (7) (c) be executed on the application of an assignee from the person in whose favour the award was made.

[P 849 C 2 ; P 850 C 1]

K. Rajah Ayyar — *for Appellants.*

T. M. Krishnaswamy Iyer and M. Natesan — *for Respondents.*

Judgment.—The only question in this appeal is whether an award under R. 15 of the Rules under S. 51, Co-operative Societies Act, may, after it has been filed in the Civil Court for enforcement under R. 15 (7) (c) be executed on the application of an assignee from the person in whose favour the award was made. No authorities have been cited. The rule itself says that the "Court shall enforce the award as if it was a decree of the Court." If it were a decree, an assignee could under O. 21, R. 16, Civil P. C., apply for execution. I see no reason why this provision should not apply to a Co-operative award which is enforceable as if it were a decree. The appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

✲ A. I. R. 1940 Madras 850

WADSWORTH J.

On difference between

BURN AND STODART JJ.

Sri Sri Sri Nandakishore Ananga Bhima Dev Kesari Gajapathi, Zamindar of Sannokhemedi represented by Sriman Viswanadha Das Mahasayo — Appellant.

v.

Susi Iamala Patta Mahadevi and others — Respondents.

Appeal No. 275 of 1936, Decided on 15th September 1939, against order of Sub-Judge, Berhampore, D/- 24th February 1936.

(a) Civil P. C. (1908), Ss. 144 and 145— No order for restitution can be made against sureties under S. 144—But they can be made parties to proceedings—Surety's liability can only be determined under S. 145 (Per *Burn and Stodart JJ.*).

In proceedings under S. 144, no order for restitution can be made against sureties although there is no objection to their being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. If the principal is found liable to pay anything to the applicant by way of restitution, it is for him (applicant) to enforce that order against the sureties by proceedings under S. 145 and the liability of the sureties can only be determined in such proceedings : *A I R 1919 P C 55, Ref.* [P 852 C 2]

✲ **(b) Civil P. C. (1908), S. 144 — Possession of Receiver is possession of party ultimately declared successful — Plaintiff succeeding in Court of first instance in suit for possession — Receiver appointed during pendency of appeal by defendant to High Court — Appeal having been allowed defendant got possession from Receiver — High Court's decree reversed by Privy Council decree and that of Court of first instance restored — Receiver's possession must be deemed to be plaintiff's possession and he must be deemed to be dispossessed when defendant took over possession from Receiver — Plaintiff held entitled to restitution of possession and mesne profits under S. 144—Fact that he was refused decree for mesne profits by Court of first instance and High Court did not deprive him of his right to profits accruing to his opponent after latter dispossessed him in consequence of High Court's decree** (Per *Wadsworth and Stodart JJ.; Burn J. contra*).

The possession of a Receiver pendente lite must be deemed to be the possession of the party who is ultimately declared successful. [P 858 C 2; P 870 C 2]

The plaintiff's suit for possession having been decreed the defendant went up in appeal to the High Court. During the pendency of the appeal a Receiver was appointed by the Court. The defendant's appeal having been allowed by the High Court he took over possession from the Receiver. But the plaintiff went up to the Privy Council whose decree reversed the decree of the High Court and restored the decree of the Court of first instance. In the application by the plaintiff under S. 144 :

Held that the possession of the Receiver must be deemed to be the possession of the plaintiff who must be deemed to have been dispossessed when the defendant took over possession from the Receiver in pursuance of the High Court's decree and consequently he was entitled to possession and mesne profits during the period he was out of possession by way of restitution under S. 144 : *A I R 1928 Pat 260, Discussed and Rel. on ; A I R 1932 Pat 317; A I R 1927 Lah 625 and A I R 1924 Cal 769, Disting.* [P 871 C 2]

Held further that the fact that the plaintiff was refused a decree for mesne profits by the Court of the first instance and the High Court did not deprive him of his right to claim the same under S. 144 from his opponent after his dispossession by the latter in consequence of High Court's decree which was subsequently reversed : *A I R 1927 Mad 898, Expl. and Disting.* [P 872 C 2]

(c) Civil P. C. (1908), S. 144—Mesne profits — "Order which is properly consequential on such reversal," what is.

An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in the words of S. 144, "an order which is properly consequential on such reversal." [P 861 C 1]

(d) Civil P. C. (1908), S. 144 — Allowances ordered by Court to be paid to parties out of suit property must be deemed to have been paid on condition of their being refunded by party ultimately proving unsuccessful (Per *Burn and Stodart JJ.*).

No interim order of the Court can operate to give away the revenues of the estate absolutely to one of the contesting parties. The allowances paid pendente lite must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful : *24 Mad 147 (P C), Rel. on.* [P 863 C 2 ; P 864 C 1]

(e) Hindu Law — Widow — Maintenance — Impartible estate (Per *Burn and Stodart JJ.*).

Even in the case of an impartible estate the widow of an undivided coparcener is prima facie entitled to maintenance : *A I R 1934 P C 157 ; A I R 1921 P C 62; A I R 1939 Mad 614, Rel. on ; A I R 1918 P C 81, Ref.* [P 867 C 1]

(f) Civil P. C. (1908), S. 144 — Application for mesne profits — Claim to set off not put in trial Court cannot be raised in appeal (Per *Stodart J.*).

Where in an application for mesne profits under S. 144 the opposite party fails to put forth the claim for set off, he cannot be allowed to raise that plea for the first time in appeal. [P 868 C 2]

(g) Civil P. C. (1908), S. 144 — Construction — Words "place the parties in the position which they would have occupied but for such a decree" in Section 144 — Meaning *(Per Wadsworth J.).*

There are three possible ways of interpreting the words "place the parties in the position which they would have occupied but for such a decree," occurring in S. 144. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The last interpretation is the correct one. There is nothing in the words of S. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred, if he has to be put in the position which he would have occupied had the right decree been passed. The correct procedure under S. 144 is to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof. [P 871 C 2, P 872 C 1]

B. Jagannadha Dass — *for Appellant.*

B. V. Ramanarasu — *for Respondents.*

Burn J.—This is an appeal from an order passed by the learned Subordinate Judge of Berhampore in an application for restitution under S. 144, Civil P. C. The applicant before the learned Subordinate Judge was the plaintiff in O. S. No. 46 of 1920 in the Court of the Subordinate Judge of Berhampore. He sued to recover the estate of Chinnakimedi alleging that he was the son of the last holder of the estate, Brojo Kishoro Deo. The defendant Kunja Bihari Deo was the grandson of the plaintiff's grandfather's younger brother. The suit was subsequently transferred to the Additional Subordinate Judge of Ganjam and tried as O. S. No. 10 of 1922. On 20th December 1922, the suit was decreed in favour of the plaintiff in so far as possession of the estate and certain moveable properties was concerned. But the plaintiff's claim for mesne profits both before and after suit till date of delivery was disallowed, the learned Subordinate Judge stating in his judgment that,

no issues were framed in the matter of past and future profits and the question relating to the profits must therefore be deemed to have been given up.

Both the plaintiff and the defendant appealed to the High Court, the defendant from the Subordinate Judge's decree awarding possession to the plaintiff, and the plaintiff from the Subordinate Judge's decree refusing him mesne profits. These appeals were numbered 25 and 261 of 1923. Pending disposal of the appeals a receiver was appointed in 1923. He took possession on some date in 1923, (the date does not appear from the papers printed on behalf of either party in this appeal and it is not important for the purposes of this appeal).

The judgment of the High Court was pronounced on 30th March 1928 allowing the defendant's appeal No. 25 of 1923 and dismissing the plaintiff's suit with costs in both Courts. Consequently, the plaintiff's appeal No. 261 of 1923 for mesne profits was dismissed with costs. The plaintiff applied for leave to appeal to the Privy Council against both these decrees, and pending disposal of his appeal, he prayed that the receiver who had been appointed in 1923 might be continued until the appeal to the Privy Council should be disposed of. The main ground upon which that application was based was that the respondent was a woman incapable of managing the estate, that she was in the hands of one Raghunatha Padhi, and that if she was put in possession, she would alienate and wrongfully dispose of the income. It is to be noticed here that during the pendency of the appeals in the High Court, the defendant Kunja Bihari Deo died in December 1925; and his widow had been brought on record as his legal representative. The High Court in its order of 17th August 1928 held that the plaintiff would be amply protected if the respondent was prevented by an injunction from alienating any of the properties of the estate without the consent or sanction of the Subordinate Judge of Berhampore, and if she were also required to give security to the extent of Rs. 60,000 for any loss that she might cause to the estate and might be accountable for if eventually the petitioner should succeed in his appeals to the Privy Council. This amount of security was subsequently reduced to Rs. 41,000. Security for that amount was furnished by April 1929, and in that month the receiver handed over possession of the estate with the small balance of cash then in his hands, and with all the records pertaining to the estate to the respondent.

The appellant was successful in his appeal from the decree of the High Court in A. S. No. 25 of 1923. The judgment of the Privy Council was pronounced on 1st November 1932 and is reported at p. 1 of 64 M L J.[1] The judgment of the Privy Council shows that the decree of the High Court dated 30th March 1928 was set aside and the decree of the Subordinate Judge dated 20th December 1922 restored. The respondent, i. e., the defendant, was ordered to pay costs of the appellant both in the High Court and before the Privy Council. The actual order in Council has not been printed in these proceedings by either party. It would appear that the plaintiff did not pursue his appeal to the Privy Council from the decree of the High Court in A. S. No. 261 of 1923 in which his claim for mesne profits was disallowed. The plaintiff executed the decree of the Sub-Court, restored by the order in Council, and got possession of the estate in execution proceedings on 10th March 1933.

On the 10th August 1933 the plaintiff put in his application for restitution quoting Ss. 144, 145 and 151, Civil P. C. He named as respondents in his application not only Kunja Bihari Deo's widow and legal representative, but also one Raghunatha Padhi Mahasayo alleged to be her agent, and nine other persons, sureties, who had executed the security bonds in pursuance of the orders of the High Court in 1929. The plaintiff claimed that counter-petitioner 1, (whom it will be convenient to call the defendant), should be ordered to restore one lakh of rupees or such sum as the Court might find due from her on account of the moneys drawn by her as allowances from the estate funds between 1922 and 1928. His second prayer was that both the defendant and her agent, counter-petitioner 2, should be ordered to restore the sum of Rs. 1,50,000 representing the amount wrongly appropriated by them during the period commencing with 2nd April 1929 and ending with 13th December 1932. A further prayer was that all the records and accounts taken from the receiver might be directed to be delivered to the plaintiff, and a fourth prayer was that the sureties, counter-petitioners 2 to 11 might be ordered to pay the plaintiff the sums covered by their security bonds.

In this appeal, we are not concerned with the first and the third prayers, since they were not pressed on behalf of the plaintiff before the learned Subordinate Judge, and learned counsel for the plaintiff has not attempted to press them before us. With regard to the fourth prayer, it is quite clear that in proceedings under S. 144, no order for restitution can be made against sureties: *vide* 42 All 158.[2] There is of course no objection to the sureties being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. In the present appeal, as my learned brother has said, we have been invited to say whether the security bonds can be enforced against the sureties in respect of mesne profits. In my opinion, this question does not arise, and although learned counsel for the sureties had addressed us on this point, I, with respect, decline to deal with it. If the defendant is found liable to pay anything to the plaintiff by way of restitution, it will be for the plaintiff to enforce that order against the sureties by proceedings under S. 145, Civil P. C., and the liability of the sureties can only be determined in such proceedings.

In my view, therefore, we are only concerned in this appeal with the second of the prayers put forward by the plaintiff. Now with regard to this, the grounds of the plaintiff's claim were somewhat obscurely stated in the affidavit sworn to by the plaintiff's agent. He alleged that during the time when the estate was in the hands of the receiver, the defendant had drawn several amounts out of the estate funds from the receiver under the orders of the High Court, as allowances for maintenance and other purposes. He said that these sums amounted to about one lakh of rupees. He also alleged that counter-petitioner 2 (defendant's agent) had collected "during the period," (but what period is not indicated), not less than 5½ lakhs of rupees, and that there ought to have been a net surplus of at least 1½ lakhs of rupees, after meeting all reasonable charges such as establishment, etc. Counter-petitioner 2, he said, had drawn Rs. 12,000 from the estate funds as a gratuity for managing the estate in addition to his monthly salary of Rupees 500. He alleged also that the sureties had drawn from the estate a substantial portion of the amounts for which they had given security. His claim therefore was that he was entitled by way of restitution to the amount of at least 2½ lakhs of rupees, out of which more than 1½ lakhs was to be made good by counter-petitioner 2 jointly with counter-petitioner 1.

---

[1] ('33) 20 A I R 1933 P C 20=141 I C 1=64 M L J 1 (P C), Ananga Bhima Deo v. Suseela Mala Patta Mahadevi.

[2] ('19) 6 A I R 1919 P C 55 =55 I C 550=46 I A 228 =42 All 158=22 O C 212 (PC), Raghubar Singh v. Jai Indra Bhahadur Singh.

The learned Subordinate Judge overruled the objection made on behalf of the defendant and the other respondents, that no restitution could be awarded under S. 144, Civil P. C., in this case. He held that S. 144 would authorize him to direct the defendant to restore the surplus profits of the estate for the period from 2nd April 1929 to 13th December 1932. But he considered that in so far as the defendant was concerned, she had not drawn from the funds of the estate for herself more than she was authorized to draw by the orders of this High Court. But the learned Subordinate Judge held that the payment of Rs. 12,000 made by the defendant to the second counter petitioner, her agent, as compensation for the loss of his practice at the bar during the period of his service under her, was not justifiable. He held therefore that the defendant and the second counter petitioner were liable to make good that amount to the plaintiff. The rest of the plaintiff's claim the learned Subordinate Judge dismissed. The plaintiff has preferred this appeal from the order dismissing his claim. The defendant and the second counter petitioner have appealed from the order directing them to restore Rs. 12,000, but we are not concerned with that appeal, since it was preferred after the District of Ganjam was transferred to the Province of Orissa and it is now pending, we understand, before the High Court of Patna.

Before us, learned counsel for the appellant has argued two items together amounting to about Rs. 1,30,000. Item 1 is Rupees 65,577-1-5 appropriated by the defendant out of the profits of the estate after she received possession of it from the receiver. The defendant's claim to this was based upon an order of the High Court passed by Krishnan J. on 11th April 1923 by which the receiver was directed to pay Rs. 1500 per mensem each to the plaintiff and the defendant. There were subsequent changes in the orders passed by this Court but they do not seem to be material. At the time in April 1929, when the defendant took possession from the receiver, this allowance was in arrears to the extent of Rs. 65,577-1-5, and the defendant's claim is that she was entitled to pay herself this sum out of the profits of the estate as they accrued during the period she was in possession. The other item is Rs. 64,500, the amount taken by the defendant out of the profits of the estate during the period between 1st April 1929 and the beginning of November 1932, at the rate of Rs. 1500 per mensem. The learned Subordinate Judge has held that the defendant's action in paying herself Rs. 65,500 on account of arrears cannot be said to be wrongful, and that she was justified in paying herself at the rate of Rs. 1500 per mensem during the period this estate was in her possession. The contention of the learned Counsel for the plaintiff is that the learned Subordinate Judge is wrong on both these points.

In my opinion, the learned Subordinate Judge was partly right and partly wrong. He was wrong, I consider, in holding that S. 144, Civil P. C., had any application to this case, but he was right, I think, in holding that even if it had, the plaintiff could not recover any portion of either of the two sums now in dispute. The plaintiff, I think, entirely misconceived his remedy. After the judgment of the Privy Council declaring him to be entitled to possession of the estate, he had, in my view, cause of action for a suit for mesne profits for any period within the bar of limitation. But he had no ground for applying for mesne profits in the guise of restitution. The doctrine of restitution under S. 144 is simple. I may quote from Sir Dinshaw Mulla's commentary on S. 144—(considering the matter from the point of view of the party to whom restitution is due):

> The word 'restitution' in this section means restoring to a party, on the variation or reversal of a decree, what has been lost to him in execution of the decree or directly in consequence of that decree. The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree,

and again, (looking at the matter from the point of view of the party who has to make restitution),

> the doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree or part thereof is subsequently varied or reversed on appeal by the judgment-debtor.

In the present case, the decree, the reversal of which has given rise to the plaintiff's claim, is the decree passed by the High Court in A. S. No. 25 of 1923. As I have already said, neither party has filed the decree before us, but from the judgment, it would seem that it was merely a decree dismissing the plaintiff's suit with costs in both the Courts. If so, there is nothing in the decree affecting the question of possession of the estate. It cannot be said that the decree of the High Court directed that possession of the estate should be taken from the plaintiff and given to the defendant. The plaintiff never had possession of the estate until he got it in execution of the Order in Council in 1933. The reversal of the High Court's decree by the judgment of the Privy Council therefore has nothing, in my opinion, to do with the question of possession of this estate and nothing to do consequently with mesne profits. The Privy Council's judgment, as I have already said, was that the decree of the Subordinate Judge should be restored, the decree of the High Court being set aside. It seems to me that learned counsel for the defendant is on firm ground when he says that in so far as the High Court's decree is concerned all the restitution that could be made to the plaintiff upon its reversal was effected by the Order in Council.

Before the High Court's decree was passed, the position was that the plaintiff had in his favour a decree of the Subordinate Judge that he should be put in possession. That decree was set aside by the High Court, and the position then was that the plaintiff had no decree in his favour. When the High Court's decree was set aside by the Privy Council and the Subordinate Judge's decree restored, the plaintiff thereby came back to the position in which he had been before the High Court's decree was passed. The contention of learned counsel for the plaintiff is that when the estate was put in possession of a Receiver in 1923, the Court was taking possession of this estate for the benefit of the true owner, and that therefore the possession of the Receiver must be deemed to have been the possession of the true owner. The true owner has now been declared by the Privy Council to be the plaintiff. Therefore, when the Receiver was in possession, he was in possession on behalf of the plaintiff; this is equivalent to saying that plaintiff was in possession and when the defendant took possession in 1929, she was dispossessing the plaintiff. Learned counsel for the plaintiff relies upon the case reported in 7 Pat 319.[3] There the learned Chief Justice has said :

> Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a receiver by the Court before the determination of the question of title the Court takes possession through its receiver on behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established.

The learned Judge goes on to refer to the judgment of Mukerjee J. in 39 Cal L J 40.[4] In considering that case, it is, I think, necessary to bear in mind that that was a case in which a dispute under S. 145, Criminal P. C., arose with regard to possession of certain properties. The Magistrate held that nobody was in actual possession and attached the properties under S. 146, Criminal P. C., and a receiver was then appointed by the Criminal Court pending decision of dispute between the parties. In the trial Court the plaintiffs got a decree for possession in their favour and in execution of the decree were put in possession. When that decree passed by a Sub-Judge was reversed by the High Court it was held that the defendants could apply for possession by way of restitution under S. 144. I can see no difficulty in applying the principle of restitution in that case, but I do not see that has any bearing on the facts of this case. The important point about that case is that the plaintiffs in the suit got a decree for possession which they executed and which was afterwards reversed on appeal. It is therefore fully in accord with what I conceive to be the doctrine of restitution, that on the reversal of the decree in their favour, they should be compelled under S. 144 to give up what they had got in execution of that decree. Nothing of that kind is to be found in the case with which we are now dealing as I have already said. The defendant in this case did not get from the High Court a decree for possession. What she got from the High Court was a decree setting aside the Subordinate Judge's decree for possession in favour of the plaintiff. As soon as the Subordinate Judge's decree was set aside, it followed that the Receiver who had been appointed during the pendency of the appeal, could no longer be left in charge of the property.

The High Court had decided that the defendant was the proper owner, and consequently the receiver's appointment had to come to an end. When it came to an end, the only person to whom he could be directed to hand over possession was the person declared by the High Court to be the rightful owner, namely the defendant. It is quite impossible, in my opinion, to say that delivery of possession was made to the defendant in pursuance of, or in execution of, or directly in consequence of the decree of the High Court. It is quite impossible, I think, to argue that the decree of the High Court was in any manner fulfilled or carried out or obeyed by the delivery of the property to the defendant. The only executable part of the High Court's decree, as I imagine, must have been a direction that the plaintiff must pay the defendant's costs. The portion of the decree which said that the Subordinate Judge's decree was set aside was not a provision which could be put in execution at all. It is therefore not, in my opinion, possible to say that the defendant got possession from the Receiver in pursuance of or in execution of or directly in consequence of the High Court's decree. Delivery of possession by the Receiver to the defendant was a consequence of the High Court's decree, no doubt, but it was an indirect consequence and not a direct consequence. I have not been able to find —and learned counsel for the appellant has not cited—any case in which restitution in the shape of possession or mesne profits has been ordered where the decree reversed had not given possession. For these reasons, I think the plaintiff entirely misconceived his remedy, that his remedy lay in a suit for accounts and mesne profits and not in an application by way of restitution. Further, if I am wrong with regard to this point, I nevertheless think that the learned Subordinate Judge was right in holding that the plaintiff could not recover from the defendant any portion of the Rs. 1,30,000 which has been the subject of argument before us. Supposing that S. 144 can be applied, then the duty of the Court as set out in S. 144, is to

---

[3] Bisheshwar Pratap v. Chandreshwar Prasad, (1928) 15 A I R Pat 260=108 I C 89 = 7 Pat 319.

[4] Dwijendra Narain v. Joges Chandra, (1924) 11 A I R Cal 600=79 I C 520=39 C L J 40.

> cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed.

Now that, in my opinion, means that the plaintiff is entitled to ask the Court to put him and the defendant back into the positions which they occupied immediately before the High Court's decree was passed. That position was a position in which the receiver was in possession and under orders of the High Court was making payments of Rs. 1500 per mensem both to the plaintiff and to the defendant so far as the funds available allowed. What would have been the position, but for the decree of the High Court? It seems clear to me that but for the decree of the High Court, the position would have continued to be the same. The High Court's decree was passed, as I have already said, on 30th March 1928. If the High Court's decree had not been passed on 30th March 1928, the appeal would still have been pending, and it would have continued to be pending until the High Court passed some decree or other.

The plaintiff's claim, in my opinion, amounts to this: that he is entitled to be "restored" to the position which he would have occupied if the High Court's decree passed on 30th March 1928 had been in his favour. Now no doubt, if the High Court on 30th March 1928 had dismissed the defendant's appeal and confirmed the Subordinate Judge's decree, the receiver would then have been directed to deliver possession to the plaintiff, and the plaintiff would thereafter have enjoyed the profits of the estate. But, it seems to me, there is a great difference between the claim to be put in the position which the plaintiff would have occupied if the High Court's decree had been in his favour, and the claim to be put in the same position that he would have occupied if the High Court's decree had never been passed. Sec. 144, Civil P. C., authorizes the latter proceeding but not the former. If the High Court's decree had not been passed and if the appeal had gone on pending, the receiver would have gone on making payments both to the plaintiff and the defendant, and it would have been quite within his authority to pay out to the defendant, when the funds of the estate allowed, the arrears due to her to the extent of Rs. 65,500 and the periodical payments of Rs. 1500 per mensem during the whole period of his receivership. I therefore consider that the learned Subordinate Judge is right in holding that the plaintiff cannot recover by way of restitution any portion of the sum of Rupees 1,30,000.

We heard a long argument on the question whether the defendant is entitled to maintenance out of the estate. Learned counsel for the appellant contends — and I think rightly — that this question was not properly raised in the pleadings before the learned Subordinate Judge. It is an interesting question but it is one on which any remarks that we can make must be obiter, and I therefore respectfully excuse myself from making any pronouncement on the question whether defendant is or is not entitled to maintenance out of this estate. The question, in my view, can only be properly tried in other proceedings. The plaintiff could have recovered from the defendant by way of restitution the amount of the costs awarded to her by the High Court's decree in A. S. No. 25 of 1923, if she had executed against him the High Court's decree for costs, but there was no allegation on this point in the affidavit of the plaintiff's agent, and as I have already noticed, the decree of the High Court has not been produced before us. No argument was addressed to us on this subject by learned counsel for the appellant. I agree with my learned brother that the allowances ordered to be paid to the defendant during the pendency of the appeal cannot be considered as giving the defendant an absolute right to those sums irrespective of the result of the litigation. They were explicitly orders of a temporary nature, and the sums drawn by the defendant would, in my opinion, be sums for which the defendant would be accountable in the event of the plaintiff's success in his appeal to the Privy Council. In my view the appeal should be dismissed with costs.

Stodart J. — This appeal arises on an application made under S. 144, Civil P. C., to the Subordinate Judge, Ganjam by the plaintiff in O. S. No. 10 of 1922 on the file of the Additional Subordinate Judge, Ganjam. Plaintiff filed that suit in 1920 in the Subordinate Judge's Court for the possession of the zemindari of Chinnakkimedi against the then Zemindar Kunji Behari Deo. In December 1922 the learned Subordinate Judge decreed the suit in plaintiff's favour. Kunji Behari filed an appeal in this Court and obtained stay of execution. But he was not allowed to remain in possession. A receiver appointed by the Court was placed in the possession of the estate by an order made by Krishnan J. (as he then was) on 11th April 1923. Kunji Behari Deo died in December 1925 before his appeal came on for hearing, and his widow, the present defendant, was brought on the record as his representative-in-interest and she continued the appeal. The appeal was decided on 30th March 1928 in the defendant's favour. Plaintiff filed a further appeal to the Judicial Committee of the Privy Council and applied for stay of execution in this Court. Stay was refused, but defendant was directed to furnish security for Rs. 60,000 (afterwards reduced to Rs. 41,000) before taking possession of the estate. She was not able to find the required security till 2nd April 1929, when the estate was delivered to her by the receiver.

Plaintiff's appeal in the Privy Council was decided on 1st November 1932. The appellate decree of this Court was reversed and the decree of the Subordinate Judge was restored. Plaintiff was given possession of the estate on 10th March 1933. In the application now under appeal plaintiff prayed that the defendant be made to restore to him the profits of the estate which she had received from 2nd April 1929 when the receiver handed over possession to her up to 13th December 1932. He also prayed for the restitution of certain sums which the defendant, and before her, her husband, had been paid, during the time when the receiver was in charge, and which were made payable to the defendant by the aforesaid order of this Court. Plaintiff did not press his claim under the latter head however; so that the only amount with which we are now concerned is the amount of the profits enjoyed by the defendant during the time she was actually in possession of the estate under the appellate decree of this Court, namely from 2nd April 1929 to 13th December 1932 on which latter date she was appointed receiver under the Court pending delivery to the plaintiff. The other respondents to this appeal are the persons who in 1929 furnished security on behalf of the defendant. It is conceded now by the plaintiff that sureties cannot be made liable under S. 144. It is only when the principal is adjudged liable to pay an ascertained sum that proceedings can be taken against the sureties under S. 145.

One of the sureties, respondent 2, has in the order now under appeal been declared liable on his bond for Rs. 12,000 and directed to pay that amount to the plaintiff. But that order is not before us in this appeal since respondent 2 has appealed against it in the High Court of Judicature at Patna to which Court jurisdiction over the subject-matter of the suit was transferred on 1st April 1936. The sureties, all of whom have been impleaded in this appeal, have invited us to determine once for all whether their bonds make them liable for the profits of the estate enjoyed by the defendant while she was in possession of it.

Agreeing with my learned brother I do not think that question is properly before us. The amount of the profits is not now in dispute. The defendant has filed an abstract statement which I would like to be read as part of this judgment showing the aggregates of expenditure under different heads during her tenure of the estate. The balance is Rs. 1,30,476. This includes a sum of Rs. 11,212 shown by the defendant as expenditure which sum was not actually spent and to which I shall have occasion to refer later. It is now agreed that the sum claimed by the plaintiff is Rs. 1,30,476 as found in this statement of account. This is the actual surplus remaining after all expenditure had been incurred. The learned Subordinate Judge held that under S. 144 the plaintiff in the circumstances of this case could not recover these profits. Hence this appeal.

In the course of the appeal the defendant has claimed that even if she is liable under S. 144 to restore the profits of the estate nevertheless out of those profits she is entitled to retain the major portion on two separate and distinct grounds, namely *(a)* as the aggregate of sums directed to be paid to her by certain orders of this Court, *(b)* as the amount which she would otherwise be entitled to receive as maintenance from the revenues of the estate as the widow of an undivided coparcener of the zamindar. The amount claimed by the defendant is very nearly Rs. 1,30,476 on either computation. Thus there are three questions for our decision in this appeal, namely I. Is the lower Court wrong in holding that the profits enjoyed by the defendant are not in the circumstances of this case liable to be restored to the plaintiff under S. 144; II. Even if they are, is the defendant entitled to retain the major portion of them under the orders passed by this Court; III. Or as maintenance.

In order to understand the finding of the learned Subordinate Judge it is necessary to explain what the orders of this Court were. The first is the order passed by Krishnan J., (as he then was) on 11th April 1923 when he placed the estate in the custody of a receiver. That order has not been printed and we have to gather its import from references made to it in subsequent orders of this Court. The matter then before Krishnan J., was the motion of the defendant for stay of delivery of possession to the plaintiff pending defendant's appeal in this Court. It is sufficient for the present purpose to state that Krishnan J. directed that the estate be put in the hands of a receiver—which was forthwith done—and that out of the surplus revenues of the estate the receiver should pay to each party for their maintenance and for the expenses of the litigation a sum of Rs. 1500 a month. Subsequently, at some date in 1924, on the receiver reporting that the surplus revenues of the estate were not sufficient to enable him to pay those allowances, Krishnan J. directed that whatever surplus there was after meeting the necessary expenditure, should be divided equally between the parties. This second order is not now before us either. Now, in April 1929, when the receiver handed over the estate to the defendant there were very substantial arrears of this allowance due to both parties. I shall have occasion later to refer to the arrears due to the plaintiff and how they were dealt with. The arrears due to the defendant were about Rs. 65,000. The receiver had less than Rs. 11,000 in his hands and of this he paid Rs. 10,000 to the plaintiff a few days before handing over the estate to the defendant. Learned counsel are agreed that that was the state of affairs in April 1929.

The finding of the learned Subordinate Judge is to the following effect. In proceedings in restitution under S. 144, what the Court has to do is to put the parties in the position they occupied at the time of the decree which has been reversed, in the present case, at the time of the appellate decree of this Court. At that time a receiver was in possession of the estate. The position of the parties, if the receiver is regarded as being in possession, and if there had been no appellate decree of this Court, was that he owed the defendant Rs. 65,000 as arrears of allowance and that he had to go on paying her further allowance up to the date of the Privy Council decree. These sums, both the arrears and the current allowance would have to be paid to defendant out of the revenues of the estate realized by the receiver after the date of the appellate decree and up to the date of the Privy Council decree. And it so happens that the aggregate of the sums which would have been payable to the defendant on this hypothesis is very nearly equal to Rs. 1,30,476, the amount of the surplus profits which defendant actually enjoyed. To take this money away from her would be to change her position for the worse, a thing which in the opinion of the learned Subordinate Judge cannot be done under S. 144 In my opinion the learned Subordinate Judge's finding cannot be supported on the grounds stated by him. His reasoning is fallacious. S. 144 is:

> Where and in so far as a decree is varied or reversed, the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will as far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and for this purpose the Court may make any orders, including orders for the refund of costs and for the payment of . . . . mesne profits which are properly consequential on such variation or reversal.

The position of the parties according to the learned Subordinate Judge but for the appellate decree of this Court would be that a receiver would be in possession of the estate and would continue in possession. But clearly if the appellate decree had not been passed on the date it was passed, the receiver could in no imaginable circumstances have been continued in possession. If that decree had not been passed there was nothing whatever to prevent the plaintiff entering on the estate. It would have been the plaintiff therefore who would have enjoyed the surplus profits of the estate from the date of the appellate decree and he was under no liability—so far as the subject matter of the suit was concerned—to pay defendant anything, whether by way of arrears of allowances or as current allowances. The fact remains that during her tenure of the estate the defendant received and enjoyed the profits which but for the appellate decree of this Court the plaintiff would have enjoyed.

A digression must be made here to correct a mistake made by the learned Subordinate Judge which may have influenced his mind in arriving at the above conclusion. Interpreting a certain order dated 20th November 1928 made by this Court (Ex. 6) after the appellate decree was passed but before the estate was handed over to the defendant, he construed it as containing a direction by this Court to the receiver to pay to the defendant the arrears of allowance due to her under Krishnan J.'s order of April 1923 and which according to the learned Subordinate Judge amounted to Rs. 65,577. But Ex. 6 has nothing to do with the arrears of allowance due to the defendant or the payment of those arrears. On the contrary, it relates to the arrears due to the plaintiff. It was passed on C. M. P. No. 4146 presented by the plaintiff and C. M. P. No. 4834 presented by the defendant. Plaintiff prayed amongst other things that the receiver be directed to pay him the arrears of allowance computed at Rs. 1,500 a month as ordered by Krishnan J. in 1923 instead of at Rs. 1,000 which was the rate adopted in a previous order of this Court dated 17th August 1928. Defendant prayed that on the contrary arrears due to the plaintiff should be computed at Rs. 500 a month only. The order of this Court was that there were no grounds to vary the original order of 1923, awarding an allowance to the plaintiff at the rate of Rs. 1500 a month. No question arose then or could arise on those petitions, of the arrears payable to the defendant, who by that time had become entitled to be in possession of the estate and so entitled to the revenues out of which such arrears could be paid.

I now come to the grounds on which the learned Subordinate Judge's finding is sought to be supported by learned counsel for the defendant. His first argument is that if the plaintiff is put back in the position he would have occupied but for the decree which has been reversed, he would be merely in the position of a successful plaintiff who has still to execute his decree. His second argument is that under S. 144 a party cannot be put in possession of that of which he was never dispossessed. These arguments are both based on the fact that the plaintiff was not actually in possession on the date of the appellate decree but a receiver was in possession. But, in my opinion, and in this my learned brother differs from me, a complete answer to these arguments is furnished by the principle that the possession of a receiver pendente lite must be deemed to be the possession of the party who is ultimately declared successful. Here the plaintiff had succeeded in the Court of first instance. He was then declared to be entitled to immediate possession of the estate. He applied to the Court to be put into possession. That application was stayed. Nevertheless the defendant was not allowed to remain in possession. A receiver was appointed and put in charge of the estate. But the estate is a profit yielding concern and the receiver had strictly to account for the profits. On whose behalf did he hold these profits? The answer, must be, in my opinion, on behalf of the party ultimately declared successful. And if he had to account for the profits to that person he should be deemed to have held the estate on behalf of that person. Virtually therefore when the defendant took over the estate from the receiver she dispossessed the plaintiff. And if the appellate decree had not been passed then at the date of that decree the order of the Court dated 11th April 1923 staying plaintiff's application for delivery of possession would have become automatically discharged and the receiver would forthwith have put the plaintiff into possession. In my view, the effect of the decree which has been reversed was to dispossess the plaintiff. On the reversal of that decree plaintiff is entitled under S. 144 to restitution of the estate and of the profits which accrued during the time he was out of possession.

The rule that the possession by a receiver must be deemed to be the possession of the person who is ultimately declared entitled, is illustrated by the procedure adopted in suits for immovable property which at the time of filing the suit is in the custody of a receiver—for example a receiver put in possession by a Magistrate under S. 146, Criminal P. C. In such a case, it is sufficient for the plaintiff to sue for a declaration of his title. He need not pray for delivery of possession and what is more important he need not pay the very much greater stamp duty leviable on a suit for possession. If he succeeds the receiver delivers the estate to him. That the same is the case when the estate is in the custody of a receiver appointed by the Court is explained in 7 Pat 319.[3] That case arose on an application for restitution under S. 144, Civil P. C., and is, I think, very much in point here. The property there in question was called the Sarsund Estate. It consisted of four separate items. The last undisputed owner died in 1908 and on his death there was a scramble for possession. The Magistrate apprehending a breach of the peace over items 2 and 3 and not being able to decide who was in possession attached these two items and put a receiver in charge of them. In 1911 one of the claimants, Asharfi Singh, who had possession of item 4, sued the other claimants for possession of items 1 and 2 and the Court in 1915 put item 1 also in custody of a receiver. Asharfi's suit was dismissed in 1919. But the receiver remained in possession until the 13th December 1920. He was discharged on that day but re-appointed on the following day in a suit which had been filed by another set of claimants numbered as 112 of 1920. Thus, up to the date of the filing of O. S. No. 112 of 1920, Asharfi Singh had not been in possession of items 1, 2 and 3 and they were in the possession of receivers and remained in such possession till the suit was decided.

The defendants in O. S. No. 112 of 1920, were Asharfi Singh and a certain rival claimant Chandreshwar who had agreed to adjust their claims inter se one giving up his claim to items 1 and 2, the other giving up his claim to items 3 and 4. The position at the time that suit was filed was that items 1, 2 and 3 were in the possession of receivers and item 4 was in the possession of Asharfi. The plaintiffs being a third set of claimants succeeded in the suit and were given a decree for possession and on 27th February 1923 possession of items 1, 2 and 3 was taken on their behalf by the Court of Wards to whom the receiver handed over items 1, 2 and 3. Asharfi and Chandreshwar, the unsuccessful defendants, filed appeals to the High Court which reversed the decree of the Court of first instance and declared the title of Asharfi and Chandreshwar in priority to the plaintiffs. The High Court did not however make any decree for delivery of possession to the defendants. At the time of the High Court decree the defendants were, in respect of items 1, 2 and 3 persons who had never had actual possession but who had been declared to be entitled; a position similar to that occupied by the plaintiff in this case at the time of the decree of the Privy Council.

The defendants, Asharfi and Chandreshwar not having a decree for delivery of possession applied in the Court of first instance for restitution of the property under S. 144. The Subordinate Judge held: (1) that as the trial Court's decree had been set aside by the High Court the applicants were entitled to be restored to the position they would have occupied but for such decree; (2) that strictly speaking restitution in such a case would mean replacing the property in the hands of the receivers; (3) but that as the possession of the receivers was the possession of the Court for the benefit of the person entitled, the applicants were entitled to possession by way of restitution. The plaintiffs then appealed to the High Court whose decision is contained in the case cited. It was urged in the High Court as it is urged here that restitution could not be made to a party who was not in possession before. The Court held, (per Dawson-Miller C. J.) :

> Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a Receiver by the Court pending the determination of the question of title, the Court takes possession through its Receiver on

behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established. Nor do I think it makes any difference whether the property is attached by the Magistrate under the provisions of the Code of Criminal Procedure, or placed in the possession of a Receiver appointed by the Civil Court.

Pausing here for a moment, I observe, that the position of the plaintiff in this case at the time the Receiver was appointed was more than that of a mere claimant. He was in a better position than Asharfi and Chandreshwar were, in the Patna case.[3] For, he was a successful claimant with a decree for possession already made in his favour. Continuing, Dawson-Miller C. J. said that in his opinion the law in the subject had been correctly stated by Mookerjee J. in two cases in the Calcutta High Court in 1924 and 1916* respectively; and he quotes from those two cases certain observations of Mookerjee J. as follows:

> When the Court has appointed a Receiver and the Receiver is in possession his possession is the possession of the Court, and the possession of the Court by its receiver is the possession of all parties to the action according to their titles...The property passes into legal custody as the receiver is in the position of stake holder and such custody is for the benefit of the true owner.
>
> * * * * * *
>
> *Brajendra Kishore* v. *Abdul Razac*[5] is an authority for the proposition that when property is attached under S. 146, Criminal P. C., it passes into legal custody and during the continuance of the attachment such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If on the other hand the wrongdoer was in possession at the time the attachment took place, the effect of the attachment is to interrupt his possession and from the moment of attachment the possession of the rightful owner is revived in the eye of the law.... If during attachment the seisin or legal possession is in the true owner the attachment does not amount to either dispossession of the owner or discontinuance of his possession.

If the facts of the present case are interpreted in the light of the rule laid down in the foregoing judgment of Mookerjee J. namely that the effect of the attachment interrupts the possession of the wrongdoer and in the eye of the law revives the possession of the rightful owner then the position is as follows: Brojo Kishore, father of the plaintiff, was the zamindar till his death in 1906. Plaintiff should have succeeded him, but his title remained in abeyance for reasons which need not now be stated. Broja Kishore was succeeded by Purushottama, elder son of his first cousin and senior representative of the junior line, and on Purushottama's death in 1915 he was succeeded by Kunji Bihari Deo, the original defendant in this suit. And Kunji Bihari Deo was the person in possession in April 1923 when the estate was placed in the possession of the receiver. As has now been settled by the decision of the Judicial Committee, the possession of the estate from 1907 to 1923 first by Purushottama, and afterwards by Kunji Bihari Deo, was wrongful. The effect of the appointment of the receiver therefore was to interrupt that possession and at the same time, in the eye of the law to revive the possession of Brojo Kishore's representative-in-interest, namely the plaintiff. Again in 7 Pat 319[3] a question of limitation was raised by the appellants. Their argument was based on the following propositions. The last male owner died in 1908. Chandreshwar had never been in possession—which was true—and had never filed a suit to substantiate his title. On the other hand Bisheshwar, one of the appellants, claimed to have entered into possession in 1908 and adding on to the period of his possession, the possession of the receivers appointed in 1908 and 1915 he had prescribed for title. Dawson-Miller C. J. on this part of the case said:

> It is clear that they (the appellants) cannot set up a title by adverse possession over 12 years, for whatever possession they may have had in the beginning, assuming it can be proved, came to an end when the receiver was appointed of the properties in Schs. 2 and 3 in 1908 and of those in Sch. 1 in 1915..... And if I am right in holding that the possession of the receiver in a case like the present is to be deemed the possession of the rightful owner then Chandreshwar has not lost his title by omitting to bring a suit within 12 years of the death of Mulukrani Kuer,

and in the same case on this point, Mullick J. said:

> Even if Bisheshwar can prove that he got possession in 1908, the subsequent entry of Mr. Stevens, the receiver appointed in 1908 by the Magistrate and of Mr. Moore, the receiver appointed by the Civil Court in 1911, put an end to the illegal possession of Bisheshwar and restored the possession of the true owner Chandreshwar.

Following the authority of this case and, with respect, adopting the reasoning of the learned Judges who decided it I hold that the effect of the appellate decree of this Court, by which the receiver's possession of the estate was determined, was to dispossess the plaintiff; since in the eye of the law the possession of the receiver was the possession of the plaintiff. The contention of learned counsel for the defendant that under S. 144 the plaintiff can only be put back to the position of a successful plaintiff who has obtained a decree but has not executed it is not in my opinion sound. Nor is there substance in his contention that the plaintiff cannot be put in possession of that of which he has never been dispossessed. For plaintiff was in the eye of the law dispossessed when the receiver handed over the estate to the defendant. Asharfi and Chandreshwar in the Patna case[3] had never actually been in possession. That case it will be observed was a stronger case than the present case: for the subject-matter of the application there was the corpus of the estate actual possession of which had not been decreed to the applicants. Here the subject-matter of the application is the surplus profits of the estate which accrued during the time when the plaintiff was out of possession. If it had been necessary, the plaintiff could have recovered the corpus of the estate under S. 144. And the Court while making an order for its restoration could have made an order for the payment to him of the profits appropriated by the wrongful owner during the latter's possession of the estate under the decree which has been reversed. An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in my opinion in the words of S. 144, "an order which is properly consequential on such reversal." I do not think that the cases are in point, which have been cited by learned counsel for the respondent in support of his position that under S. 144 a person cannot be restored to possession of that of which he was never dispossessed. The property, now in question, consists of mesne profits which prima facie could never have been in plaintiff's possession. The cases cited refer to specific items of property.

---

* A I R 1924 Cal 600 and A I R 1916 Cal 751.

[5] ('16) 3 A I R 1916 Cal 751 = 31 I C 242 = 22 C L J 283=20 C W N 481.

In 51 Cal 324[6] the property claimed consisted of cash and ornaments contained in an iron safe and in the possession of Prosannamoyi Debi, sister of one Mondakini, deceased. Baikuntha applied for letters of administration to the estate of the deceased and was opposed in the Court of the District Judge by Prosannamoyi who set up a will in her favour. The District Judge granted the letters, but on appeal to the High Court, they were revoked and probate of the will was granted to Prosannamoyi. Baikuntha preferred an appeal to the Judicial Committee which succeeded. When the matter was pending in the District Court a Commissioner had been appointed to take an inventory of the property and Prosannamoyi prevented him from opening the safe, contending that some of its contents were her own, apart from the effect of the will. The District Judge ordered the safe to be kept under seal in a separate room and the key retained by the Commissioner. When the appeal of Prosannamoyi succeeded in the High Court the Commissioner removed the seals. After the Privy Council decree Baikuntha applied to the District Judge under S. 144 for an order against Prosannamoyi to restore to him the contents of the iron safe. The District Judge held that by his order that the safe be sealed and kept in a separate room he did not intend that it should be taken out of Prosannamoyi's possession and that as a probate Court he had no power to take property out of a person's possession. Further he held that his order, passed after the appellate decree, directing that the seals be removed did not amount to an order restoring possession of the safe and its contents to Prosannamoyi. In other words he held that Prosannamoyi's possession of the safe and its contents had not been interrupted and he rejected the claim of the administrator that she had got possession of the safe from the Court in consequence of the High Court's decree and so must be made to return it when that decree was reversed. It is clear that in that case the proper remedy of the administrator was to sue for possession of the property in question if he thought he could prove that it was part of the estate of the deceased. In confirming the District Judge's order the Court (Chatterjee and Panton JJ.) observed :

> The Probate Court could not direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession.

That observation clearly relates to the facts of that particular case. The administrator under his letters of administration did not become entitled to possession of any property but only to bring in such property as he could prove to have been the property of the deceased. He had never got possession of the iron safe and its contents. The Commissioner had never got possession of it as the property of the deceased. Restitution could only be made in such a case of property which the administrator had reduced to possession under his letters as belonging to the estate of the deceased and which had been taken from him as a result of the decree which had been reversed. In 8 Lah 356,[7] the property was a debt due by two partners to the custodian of enemy property who was no party to the suit. The suit was for dissolution of partnership. In the Court of first instance it was decreed that the debt aforesaid was payable by one partner only. He paid the whole debt to the custodian. On an appeal filed by him, it was declared that the debt was payable by both partners in equal shares. The appellant then claimed under S. 144 from his ex-partner half of the amount of the debt. It was held that S. 144 did not apply to the facts of the case. Appellant had not paid his partner's share of the debt to the custodian in execution of the decree which had been reversed nor in consequence of that decree. Nor was his partner in possession of any property which had been taken out of appellant's possession by any decree or order of a Court. That was a clear case where the appellant's proper remedy was by a suit for contribution.

---

[6] Baikuntha Nath v. Prosanna Moyee Debi, (1924) 11 A I R Cal 769=81 I C 571=51 Cal 324.

In 11 Pat 553,[8] the property was five bales of cotton. These were part of a larger quantity, namely 18 bales, which plaintiff sued to recover from the defendant on the ground that they belonged to himself. Plaintiff's suit was dismissed and he appealed. Pending his appeal eight bales were attached by one of defendant's creditors who by way of compromise accepted and took away five bales. Plaintiff's appeal succeeded. He then applied for restitution of the five bales aforesaid which had legally passed into the hands of a third party. The Court (per Fazl Ali J.) held that S.144 did not apply to the facts of the case. It was observed that:

> Section 144 is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates the restitution of the property or money which the judgment-debtor had to part with at the instance of the Court.

The last argument of learned counsel for the respondent on this part of the case is that the plaintiff having in this suit asked for and failed to obtain a decree for future mesne profits cannot now claim them by way of restitution under S. 144. It is true that the plaintiff in his suit prayed for future mesne profits. In the Court of first instance this prayer was refused. And when defendants appealed against the substantive part of the decree plaintiff filed a cross appeal, A. S. No. 261, against the trial Court's order denying his future mesne profits. This cross appeal naturally failed. And it does not appear that in his appeal to the Judicial Committee the plaintiff renewed his prayer for future mesne profits. But the answer to this contention of learned counsel for the defendant is, in my opinion, that the profits which the plaintiff claims now in this application under S. 144 are not the same as the profits which he would have got if he had been given a decree for future mesne profits. Future mesne profits could have been awarded for the period extending from the date of the plaint to the date when the plaintiff recovered possession of the estate. But, as a result of my finding on the first part of learned counsel's argument, plaintiff's possession in the eye of the law began when the receiver was put in possession which was on or about 11th April 1923. The profits accruing during the receiver's tenure of the estate would be the plaintiff's apart from any decree that he might have obtained for future mesne profits. The profits now claimed are for a period long after the plaintiff in this sense obtained possession. They are for the period subsequent to the appellate decree of this Court which caused the plaintiff to be dispossessed.

In my opinion, a plaintiff who has been refused a decree for mesne profits but who subsequently gets into possession is not debarred from claiming under S. 144, profits which accrued to his opponent after the latter had as the result of a successful appeal dispossessed the plaintiff. That in my view is the position of the plaintiff in this case. It will not be right to say that he is merely in the position of one who has got a decree for possession without future mesne profits. His position is better than that. He has got a decree for possession and has reduced the estate to possession. His present claim for profits is based on his deprival of the estate by the force of the appellate decree. The decree of the Court of first instance worked itself out when the receiver was placed in possession of the estate. The plaintiff acquired new rights when under the appellate decree the receiver's possession which was plaintiff's possession was determined and the defendant was placed in possession of the estate.

---

[7] Niadar Mal v. Ratan Lal, (1927) 14 A I R Lah 625=104 I C 817=8 Lah 356=28 P L R 695.

[8] Banarsi Prasad v. Harikishun Radhe Kishun, (1932) 19 A I R Pat 317=140 I C 482=11 Pat 553.

Lastly on the question of restitution generally and the meaning of S. 144, there is a passage in a recent case decided by a Bench of the Allahabad High Court (Harris and Misra JJ.), with which, with respect, I concur and which I think may with advantage be quoted. *See* I L R (1939) All 103[9] at p. 108.

> The doctrine of restitution contemplates a case where property has been recovered by the decree-holder under his decree and the decree is subsequently reversed wholly or partly in other proceedings. In such cases the law raises an obligation on the party who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The use of the words "damages, compensation and mesne profits" in the section indicates that the possession obtained under an erroneous decree, subsequently reversed, is wrongful possession and on the reversal of the decree the judgment-debtor would be entitled not only to the possession of the property taken from him but also to mesne profits during the period he was kept out of possession.

Two more points only remain for our decision. It is contended now on behalf of the defendant that even if the plaintiff is entitled to recover this Rs. 1,30,476 from her as the surplus profits of the estate nevertheless she is entitled to retain for herself a sum which is very nearly equal to Rs. 1,30,476 either : (I) as allowance payable to her under orders of this Court, or (II) as maintenance at the rate of Rupees 1500 a month which, she claims, would be payable to her as the widow of an undivided coparcener of the zamindar.

First as to the allowances. The orders of this Court on which the defendant relies are first the orders made by Krishnan J. in 1923 and 1924; and secondly the orders made in 1928 and 1929 after the defendant had succeeded on appeal and before the estate was handed over to her. It will be remembered that when Krishnan J. placed the estate in the custody of the receiver he directed that each of the parties should be paid for maintenance and for the expenses of the litigation, a sum of Rs. 1500 a month: and that Rs. 65,577 (as found by the lower Court) out of the allowances due to the defendant remained unpaid at the time (2nd April 1929) the receiver handed over the estate to her. Defendant's case is that out of the revenues of the estate accruing to her after she came into possession of it, she paid herself this sum and is now entitled to retain it. Further she claims that for the 43 months during which she was in possession under the appellate decree she was entitled to appropriate to herself a monthly allowance at the same rate and this amounts to Rs. 64,500; these two amounts being added together come to Rs. 1,30,077 which is very nearly equal to the amount of Rs. 1,30,476 of the surplus profits of the estate. In considering this part of the defendant's case we have to ascertain what the orders of this Court are relating to these allowances. And we have to decide what the effect of those orders is. Do they mean that the parties were to keep whatever was paid to them as allowances irrespective of the ultimate result of the litigation ? Or do they mean that the allowances were only provisional payments and were bound to be refunded by that one of the parties who was finally unsuccessful ?

As regards the Rs. 64,500 which the defendant claims to be entitled to appropriate as allowances accruing due, during the period she was in possession of the estate, there are of course no orders of this Court sanctioning any such appropriation. The allowance was payable under Krishnan J.'s order during the pendency of the defendant's appeal to this Court and the effect of that order was spent when the appeal was decided. Then when this Court directed the defendant to be put in possession in 1929, she was put in possession as rightful owner entitled to all the revenues of the estate and there would have been no point in making an order that she was entitled to take so much a month out of those revenues as an allowance for herself. We are left therefore with the Rs. 65,577 (accepting the lower Court's figure) which represented arrears of the allowance accruing due to the defendant during the pendency of her appeal and remaining unpaid when she entered on the estate. Was the defendant entitled to appropriate this sum out of the revenues of the estate which accrued to her after she entered in possession and even if she was, is she not now bound to refund it to the plaintiff ? Learned counsel for the plaintiff contends that no interim order of the Court could operate to give away the revenues of the estate absolutely to one of the contesting parties, but that allowances paid pendente lite must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful. He contends that even if this sum of Rupees 65,577 had been paid to defendant by the receiver before he handed over charge to

---

9. Badrudin Khan v. Mahyar Khan, (1939) 26 A I R All 66=180 I C 633=I L R (1939) All 103=1938 A L J 1189.

the defendant, the plaintiff would be entitled to recover it. I think that he is right.

In *Challapalle Zemindari case*, 24 Mad 147,[10] there is an observation of the Judicial Committee referring to allowances paid to a claimant pendente lite. That was a suit for maintenance by a younger brother against the zamindar in possession. It was urged on behalf of the defendant before the Judicial Committee that the plaintiff could not recover arrears of maintenance accruing prior to suit because he had never demanded maintenance. As against this it was pointed out that he was, prior to the maintenance suit, prosecuting another suit against the zamindar for partition of the estate. The Privy Council observed by way of explaining the absence of a demand for maintenance, that

> so long as that action, i. e., the partition suit was pending, the plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council.

This observation appears to support the contention put forward by plaintiff's counsel that sums awarded to a litigant as maintenance pendente lite are awarded on the implied understanding that they are to be refunded if the party is ultimately unsuccessful. It would be anomalous in my opinion if a Court could award to a suitor money to be paid out of the revenues of the very property which he is suing to recover, otherwise than on condition that the money would have to be refunded if he fails in his suit. That would be to give him part of the very relief which he claims before there is any judicial decision that he is entitled to that relief. I think therefore that Krishnan J.'s order of 1923 did not operate to give defendant an absolute title to the sums directed to be paid to her for maintenance and for the expenses of the litigation.

We have next to see whether in any of the orders of this Court authority was in fact given to the defendant to appropriate Rs. 65,577 out of the revenues of the estate which accrued to her after she entered into possession, and to retain it as her own property on account of arrears of allowance due to her for the period when, pending her appeal to this Court, she was out of possession. Krishnan J.'s orders of 1923 and 1924 are as I have said not before us. Learned counsel on both sides have been content to rely, for the import of those orders, on references made to them in the orders passed by this Court after defendants' appeal was decided on 30th March 1928 and before defendant entered into possession of the estate on 2nd April 1929. It is necessary therefore to explain what these latter orders were. After the appellate decree was made, the plaintiff applied for stay of execution pending his appeal to the Judicial Committee and for a continuance of the receiver appointed by Krishnan J. in 1923. That application was dismissed in the order Ex. A, dated 17th August 1928. In Ex. A no reference is made to the arrears of allowances due to the defendant. The plaintiff's arrears of allowance amounting to Rupees 45,000 were dealt with however. The receiver was directed to pay them up to the date of his handing over possession. The receiver was still in possession pending defendant's taking delivery and pending disposal of plaintiff's petition that defendant be not given delivery but that the receiver should be continued.

The next order is Ex. 6, dated 20th November 1928 to which we have already referred, in which the rate at which the arrears payable to plaintiff were to be computed was directed to be Rs. 1,500 a month not Rs. 1,000 a month as had been inadvertently stated in the previous order Ex. A. On that occasion no motion was made by the defendant regarding her own arrears. The last order is Ex. C, dated 20th March 1929. In this order the question of allowances and arrear allowances is discussed in full. There were three petitions before the Court. One was by the plaintiff praying for a direction to the receiver to pay him the arrears of allowance, as already ordered, and that the receiver be not discharged until he did so—which was obviously only a device to prevent the defendant from getting into possession, since the receiver had not nearly enough funds in hand to pay plaintiff's arrears—they amounted to Rs. 45,000 and would have had to continue in possession in order to realize the necessary sum from the rents of the estate. The second motion was by the defendant praying that the receiver be directed to disburse to her the arrears of allowance due to her as he had already been directed to do in the case of the plaintiff; and in the alternative if he had not enough funds — which everybody knew to be the case, for he had less than Rs. 11,000 in his hands—then to direct him to divide whatever he had, equally between the parties.

---

[10] Mallikarjuna Prasada Naidu v. Durga Prasada Naidu, (1901) 24 Mad 147=27 I A 151=7 Sar 761 (P C).

The third petition was by the defendant praying that the order of the Court passed on 20th November 1928 (Ex. 6) should be reviewed and amended by reducing the rate at which the arrears due to plaintiff were directed by that order to be calculated. The order of the Court Ex. B was that the arrears due to the plaintiff under Mr. Krishnan's order were Rs. 45,000 as on 1st September 1928; that he was to be paid Rs. 500 per month as from that date; that the arrears of Rs. 45,000 were to be paid to him in annual instalments on 1st July of every year; that the receiver however might pay him the instalment for 1929, namely Rs. 10,000 out of the money in his hands, and if he did not, then the respondent (who was about to take possession of the estate and did take possession a fortnight later) must pay it, and if the money was not paid as directed that this order could be executed and also the parties would be at liberty to apply for directions. No definite direction was made on the petition of this respondent praying that the arrears of allowance due to her should be paid by the receiver or that he should divide the funds in his hands between herself and the plaintiff. The relevant portions of Ex. B in which these directions were made are as follows :

> These applications relate to the arrears of maintenance at Rs. 1500 a month ordered to be paid both to the plaintiff and defendant by Krishnan J. on 11th April 1923. An appeal by the defendant was then pending in the High Court and a receiver was in possession of the estate. On 11th February 1924 the Subordinate Judge reported that the allowances could not be paid having regard to the collections of the estate, the payment of peishcush and other necessary charges. On 22nd February 1924, Krishnan J. varied his order by saying that whatever net amount remained available after paying peishcush, the establishment charges and the receiver's remuneration should be divided equally between the plaintiff and the defendant, subject, I take it, to the maximum of Rs. 1500 allowed to each. . . . On 17th August 1928 we directed that the defendant do take possession of the estate on giving security for Rs. 60,000 and we also directed Rs. 500 a month to be given to the plaintiff for maintenance, Rs. 250 without security and the remaining Rs. 250 on his giving security to return the amount if called upon after the disposal of the Privy Council appeal . . . . As we were under the impression that security would be given by the defendant within a short period we said that till the security was given and the receiver discharged, the position was to be treated as if the old order of things continued, and Rs. 1500 a month should be given to the plaintiff for maintenance. (Then dealing with the question of the arrears of allowance). The plaintiff wants to treat the income for this year and the money in the Imperial Bank as the assets out of which his arrears should be paid; and he wants payment. For the defendant, it is contended by the learned Advocate-General that, so far as the arrears of maintenance are concerned, both his client and the plaintiff are entitled equally to Rs. 1500 a month, and that any sum in Court would not be available entirely to the plaintiff to discharge his arrears. Another contention is put forward, that there can be no question of arrears in this case, for all that the plaintiff is entitled to is a half of the available net income till the receiver is discharged, and if on any account there is no possibility of being paid . . . he must suffer the consequences, and cannot claim any payment. . . . . We are unable to accede to the argument of the learned Advocate-General that no arrears of maintenance are really payable at all and that the plaintiff must take the consequences if the receiver is discharged. If that view had been pressed we would not have discharged the receiver. We think Krishnan J.'s order is clear that each party was to get Rs. 1500 a month but as it was reported that the receiver had not sufficient funds to pay this amount, the net income after meeting the necessary expenses was directed to be divided between the parties. We think that, if in any year assets had been available to pay the maintenance due and a balance remained, such balance should have been claimed by the parties to pay the arrears. Mr. T. Rangachariar says that while Krishnan J.'s order limited the necessary expenses to the payment of peishcush, receiver's remuneration and the establishment charges, the receiver paid off debts due by the estate to the extent of Rs. 1,00,000 the benefit of which amount the plaintiff would have got if it had not been paid and that now the defendant gets it. We have no doubt that the order of Krishnan J. must be so construed that Rs. 1500 is payable to each party and that as there were not sufficient funds they should share the balance after payment of kist etc., and that when funds were available they could enforce the claim for Rs. 1500 and get paid. We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court or the assets as entirely attributable to the plaintiff. . . . .
>
> We expected that security would be furnished within about two months from the date of our order (17th August 1928). We now find that matters are still pending. If matters are thus pending it is difficult to make any order as regards the arrears. We think in view of the circumstances that the best solution will be to direct that the security now tendered, Rs. 41,000 to be accepted as sufficient and to reduce the security already ordered to this amount so that there should be no difficulty in the defendant taking possession of the estate. (I note that defendant actually took possession a fortnight after this order.)
>
> As regards the payment of arrears due to the plaintiff the sum due to him is Rs. 45,000. The same consideration which guided Krishnan J. in directing the available assets to be divided between the parties will govern us also in making any provision for the payment of arrears: and we think that, if Rs. 10,000 is paid every year to the plaintiff out of the income, it would be sufficient protection. It will on the one hand give the plaintiff funds to carry on the litigation and maintain himself . . . . and on the other it will not unduly cripple the estate which the defendant will have

to manage. Our order therefore is etc. The receiver is at liberty to pay the Rs. 10,000 to be paid this year. If he does not pay, the defendant will have to pay.

Now in this order there is no direction as I have said that defendant should irrespective of the result of the plaintiff's appeal take absolutely out of the future profits of the estate a sum equal to the arrears due to her as allowance for the period prior to her entry on the estate. And there is no direction that during her occupation of the estate and pending plaintiff's appeal any part of the profits should be earmarked as a personal allowance of the defendant. The learned Judges knew that if plaintiff succeeded the defendant would have to account for the profits. In fact, they directed that defendant should file accounts annually of income and expenditure. If they had thought that defendant was entitled to any part of the profits, other than in her character of rightful owner, they would have said so. Learned counsel relies on one sentence in this order :

> We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court, or the assets, as entirely attributable to the plaintiff.

But this sentence must, I think, be construed with reference to the facts. There was between Rs. 10,000 and Rs. 11,000 in Court. Plaintiff to whom Rs. 45,000 was due on account of arrears of allowance had prayed that the whole of this sum and the income for the current year should be treated as the assets out of which his arrears should be paid. This was another way of praying that the receiver should be continued, a prayer which the Judges had already refused in their order Ex. A. The Advocate-General appearing for the defendant had pointed out that under Krishnan J.'s order the money in Court, though it fell far short of the arrears of allowance due to the parties, should be divided between the parties. The sentence just quoted appears to relate to this argument. "We cannot treat the amount in Court or the assets as entirely attributable to the plaintiff." And the order of the Judges about this amount was that out of it Rs. 10,000 might be paid to plaintiff by the receiver before he handed over the estate to the defendant. If not it would have been handed over to the defendant who would then have had to pay the plaintiff Rs 10,000 on or before 1st July 1929. Learned counsel also wishes us to construe this order as meaning that since out of the future profits of the estate plaintiff was to be paid the arrears due to him, therefore the defendant was similarly to pay herself the arrears of allowance due to her. This I think is far-fetched. Defendant took the estate absolutely. The whole of the profits belonged to her. If it had been intended that she was not to be accountable for the whole of those profits but could in any case appropriate Rs. 65,577 we think there would have been a definite direction to that effect. We observe also that defendant is in effect claiming this sum of Rs. 65,577 as a first charge on the revenues of the estate. She is putting it before the payments she was directed to make to the plaintiff. Those payments consisted of Rs. 30,000 arrears of allowance and Rs. 500 per month for 50 months or Rs. 55,000 in all. Defendant paid the plaintiff in fact only Rs. 29,000. See item 21 in the abstract statement. She owes him under this head Rs. 26,000. My conclusion therefore is that as regards the Rs. 65,577 arrears of allowance there is no warrant in the orders of this Court to justify the defendant in appropriating it; and that even if there was, such an appropriation would be provisional, and in the event that has happened, the money would have to be refunded to the plaintiff. And secondly that as regards the Rs. 64,500 claimed as allowance for the period during which defendant was in possession of the estate there is no shadow of a justification for that claim in any of the orders of this Court.

The second of the grounds on which the defendant claims to be entitled to retain almost the whole of the amount now claimed by the plaintiff as mesne profits is that as the widow of an undivided coparcener of the zamindar she has the right to be maintained out of the revenues of the estate; that Rs. 1500 a month is a reasonable rate of maintenance and that therefore she is entitled to retain Rs. 1,30,077 which amount is calculated in the manner we have already explained, namely Rs. 65,577 due up to her taking possession of the estate and Rs. 64,500 due for the subsequent period up to the date of the Privy Council decree. To this claim learned counsel for the plaintiff answers (1) that the defendant is not a person who is entitled to maintenance; (2) that in these proceedings a counterclaim like the present cannot be adjudicated on as it raises complicated questions of law and fact; (3) that this counterclaim was not placed in the lower Court.

On the point of law whether the defendant is entitled to maintenance as of right learned counsel for the plaintiff relies on what is known as the *second Pittapur case*, 41 Mad 778,[11] in which the Privy Council ruled that in an impartible zamindari belonging to a person governed by the Mitakshara law there is no coparcenary between the zamindar and his agnates; and therefore the grandson of a deceased zamindar was held to be not entitled to maintenance out of the impartible estate in the hands of his successor. In this decision the view taken by this Court in certain cases decided prior to 1899 that there was joint property in an impartible estate which only fell short of coparcenary because by custom there was no right to partition was held to be no longer tenable. On the other side learned counsel for defendant contends that the decision in the *second Pittapur case*, 41 Mad 778,[11] has been overruled in subsequent decisions of the Judicial Committee notably in 43 All 228[12] and 56 All 468.[13] It is unnecessary for me to refer in detail to the decisions which have been cited to us now in support of the rival theories, since very recently a Bench of this Court has decided, following 56 All 468,[13] that the undivided members of the family of a zamindar have a right to maintenance out of the estate as if it were joint family property and that the decisions of this Court to that effect made prior to the *second Pittapur case*, 41 Mad 778,[11] and overruled by it may now be followed: *see* I L R (1939) Mad 622[14] at p. 658. We quote from that decision with respect a passage in the judgment of my Lord the Chief Justice:

> Impartibility arises out of custom, but with the greatest respect to what has been said to the contrary I do not regard a custom of impartibility as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that a family has allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the estate . . . . . . To deprive junior members of a joint Hindu family owning an ancestral estate, whether partible or impartible, of the right to maintenance there must, it seems to me, be a custom to that effect.

On this part of the defendant's case if the point directly arose for decision I would on the materials furnished in this case, hold that as widow of an undivided coparcener defendant is prima facie entitled to maintenance out of the estate. There is I think very little reason to doubt that Kunji Behari Deo, her late husband, was an undivided member of the family to which the zamindar belongs. Both were descended from a common great grandfather who was the holder of the estate. Audikonda grandfather of the plaintiff, and Raghunatha, grandfather of Kunji Behari, husband of this defendant, were brothers. There was a younger brother but he died without leaving male issue and the family thereafter has been represented solely by Audikonda and Raghunath and their descendants. Audikonda, the elder brother, was zamindar from 1840 till 1868. Dying without male issue, he was succeeded by Raghunath who was ousted in 1876 by plaintiff's father Brojo Kishore who had in 1870 been adopted by Audikonda's widow. Brojo Kishore was zamindar till his death in 1906. Raghunath's son — Raghunath had in 1883 — Vaishna Deo, claimed the estate but died before his claim could be recognized. In 1907 Vaishna Deo's elder son Purushottama Deo was registered in the Collector's books as proprietor of the estate and entered on possession and remained in possession till his death in 1915 when he was succeeded by his younger brother defendant's husband Kunji Behari Deo. Kunji Behari Deo was zamindar till 20th December 1922 when the title of the plaintiff was declared by the decree of the Court of first instance in the present suit, in which plaintiff's claim as the legitimate son of Brojo Kishore was confirmed.

It will be seen therefore that the estate has been in the possession of the junior line for 23 years during the period from 1868 to this suit, while the senior line has held it for 27 years. In the judgments of this Court and of the Privy Council, in which the title to this estate has been in question, namely 1 Mad 69,[15] 41 Mad 855[16] and the present suit 64 M L J 1[1] there is no indication that the two branches of the family had ever become divided. Besides these cases, there is an unreported case dated 1896 of this Court, not referred to in the arguments before us in which Brojo Kishore zamindar from 1876 to 1908 and father of this plaintiff appealed to this Court against a decree of the District Judge, Ganjam, awarding maintenance to Brojo Kishore's cousin Vaishna Deo, father of defendant's husband Kunji Behari Deo: see A. S. No. 111 of 1895, decided on appeal against O. S. No. 14 of 1893 of the District Court, Ganjam. The decision of this Court was that Vaishna Deo was clearly entitled to maintenance as a matter of right. The amount awarded was Rs. 500 a month, stated to be about 1/9th of the admitted income.

---

[11] ('18) 5 A I R 1918 P C 81=47 I C 354=45 I A 148 = 41 Mad 778 (P C), Venkata Mahipathi Gangadara Rama Rao v. Raja of Pittapur.

[12] ('21) 8 A I R 1921 P C 62=60 I C 534=48 I A 195 =43 All 228 (P C), Baijnath Prasad Singh v. Tej Bali Singh.

[13] ('34) 21 A I R 1934 P C 157=150 I C 545=61 I A 286=56 All 468 (P C), Collector of Gorakhpur v. Ram Sundar Lal.

[14] ('39) 26 A I R 1939 Mad 614=189 I C 123=I L R (1939) Mad 622 = (1939) 1 M L J 831, Maharajah of Venkatagiri v. Raja Rajeswara Rao.

[15] ('76) 1 Mad 69=3 I A 154=25 W R 291=3 Sar 583 (P C), Virada Pratapa Deo v. Brozo Kishoro Datta.

[16] ('18) 5 A I R 1918 P C 74=46 I C 481=45 I A 156 =41 Mad 855 (P C), Madana Mohana Ananga Bheema Deo v. Purushottama Ranga Bheema Deo.

Learned counsel for the plaintiff contends however that the defendant in her answer to the plaintiff's claim did not explicitly put forward her own claim to maintenance as a set-off against the amount which plaintiff sought to recover from her as profits of the estate enjoyed by her while she was in possession. This I think is true. In defendant's pleading there is no positive assertion of a claim against the plaintiff for money due to the defendant by way of maintenance. The relevant portions of that pleading are as follows:

> The abstract herewith filed shows an expenditure of Rs. 1,19,264 towards arrears of allowances and the current allowance of this respondent. This expenditure is also binding on the estate. The order of Krishnan J. fixing an allowance of Rs. 1500 a month to each party .... is not modified or set aside so far as this respondent is concerned, and hence the expenditure of Rs. 1500 a month as allowance of this respondent is binding on the estate and on the petitioner. Moreover, this respondent was representing and managing the estate during the period in question and had to maintain the status and expenditure incidental to the said position and hence the expenditure of Rs. 1500 a month as the allowance of the respondent is reasonable and binding on the estate.

It is clear I think that respondent's counterclaim was put forward entirely on the strength of Krishnan J.'s order and not on the ground that it represented the amount of maintenance due to her as of right. At the stage of argument in the lower Court, apparently, defendant's counsel raised for the first time this alternative basis for the counterclaim. For the learned Subordinate Judge observes in para. 4 of his judgment:

> It is contended that the first counterpetitioner (that is, this defendant) is entitled to maintenance out of the estate as the widow of a member of the plaintiff's family.

And the learned Subordinate Judge disposing of this contention held that in accordance with the ruling in the *second Pittapur case*, 41 Mad 778,[11] that the defendant was not entitled to maintenance out of the estate as of right or by custom. The question therefore arises whether this counterclaim by way of maintenance can be canvassed on appeal. The first point that would have to be decided, if the question was directly in issue before us is whether such a claim can be advanced in answer to an application for mesne profits under S. 144, Civil P. C. That I think is an arguable point. The decision of it would depend on whether the defendant's claim arises from the same transaction as the plaintiff's claim. And the crucial point would be, what is the transaction in the circumstances of the present case? Plaintiff claims the profits which accrued to the defendant while she was in possession of the estate. Defendant's counterclaim would presumably be that some of those profits would be payable to her even if she had not been in possession. We think there would be a reasonable ground for argument, in defendant's behalf, that her counterclaim arises in the same transaction as the plaintiff's claim. It might possibly be held that the transaction consisted in the enjoyment by the defendant of the whole profits of the estate during a period when she was, independent of her position as owner in possession, entitled to part of those profits. I do not think it necessary however to record a finding on this question as the set off by way of maintenance was not properly raised and adjudicated upon in the lower Court and is not properly before us in appeal. Assuming that the defendant is entitled to maintenance, the question, how much she is entitled to under that head remains to be tried and decided.

In the result therefore I find that none of the objections raised on behalf of the defendant either in the lower Court, or newly in this appeal can validly affect the plaintiff's right to recover from the defendant by way of restitution, under Sec. 144, Civil P. C., the sum of Rs. 1,30,476 which the defendant received as profits of the estate during the time she was in possession under the decree which has been reversed. In this judgment throughout I have referred to the amount of profits as Rupees 1,30,476. That is the actual amount. I should explain that in her abstract of accounts the defendant put it at Rs. 1,19,264. See item 23 of that statement, in which she calls it her "allowance". That is a fallacious figure. Defendant arrives at it by debiting herself with Rs. 11,212 (*see* item 22) which she sets down as having been paid by her to the plaintiff. But she never paid this sum to the plaintiff. The debit entry is sought to be explained in the following manner: At the date of the appellate decree plaintiff owed to defendant a certain sum for money which he had recovered from her as costs awarded to him by the Court of first instance. And he also became liable by the appellate decree to pay to the defendant a certain sum as costs. These two sums added together come to Rs. 11,212. Defendant on the other hand had, as already explained, to pay to the plaintiff large sums under the order of this Court Ex. B as well as an allowance of Rs. 500 a month. By entering on the debit side Rs. 11,212 defendant professes to have adjusted the money due to her by the plaintiff pro tanto against the money she had to pay the plaintiff. But she has done nothing of the sort. In order to effect that adjustment she would have to enter Rs. 11,212 also on the credit side of the account as having been received from the plaintiff. This she has not done. In fact therefore she did not pay the plaintiff this sum of Rs. 11,212. She put it in her pocket. The true figure of profits received by her is therefore Rs. 1,30,746.

I would also observe before leaving this part of the case that if defendant's counter claim for the profits of the estate or part of them whether on the ground that she is entitled to them as allowances under the orders of this Court or as maintenance due to her as a coparcener's widow is to be entertained, the money which the defendant owes the plaintiff as arrears of allowances and as allowance directed to be paid by her to the plaintiff—which is Rs. 26,000—should be taken into account. He who seeks equity should do equity. In accordance with the opinions expressed above I think this appeal should succeed and that the plaintiff is entitled to recover Rs.1,30,476 from the defendant.

(On account of difference of opinion between Burn and Stodart JJ., the case was referred to Wadsworth J.).

Wadsworth J. — This appeal raises a question of restitution and has been referred to me on a difference of opinion between Burn and Stodart JJ., on two points: (1) The question of the applicability of S. 144, Civil P. C., and (2) the question of the liability of the defendant's legal representative (respondent 1 herein) to make a restitution, if S. 144, Civil P. C., applies.

The facts of the case have been fully set forth in the judgments of my learned brothers and it is unnecessary to repeat them at length. The essential points are that the plaintiff sued for possession of his estate from the husband of the present respondent 1 and in the Subordinate Judge's Court he succeeded, the decree being dated 20th December 1922. The defendant appealed to the High Court and in that appeal a receiver was appointed who took charge of the estate in April 1923, the plaintiff not having got possession meanwhile. The defendant died in 1925 and his widow (the present respondent 1) carried on the appeal. On 30th March 1928 the High Court reversed the trial Court's decree. The plaintiff preferred an appeal to the Privy Council and asked that the receiver should continue in possession of the estate. But this prayer was refused and the widow obtained possession from the receiver. On 1st November 1932, the Privy Council set aside the decree of the High Court and restored the decree of the Subordinate Judge. Immediately after this decree was passed, respondent 1 was herself appointed receiver pending receipt of the formal order in council and the appellant got possession in March 1933. The appellant claims restitution in the shape of profits of the estate for the period from April 1929, when respondent 1 took possession from the receiver, to December 1932, when she was herself appointed receiver. The profits of the estate, after allowing ordinary charges, amount to approximately Rs. 1,30,000 for this period.

Respondent 1 contended, firstly, that there could be no order for restitution in the circumstances of the case, and secondly, that she was entitled to appropriate the profits to the amount due to her under the High Court's orders whereby the receiver was directed to pay to each party a monthly maintenance of Rs. 1500 and she claims that she is entitled to set off, against the surplus, the arrears of this maintenance for the period during which the receiver was in charge and a monthly allowance of Rs. 1500 for the period during which she herself had possession of the estate. It has to be observed that pending the appeal to the Privy Council, respondent 1 was required to pay a reduced maintenance of Rs. 500 per mensem to the plaintiff and she was directed to pay the arrears due to him under the previous order as the balances in her hands permitted and she did in fact pay certain sums towards the arrears.

The learned Judges who referred this appeal are agreed on certain points. They agree that the order of Krishnan J. fixing for each party a monthly maintenance allowance of Rs. 1500 cannot be regarded as anything more than a provisional arrangement to be in force during the pendency of the appeal. They are also agreed that the respondent cannot claim in these proceedings a right to appropriate maintenance under any common law right which she may have, so that she must stand or fall by the order of the High Court fixing her maintenance. There is a further fact which has to be stated. The suit originally included a claim for past and future mesne profits, but no issue was framed in this respect and the trial Judge held that the claim for mesne profits had been given up. Before the High Court there was a cross appeal by the plaintiff on the subject of mesne profits which was dismissed. The judgment of the Privy Council does not deal expressly with the claim for mesne profits, but since the decree of the trial Court is restored, it must be taken that no mesne profits were awarded in the suit.

The view taken by Burn J., is, firstly, that S. 144, Civil P. C., does not apply because the possession which respondent 1 got after the High Court's decree was neither under that decree nor properly consequential upon that decree; secondly, that even if S. 144 does apply, the most that could be claimed would be the restoration of any benefit accruing to respondent 1 on the basis of the continuance of the position which obtained immediately before the wrong decree was passed; therefore one must postulate the continuance of the provisional orders which would justify the appropriation by respondent 1 of the amounts to which she was entitled under the orders, so that nothing would be left which could be called a benefit returnable; and thirdly that the refusal of future mesne profits in the decree of the trial Court which the Privy Council has restored, bars the claim by way of restitution for any sum out of the profits of the estate during respondent 1's possession. Stodart J. has taken a contrary view on all these points.

I will deal firstly with the question of the applicability of S. 144, a matter which seems to be covered by the decision in 7 Pat 319,[3] discussed by both the learned referring Judges. In that case, a receiver was appointed pending a suit for possession of land. After the decree, the successful party obtained possession from the receiver. The decree was reversed in appeal. The appellant applied for restitution. Objection was taken that the appellant was not entitled to get the property back by way of restitution because it was the receiver who had been dispossessed and not the appellant. It was held that the appellant could get the property back, since the possession of the receiver was for the benefit of the person entitled to the property. Burn J. distinguishes this case on the ground that the wrong decree was actually executed and the receiver was therefore dispossessed under that decree and he points out that there can be no doubt that the order for restoration of possession was one properly consequential on the variation of the erroneous decree. He points out that in order to justify restitution, it must be shown that property has been received by the decree-holder in execution of a wrongful decree or directly in consequence of that decree.

My learned brother holds the view that the possession obtained by respondent 1 in the present case was not possession in execution of the decree, nor under any explicit direction contained in the wrong decree and that it must therefore be held to be only indirectly consequential on the wrong decree, so that it cannot form the basis for an order for restitution. With the greatest respect, I find myself unable to agree with this conclusion and I am of opinion that Stodart J. is right in holding that not only was the possession of the receiver the possession of the plaintiff who is ultimately found entitled to the property, but also that the dispossession of the receiver was directly consequential on the wrong decree. It is true that the High Court's decree merely reverses the decree for possession given by the Subordinate Judge and it is true that respondent 1 got possession after some little delay as a result of the refusal of the appellant's application to continue the receiver pending the appeal to the Privy Council. But I am unable to subscribe to the view that restitution should not be ordered unless the possession is got as a result of either the execution of the decree or an explicit order contained in the wrong decree. When, as in this case, the property in dispute is held by the Court's receiver, it is unnecessary for the decree to contain a direction to the receiver to hand over the property to the successful party. The receiver will automatically transfer possession to the party who succeeds in the suit and the fact that the transfer is made without the execution of the decree and without any explicit order in the decree, will not, to my mind, alter the fact that possession is, in fact, given under the decree. The surrender of possession by the receiver on the termination of the appeal is the inevitable consequence of the decree passed in the appeal. It seems to me therefore with great respect that the distinction which my learned brother Burn J. seeks to apply in dealing with the case in 7 Pat 319[3] is fallacious.

An attempt has been made before me to make a further distinction based on the ground that in the Patna case the party who got possession under the wrongful decree could trace that possession to no other source than the decree which was set aside, whereas in the present case respondent 1 who succeeded in the High Court was the widow of the party originally in possession before the litigation started who had continued in possession right up to the time when the receiver was appointed. It is argued therefore that respondent 1's possession, obtained from the receiver, was nothing more than the restoration of the possession which her husband had before the appointment of the receiver. It seems to me that this argument is spacious. The point of time for determining a right to restitution is not the inception of the proceedings resulting in the wrong decree, but the point of time immediately before the wrong decree. This is clear from the words "place the parties in the position which they would have occupied but for such decree." They are not to be placed in the position which they occupied at the beginning of the litigation, but in the position which they occupied just before the wrong decree was passed.

When once it is conceded, as I think it must be, that the possession of the receiver at the time when the High Court's decree was passed, was the possession of the plaintiff who ultimately succeeded before the Privy Council, it does not seem to me to matter that the plaintiff did not get possession after the trial Court's decree or that the defendant continued in possession up to the time of the appointment of the receiver. The important question is, who was in possession before the wrong decree was passed. The answer to that question is that the receiver was in possession on behalf of the person who would ultimately be found entitled, that is to say, on behalf of the plaintiff. The receiver surrendered possession to respondent 1, not because he had taken possession from the original defendant, but because respondent 1 had been declared entitled by the erroneous decree. It follows, therefore, that his possession, which was constructively the possession of the plaintiff, terminated and the defendant got possession directly in consequence of the erroneous decree of the High Court, reversing the trial Court's decree. It seems to me, therefore, that S. 144 applies in terms and that the plaintiff is entitled to claim restitution of any profits realized by the defendant's legal representative which can be called properly consequential upon the wrong decree, unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court.

This leads to the next question as to the extent of the defendant's legal representative's liability by way of restitution and involves a consideration of the precise meaning of the words "place the parties in the position which they would have occupied but for such a decree," occurring in S. 144, Civil P. C. It seems to me that there are three possible ways of interpreting these words. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. It seems to me that the last interpretation is the correct one. There is nothing in the words of S. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred if we are to take it that he has to be put in the position which he would have occupied had the right decree been passed. Similarly I do not think that it can be said that the person claiming restitution must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. It seems to me to be going too far to postulate, for purposes of restitution, the continuation of the proceedings until terminated by the right decree, more especially if we are to postulate also the continuation of all incidental orders passed during the pendency of those proceedings. The correct procedure seems to me to be to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date, having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof.

In any view, it seems to me that it is impossible to hold on the facts of the present case that the defendant's legal representative would be entitled to appropriate the whole of the amounts due to her both for arrears and for future maintenance on the basis of the continuation of the provisional orders passed pending the High Court appeal, without regard to the fact that those orders recognized similar rights in the plaintiff. But I am of opinion that the correct view is that which has been taken by my learned brother Stodart J., namely, that one must regard the possession of the receiver immediately before the erroneous decree as the possession of the plaintiff who is found ultimately to be entitled, one must treat these provisional orders passed purely for the purpose of appeal before the High Court as having terminated on the termination of that appeal and one must award to the plaintiff the profits wrongfully received by the defendant's legal representative as a result of the dispossession of the receiver, as representing the plaintiff, without any adjustment in respect of payments which could only be made on the assumption of the continuance of the provisional orders, which automatically came to an end on the termination of the appeal before the High Court. That is to say the plaintiff is entitled to restitution on the basis of the position immediately before the wrong decree and on the assumption that orders made with reference to the pending appeal came to an end on the termination of that appeal.

There remains the question whether the plaintiff's claim to restitution is barred by reason of his failure to get a decree for future mesne profits in the original Court. On this part of the case, the respondent relies on the decision in 27 M L W 188[17] which was to the effect that when in a suit for partition and possession, there was no prayer for mesne profits, mesne profits could not be claimed by way of restitution when the original order, dispossessing the claimants, was set aside. This decision would be authority for the view that the plaintiff could not claim by way of restitution mesne profits for the period anterior to the date on which the receiver got possession constructively for the plaintiff. But when the receiver got possession, there was really no scope for any execution by the plaintiff either in respect of possession or in respect of profits. Thereafter the possession of the receiver was the possession of the plaintiff and no question of future mesne profits could arise.

The High Court having passed an erroneous decree as a result of which the receiver was dispossessed and respondent 1 was put into possession the profits which accrued to the defendant's legal representative as a result of this erroneous decree are not, in my opinion, profits which could have been claimed in the original suit. They were profits flowing directly from the erroneous appellate decree, recoverable only by restitution and not such as could have been foreseen in drafting the original plaint. The position is just the same as it would have been had the plaintiff executed his decree and got possession during the pendency of the High Court appeal and been dispossessed as a consequence of his failure in that appeal. After such dispossession, profits accruing to the defendant's legal representative would not be recoverable as future mesne profits claimed in the suit, but by way of restitution owing to the wrongful decree. It seems to me therefore that there is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court. In the result therefore I find, agreeing with my learned brother Stodart J., that the appeal must be allowed and the plaintiff be given a decree for restitution of a sum of Rs. 1,30,476 from the defendant's legal representative with costs throughout.

---

[17] ('27) 14 A I R 1927 Mad 898=104 I C 768=27 M L W 188, Bhimana Gowd v. Siddalingana Gowd.

No relief is granted against the sureties in this application. Advocate's fee Rs. 500.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 873

GENTLE J.

K. N. Guruswamy — Petitioner.

v.

Indo-Carnatic Bank, Ltd.—Respondent.

and

A. Westmorland Wood, Official Liquidator — Applicant.

Appln. No. 1088 of 1939, Decided on 24th November 1939, in O. P. No. 81 of 1939.

Company — Certain shareholders receiving notice that if there was failure to pay by certain date call in respect of allotment money, shares allotted would be forfeited — These shareholders not paying money demanded — Board of directors passing resolution forfeiting shares of number of shareholders, but names of these shareholders not included — Company held continued to treat these shareholders as shareholders and their names could be included in list of contributories.

A notice was given to certain contributories that if there was failure to pay by certain date the call in respect of allotment money, at the registered office of the company, the shares allotted to the shareholders would be forfeited without further notice as per articles of association of the company. Neither of these contributories paid the moneys demanded. At a meeting of the board of directors, a resolution was passed forfeiting the shares of a number of shareholders, but the names of these contributories were not included in the resolution :

Held that the company continued to treat these contributories as shareholders and hence they could not object to being included in the list of contributories : *A I R 1931 Pat 44, Rel. on.* [P 874 C 2]

S. Narasimha Iyengar — *for Contributories.*

Srinivasaraghavan and Thiagarajan — *for Official Liquidator.*

Order. — *Contributories Nos. 349 and 756:* These two contributories object to being included in the list on the ground that the shares which they held in the company have been forfeited. Contributory No. 349 in his affidavit sets out that in 1936 he received a notice from the secretary of the company asking that payment be made of the first call on or before the 1st March and that if that was not done the question of enforcing articles 27 and 29 would be placed before the directors for their consideration and that the contributory should make immediate arrangements for payment to avoid forfeiture of the shares. In regard to contributory No. 756, there is no such allegation of an earlier proceeding or notice. In regard to both of them, they each received a notice from the company dated 23rd November 1938 to the effect that in pursuance of the resolution of the board notice was given that if there was failure to pay by 23rd December 1938 the call in respect of allotment money, at the registered office of the company, the shares allotted to the shareholders would be forfeited without further notice as per articles 27, 28 and 29 of the articles of association of the bank. Neither of these contributories paid the moneys demanded. Art. 27 provides that if any member fails to pay any call or instalment on the day appointed, the directors may serve a notice requiring him to pay. Art. 28 provides that the notice shall name a day and place of payment and shall state in the event of non-payment the shares will be liable to be forfeited. Art. 29 provides that if there is non-compliance with the notice, then by a resolution of the directors a forfeiture shall be effected of the shares in respect of which non-payment is made. Art. 30 directs that notice of forfeiture shall be sent.

It is contended on behalf of the contributories that the notice which was given was a combined notice and follows a resolution passed under Art. 29 that the shares they held would be forfeited upon non-payment on the specified date. In January 1939, at a meeting of the board of directors, a resolution was passed forfeiting the shares of a number of shareholders but the names of these two contributories were not included in the resolution. Reliance has been placed upon two English cases, (1859) 4 De G & J 437[1] and (1867) 2 Ch App 321.[2] In the first case, the guiding rules of the company, comparable to the articles of association, provided that when a shareholder refused or neglected to pay moneys due in respect of the shares within the time provided the secretary should send to him a notice specifying the amount due, requiring payment within a stated time on pain of forfeiture, and if the amount was not paid the directors could declare the share or shares to be forfeited. A notice was sent to the shareholder conveying the information that at a resolution of the board of directors it was declared that unless the amount due was

---

1. Woollaston's case, (1859) 4 De G & J 437 = 5 Jur (N S) 853=7 W R 645 = 33 L T (O S) 294 = 124 R R 329.
2. Knight's case, (1867) 2 Ch A 321 = 36 L J Ch 317 = 15 L T 546 = 15 W R 294.

paid then these shares would immediately be forfeited. For three years following, the company and the shareholder treated the shares as having been forfeited. Turner L. J. at p. 173 in holding that there was in fact a forfeiture and that the difference between the procedure adopted and which should have been followed was one of form and not of substance, pointed out that both the company and the shareholder had treated forfeiture as having been effected.

In (1867) 2 Ch App 321,[2] the articles and the facts were somewhat similar save that in addition, although not authorized, the secretary of the company, upon the shareholders failing to make payment, made the necessary entries regarding forfeiture, and in that case it was held too that there was a forfeiture. Both the decisions to which I have referred were considered in (1865) 1 Eq 309.[3] In that case, the shareholder received a notice that on non-payment of arrears of call by a particular time his shares would be forfeited without further notice. He was the holder of about 150 shares and shortly before the date of expiry of the time given him for payment he went to the company's office, paid the amounts due in respect of about ten shares and intimated that in regard to the balance he was prepared to be treated as a defaulter and his shares to be forfeited. In the course of the judgment, Sir W. Page Wood V. C. in referring to the two earlier cases I cited, pointed out that emphasis was placed upon the conduct which followed the purported action of forfeiture or the giving of the notice, namely that the companies and the shareholders in both the cases treated the forfeitures as having been effected. There was no resolution subsequent to the giving of the notice in (1865) 1 Eq 309,[3] which provided for a forfeiture, and it was held that there was in fact no forfeiture and the name of the shareholder was included in the list of the contributories. All the above decisions were considered by a Division Bench in 10 Pat 249.[4] In that case, there was a notice which was to the same effect as was given to the two contributories now before me with which there was non-compliance, and the articles of the company were to the same effect as those of this company. The learned Judges of the Patna High Court considered all authorities including those I mentioned and held that in the case before them there was no forfeiture effected.

In my view, the company has continued to treat these two persons as shareholders inasmuch as in the month following the date of expiration of the notice sent to each of them, at a meeting of the board of directors a resolution was passed that certain persons who were defaulters were to have their shares forfeited. The names of the two contributories before me were not included. There is express provision in the articles providing for the method by which shares should be forfeited. There is no doubt that the machinery laid down in the articles has not been strictly followed. Construing the notice which was sent, it means that unless payment was made by 23rd December of the amount due to the company, it was the intention of the directors to proceed to forfeiture without giving any further notice of such intention. The notice contains reference to the articles under which forfeiture is made and the machinery to be followed, and in my view, the notice which was given was not one in which on the failure of the shareholder to comply with the payment required, automatically the forfeiture of the shares would follow. The result is that these two contributories will remain in the list filed by the official liquidators of this company.

C.R.K./D.S. *Order accordingly.*

---

* A. I. R. 1940 Madras 874

WADSWORTH J.

Bolisetti Sundaram and another — Petitioners.

v.

Kanuparthi Venkatappadasu and another — Respondents.

Civil Revn. Petn. No. 270 of 1937, Decided on 17th April 1940, to revise decree of Dist. Munsif, Repalle, in S. C. S. No. 146 of 1936.

(a) Promissory Note — Party to pronote promising to execute note but going away without doing so—No evidence that he authorized anyone to affix his mark — He is not liable on pronote.

Where there is no evidence that a party to a pronote authorized anyone to affix his mark and all that is in evidence is that he promised to execute the note and went away without doing so, there is no execution either by him or by a person authorized to execute on his behalf. He is therefore not liable on the pronote : *A I R 1918 Mad 24, Disting.* [P 875 C 2]

---

[3] Bigg's case, (1865) 1 Eq 309=35 L J Ch 216=12 Jur (N S) 89 = 13 L T (N S) 627=14 W R 244 = 148 R R 187.

[4] Parayan Prasad v. Gaya Bank and Trades Association, Ltd., (1931) 18 A I R Pat 44 = 130 I C 534 = 10 Pat 249 = 12 P L T 215.

*** (b) Promissory note — Promissory note purporting to be joint promissory note of *A* and *B* in renewal of previous joint promissory note—*A* alone executing it and *B* failing to execute it — No evidence whether *A* executed only on faith that *B* would also execute — Note is binding on *A*.**

When *A* executes a bond on the faith that *B* will also execute it and that *B* fails to do so, *A* has an equity in his favour relieving him from a liability which he never intended to undertake. On the other hand, if *A* signed the bond without any regard to the question whether *B* signed it or not and if he delivered it as his bond, he is liable thereon, even though *B* did not sign. The question whether a particular instrument was signed by one of the parties on the faith that the other would also sign is a question of fact. This question of fact is a ground of defence which must be established by the person who has signed the instrument. [P 875 C 2 ; P 876 C 1]

When there is a promissory note purporting to be a joint promissory note of *A* and *B* in renewal of previous joint promissory note and *A* alone executes and delivers that note and *B* fails to execute it, the note is binding on *A*, when there is no evidence one way or the other whether or not *A* executed only on the faith that *B* would also execute. [P 876 C 2]

N. Vasudeva Rao — *for Petitioners.*

A. Lakshmayya — *for Respondents.*

Order.—The petitioners were plaintiffs in a small cause suit based on a promissory note, Ex. A, dated 25th March 1933 for a sum of Rs. 167-12-9. The promissory note reads as if it were a joint promissory note by defendants 1 and 2. But it is found that it was not executed by defendant 2 though it was executed by defendant 1. What happened was that the two defendants went to the plaintiffs and asked them to write a promissory note in renewal of two earlier promissory notes, the major note being Ex. C, a joint bond executed by both defendants 1 and 2, the lesser one being Ex. B, a promissory note by defendant 1 alone. While the suit note was being written defendant 2 went away. The scribe wrote at the foot of the note the description of defendant 2 as the person who affixed his mark, but no mark or thumb print was in fact taken from defendant 2. Defendant 1 executed the promissory note and he did not defend the suit nor has he appeared to oppose this revision petition. The lower Court found that as the note was intended to be a joint note and was not executed by one of the joint promisors, there was no completed contract and the suit had to be dismissed as against both the defendants. In revision, it is contended that both the defendants are liable.

The case with reference to defendant 2 is simple. It is based on the decision of a Bench of this Court in 40 Mad 1171[1] which held that when a party to a promissory note authorized the scribe to affix his mark and under that authority the scribe wrote words indicating that the promisor was the person who affixed the mark, but did not actually put any mark, there was a sufficient execution by the agent of the promisor to bind him. It seems to me that there are no such facts in the present case. There is no evidence that defendant 2 authorized anyone to affix his mark ; all that we have is evidence that he promised to execute the note and went away without doing so. There was no execution either by him or by a person authorized to execute on his behalf. Clearly therefore the decision of the lower Court, so far as defendant 2 is concerned, is correct. The position with reference to defendant 1 is not so clear and there is a good deal of rather conflicting case-law on the subject. Most of the cases decided by the Indian Courts have references to S. 87, Negotiable Instruments Act, and are cases in which when one person has signed a bond, the signature of the other person is forged on that bond either with or without the connivance of the actual executant. We are not here concerned with any alteration of the instrument or any forgery of the signature of defendant 2.

The simple position is this: When there is a promissory note purporting to be a joint promissory note of *A* and *B*, and *A* alone executes and delivers that note and *B* fails to execute it, is the note binding on *A*, when there is no evidence one way or the other whether or not *A* executed only on the faith that *B* would also execute? It is, I think, well established that when *A* executes a bond on the faith that *B* will also execute it and that *B* fails to do so, *A* has an equity in his favour relieving him from a liability which he never intended to undertake. But it seems also to be settled that if *A* signed the bond without any regard to the question whether *B* signed it or not and if he delivered it as his bond, he is liable thereon, even though *B* did not sign. The English cases do to some extent distinguish between a deed and a simple contract. Seeing that under S. 46, Negotiable Instruments Act, the making of a promissory note is completed by delivery, it is difficult to see how a person who signs and delivers a negotiable instrument is in any better position than a person who signs, seals and delivers a deed. The instrument is in law the instrument of the maker, unless he can establish any equity whereby it should not be enforced against him. It seems to be settled that the question whether a particular instrument was signed by one of the parties on the faith, that the other would also sign is a question of fact : *vide* 113 E R 678.[2] Is this question of fact one which must be proved by the plaintiff who seeks to impose liability upon the actual executant or is it a ground of defence which must be established by the person who has signed the instrument ? The latter view seems to be a correct view. It is true that Jessel M. R. has stated in (1879) 11 Ch D 121[3] at p. 125 that

---

[1] Balayya v. Subbayya, (1918) 5 A I R Mad 24= 44 I C 813=40 Mad 1171.

> it is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute.

This dictum has however been criticized by the House of Lords as going too far. In (1940) 1 All E R 485,[4] where their Lordships discuss the cases on this subject and point out that they are mainly cases where it was sought to impose on a man a greater liability than he had ever intended to bear, where his intention was not in doubt, and where, if he were not able to get equitable relief, he would suffer substantial loss. Their Lordships further on quote with approval the case in (1880) 41 L T 517,[5] where it is expressly decided that the person who asserts such an equity in his favour to relieve him from the obligations of the contract which he has signed must affirm and prove the grounds upon which that equity is based. Their Lordships state that

> two propositions as regards the equity in question may safely be asserted, namely, (i) that the intention of the person who is setting it up is not a matter of mere conjecture, and (ii) that the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice.

I may observe that the case just referred to in (1880) 41 L T 517[5] was not a case of a deed but of a simple letter of guarantee. And it was clearly laid down that the burden of proof lay upon the person who, having signed that guarantee sought equitable relief against the obligation which it imposed. It is true that in that case the letter of guarantee did not in its actual recitals indicate an intention that other parties should also sign it. But the previous letter leading up to that letter of guarantee made this point clear. Turning to the facts of the present case, there was no doubt an intention to execute a joint promissory note. But defendant 1 was personally liable under both of the promissory notes which the suit note superseded. There was no question therefore of his being a mere surety or guarantor and the plaintiffs could have recovered the whole amount of the two earlier promissory notes from him personally. It is true that the failure of defendant 2 to execute the suit promissory note might make it difficult for defendant 1 to establish a right of contribution as against him. But so far as the plaintiffs were concerned the liability with which they propose to charge defendant 1 under this note is not different from the liability which he proposed to undertake; and there is no evidence that he would have been unwilling to sign this promissory note, had it not been for the belief that defendant 2 was also going to sign it. Defendant 1 has not denied his liability and has not put forward any plea that his liability was incurred conditionally upon defendant 2 undertaking a similar liability.

On these facts and on the authorities cited, it seems to me that defendant 1 having signed and delivered this promissory note and having established no grounds to relieve him from the liability incurred thereunder must be held liable for the suit claim. In the result therefore I allow the petition to the extent that the plaintiffs will have a decree for the suit claim with interest at the contract rate until today and subsequent interest at 6 per cent. till realization and costs against defendant 1 only. As against defendant 2 the revision petition is dismissed with costs.

C.R.K./D.S. *Petition partly allowed.*

A. I. R. 1940 Madras 876

PATANJALI SASTRI J.

S. Ratnasabapathi Pillai — Appellant.

v.

Gopala Iyer and another—Respondents.

Second Appeal No. 508 and Appeal No. 252 of 1936, Decided on 22nd August 1939, against decree of Sub-Judge, Mayavaram, in A. S. No. 7 of 1935.

---

[2] Latch v. Wedlake, 113 E R 678.

[3] Luke v. South Kensington Hotel Co., (1879) 11 Ch D 121=48 L J Ch 361 =40 L T 638= 27 W R 514.

[4] Nass v. Westminster Bank Ltd., (1940) 1 All E R 485.

[5] Ex parte Harding ; In re Smith, Fleming and Co., (1880) 12 Ch D 557=41 L T 517=48 L J Bk 115=28 W R 158.

(a) Civil P. C. (1908), S. 146 and O. 22, Rr. 10 and 11—Suit by *A* against *B* for recovery of property decreed — Pending suit *A's* son *C* acquiring suit property by final partition decree —Appeal by *B*—Application by *C* to be impleaded as respondent—Neither S. 146 nor O. 22, R. 10 held could apply.

A suit brought by *A* against *B* for recovery of property was decreed. During the pendency of the suit *C* who was a son of *A* acquired *A's* interest in the suit property by a final partition decree. *B* appealed against the decree passed in the suit by *A* against *B*. *C* made an application under O. 22, R. 10 to implead himself as supplemental respondent to the appeal:

Held that S. 146 did not apply as *C* could not be regarded as claiming under *A* as he got the suit property by partition decree and not by reason of any assignment or devolution from his father. [P 877 C 2]

Held further that O. 22, R. 10 also did not apply as *C* acquired the suit property before the appeal and not during the pendency of the appeal. *C* was therefore not entitled to be impleaded as a respondent: *A I R 1934 All 442 and A I R 1935 Lah 119, Rel. on.* [P 877 C 2; P 878 C 1]

(b) Civil P. C. (1908), S. 151—Remedy under specific provisions of Civil Procedure Code not availed of—Powers under S. 151 cannot be invoked.

Where a party who had an appropriate remedy under a specific provision of the Civil P. C. of which, he has failed to avail himself, he cannot be allowed to invoke the inherent powers of the Court under S. 151: *A I R 1924 All 446; A I R 1917 Cal 44 (FB) and A I R 1927 Bom 79, Rel. on.* [P 878 C 1]

K. S. Sankara Iyer — *for Appellant.*

C. A. Seshagiri Sastri—*for Respondents.*

Judgment.—The facts giving rise to this civil miscellaneous appeal and the connected second appeal No. 508 of 1936 are briefly these: One Sambasivan Pillai, respondent 3 herein, brought the suit, O. S. No. 268 of 1932, for recovery of the plaint-mentioned property from respondent 1 herein on the ground that it had been leased by him to one Vyasachariar who let respondent 1 into possession as a sub-tenant and that the latter was bound to surrender possession as the lease to Vyasachariar has been terminated.

The trial Court decreed the suit on 26th September 1933 and respondent 1 preferred an appeal, A. S. No. 7 of 1935, on the file of the Subordinate Judge's Court of Mayavaram. By this time, respondent 1 had discovered that there had been a partition suit between respondent 3 and his two sons and that a final decree had been passed therein on 25th August 1927 under which the suit property had been allotted to the sons of respondent 3. That partition suit culminated in a second appeal (S. A. No. 630 of 1933) to this Court which was dismissed on 15th September 1933. On these facts, respondent 1 contended in his appeal to the Subordinate Judge of Mayavaram that respondent 3 had no right to sue for recovery of the property as he had lost the right to such property by reason of the final decree passed in August 1927 under which the suit property as already stated had been allotted to respondent 3's sons. In view of this contention, the appellant herein, who is one of the sons of respondent 3 who got the property under the partition decree, filed I. A. No. 13 of 1935 in A. S. No. 7 of 1935 in the lower Appellate Court under O. 22, R. 10, Civil P. C., to implead himself as a supplemental respondent in the appeal so as to enable him to resist respondent 1's appeal as the rightful owner of the property and thus safeguard his interests therein. The Court below dismissed this application and allowed the appeal and this civil miscellaneous appeal and the connected second appeal have been preferred against the said order and decree respectively.

The learned counsel for the appellant has urged three contentions before me in the civil miscellaneous appeal. First he argued that the appellant was entitled to come on record under S. 146, Civil P. C., and that the lower Court was wrong in dismissing the petition without considering the applicability of that section. I do not however see how that provision is applicable to the appellant in the circumstances of the case. That Section would apply only if the appellant could be properly regarded as claiming under respondent 3 who originally brought the action and was the sole respondent in the appeal in the Court below. But it is clear that the appellant cannot be so regarded as he got the suit property by virtue of the partition decree referred to already and not by reason of any assignment or devolution from his father, respondent 3. I must therefore reject this contention.

The appellant's counsel next urged that O. 22, R. 10 applied to the case and the appellant is entitled to be impleaded in the appeal under that provision. But, as pointed out by the Court below, reading that provision in the light of R. 11 of the same Order, it is clear that unless the assignment, creation or devolution referred to in the provision occurred during the pendency of the appeal, that provision would not entitle the appellant to be impleaded in the appeal, and from the material dates already given, it will be seen that the appellant acquired the suit property as his separate and absolute property by virtue of the partition decree passed during the pendency of the suit and before the appeal was filed, even taking the date of the dismissal of the second appeal as the date when the partition became final between the parties. It cannot therefore be said that the appellant acquired any title during the pendency of the appeal as contemplated in O. 22, R. 10, read with R. 11 : *see* A I R 1934 All 442[1] and A I R 1935 Lah 119.[2]

Lastly, it is urged that if neither S. 146 nor O. 22, R. 10 was applicable to the facts of this case, the Court had inherent powers under S. 151, Civil P. C., to implead the respondent, as otherwise the appellant would be deprived of all opportunity of resisting the appeal and might run the risk of even losing the property to which respondent 1 was found to have no manner of right or title. I should be disposed to consider this argument with more favour if I could see my way to hold that the appellant's case was altogether outside the purview of O. 22, R. 10. But I am of opinion that the accrual of exclusive title to the appellant in respect of the suit property under the partition decree could properly be regarded as the 'creation' of an interest within the meaning of O. 22, R. 10, so that if the appellant had only applied under that provision to be impleaded during the pendency of the suit, his application would have been in order and the present difficulty would have been avoided. He, however, failed to do so and made this application only during the pendency of the appeal when it was no longer maintainable under that provision for the reasons already indicated. The appellant had thus an appropriate remedy under a specific provision of the Code of which, however, he failed to avail himself and he cannot therefore be allowed to invoke the inherent powers of the Court. It has often been held that there is no room for the exercise of such powers in a case coming within any specific provision of the Code: *see* 46 All 144,[3] 44 Cal 929[4] and 51 Bom 26.[5] This contention also must therefore be rejected. In the result, the appeal fails and is dismissed with costs. It is conceded that if the civil miscellaneous appeal is dismissed, the second appeal cannot be sustained. It is accordingly dismissed but I make no order as to costs therein.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1940 Madras 878

VENKATARAMANA RAO AND
ABDUR RAHMAN JJ.

Midde Sampathirayudu — Appellant.
v.
Sonti Venkataratnam — Respondent.

Appeal No. 230 of 1936, Decided on 28th August 1939, against decree of Sub-Judge, Masulipatam, D/- 22nd April 1936.

(a) Court-fees Act (1870), S. 7 (iv) (f)—Suit for accounts dismissed — Appeal should be valued at full amount of valuation in plaint.

The plaintiff whose suit for accounts has been dismissed is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint : *A I R 1938 Mad 887 (F B), Rel. on; A I R 1933 Mad 330, held overruled in A I R 1938 Mad 435 (F B).* [P 879 C 1]

(b) Government Securities Act (1920), S. 5 —S. 5 is enacted to protect Government — Question of assignor's beneficial ownership in war bonds and Government promissory notes deposited by assignee as security is not affected by S. 5.

Section 5 was enacted only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of the assignor in the war bonds and Government promissory notes deposited by the assignee with the Government is not affected by S. 5. [P 879 C 2]

P. Satyanarayana Rao—*for Appellant.*
Ch. Raghava Rao—*for Respondent.*

Venkataramana Rao J. — This is an appeal from the judgment and decree of the learned Subordinate Judge of Masulipatam dismissing the plaintiff's suit. The plaintiff claimed two reliefs in the suit: (1) an account of a certain arrack business alleged to have been carried on by the plaintiff in the name of the defendant, and (2) a declaration that the plaintiff is the owner of certain war bonds and Government promissory notes described in the schedule to the plaint. The case for the plaintiff is that the defendant was his son-in-law and therefore he allowed the arrack business to be carried on in his name and as security for the said business he had the Government promissory notes and war bonds deposited therefor. The learned Subordinate Judge is of opinion that the plaintiff has not made out his case that the defendant was only a benamidar in respect of the arrack business. In regard to the war bonds and Government promissory notes, the learned Judge is of opinion that by virtue of S. 5, Government Securities Act, the defendant being the holder of the promissory notes and bonds by virtue of the transfer in his favour, he must be deemed to be the owner. The plaintiff preferred this appeal and he claimed both the reliefs again in his memorandum of appeal. He valued the relief as to account at the sum of Rs. 1000 on the ground that he was entitled to put his own valuation on the strength of the ruling in 56 Mad 705[1] of Ramesam and Mockett JJ. which has since been overruled by a Full Bench case which is reported in ILR (1938) Mad 598.[2] Under the latest ruling I L R (1938) Mad 1031,[3] the plaintiff is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint. If this ruling is given effect to, the plaintiff ought to have paid the duty on Rs. 10,000 not on Rs. 1000. When confronted by this ruling Mr. Satyanarayana Rao under instructions from his client is not prepared to pay the deficit court-fee and abandoning the claim in respect thereof. Therefore the appeal so far as the relief for account is concerned must be dismissed with costs.

---

[1] ('34) 21 A I R 1934 All 442=149 I C 970=1934 A L J 832, Phul Chand v. Tahir Hussain.
[2] ('35) 22 A I R 1935 Lah 119, Kantichander v. Pirbhu Dayal.
[3] ('24) 11 A I R 1924 All 446=78 I C 416=46 All 144, Shib Prakash v. Jinguria.
[4] ('17) 4 AIR 1917 Cal 44=41 I C 598=44 Cal 929 =21 C W N 877=26 C L J 49 (F B), Ghuznavi v. Allahabad Bank Ltd.
[5] ('27) 14 A I R 1927 Bom 79=100 I C 154=51 Bom 26=28 Bom L R 1442, Vallabhai Naranji v. Chotalal Purushothamdas & Co.

He has only pressed the claim with regard to the relief relating to war bonds and Government promissory notes. The war bonds are evidenced by Exs. C, D E, F and L series and the Government promissory notes by Ex. M series. The documentary evidence in support thereof completely bears out the plaintiff's case. In respect of every one of these war bonds and promissory notes the plaintiff has paid money and become the owner thereof but he deposited them in 1929 as security for the arrack business which was being carried on by the defendant having regard to the relationship with him. Therefore there can be no question that the beneficial ownership in the suit bonds and promissory notes is in the plaintiff and the defendant in his deposition admitted that these bonds and promissory notes belonged to the plaintiff but he set up a claim that he became the owner thereof by virtue of a transfer from the plaintiff in consideration of a sum of Rs. 3000 paid by the defendant to the plaintiff. As remarked by the learned Subordinate Judge, there is no evidence to prove that the defendant paid the sum of Rs. 3000. Therefore if this story of transfer is not to be believed, the plaintiff's title to the suit war bonds and Government promissory notes remains. In our opinion S. 5, Government Securities Act, has no bearing on the case, because this section was enacted only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership is not affected by S. 5. The plaintiff's appeal with regard to the suit war bonds and promissory notes has therefore to be allowed. We therefore set aside the decree of the learned Subordinate Judge in regard thereto and give the declaration asked for. The respondent will pay the costs of the appellant so far as this claim is concerned.

C.R.K./G.N. *Order accordingly.*

✻ A. I. R. 1940 Madras 879

PANDRANG ROW AND ABDUR RAHMAN JJ.

Edara Venkayya Pantulu and another — Appellants.

v.

Kalipattapu Chitti Surya Prakasamma and another — Respondents.

Appeal No. 52 of 1938, Decided on 29th April 1940, against decree of Sub-Judge (Addl.), Ellore, in O. S. No. 9 of 1937.

(a) Defamation — Statement that unmarried girl of Brahmin community has not preserved her virgin purity is grossest defamation.

A statement in an article that an unmarried girl of the Brahmin community who is well connected, had not preserved her virgin purity is defamation of the grossest kind. [P 880 C 1]

✻ **(b) Defamation—Suit for damages — Fact that there was criminal prosecution and conviction before civil suit is no reason for reducing amount of damages.**

Law grants both remedies, i. e. civil and criminal, for defamation and the mere fact that there had been a criminal prosecution and a conviction obtained before the civil suit was launched is not itself a reason for reducing the amount of damages. [P 880 C 2]

(c) Defamation — Loss of reputation in respect of virginity of unmarried girl – Assessment of damages at exact figure is not possible.

Especially in a case where loss of reputation is suffered in respect of the virginity or purity of an

---

[1] ('33) 20 AIR 1933 Mad 330=141 I C 602=56 Mad 705=64 M L J 122, In re Venkatanandam.

[2] ('38) 25 AIR 1938 Mad 435=175 I C 470=ILR (1938) Mad 598 = (1938) 1 M L J 628 (F B), In re Dhanukodi.

[3] ('38) 25 AIR 1938 Mad 887=178 I C 159=ILR (1938) Mad 1031 = (1938) 2 M L J 557 (F B), Narayanan v. Periappan.

unmarried girl, it is not possible for the Court to assess the damages at an exact figure giving absolutely convincing reasons for so doing.
[P 880 C 2]

T. V. Ramanatha Iyer— *for Appellants.*

Kasturi Seshagiri Rao and D. Suryaprakasa Rao — *for Respondents.*

Pandrang Row J.—The only points in this appeal are whether a certain article published in a Telugu Weekly on 5th May 1935 is defamatory of the plaintiff, and if so, to what damages is the plaintiff entitled. As regards the defamatory character of the article there can really be no question. In particular the last two sentences in para. 2 are undoubtedly defamatory inasmuch as they clearly indicate that the plaintiff, an unmarried girl of the Brahmin community who is well connected, had not preserved her virgin purity. One can hardly imagine a grosser kind of defamation. No satisfactory attempt has been made to explain these sentences away. In our opinion what has been stated above is sufficient to show the nature of the defamation and the extent of the loss of reputation caused to the plaintiff. We do not think it desirable to give a wider publicity to the defamatory passages by reproducing them in this judgment. The plaintiff's father is a retired Deputy Collector and her brother is an advocate of this Court. Undoubtedly she was being educated in a school in Madras and there were proposals for a marriage between her and one Krishnamurthi. This marriage did not take place though for reasons unconnected with the publication of the article. The defamation having been established beyond doubt it only remains to consider whether the amount of damages awarded by the Court below is reasonable.

It may be mentioned in this connection that before the suit was filed there was a criminal prosecution at the instance of the father of the plaintiff which resulted in the conviction of all the defendants which was upheld in the High Court on revision. It is argued that the very fact that there had been a criminal prosecution and a conviction obtained before the civil suit was launched is itself a reason for reducing the amount of damages, and reliance has been placed on the decision in A I R 1936 Rang 332.[1] At p. 334 there are certain observations which show that the learned Judge disapproved conduct of this kind, that is, the filing of a civil suit for damages after a criminal prosecution, though the law grants both remedies to the wronged person. We are not prepared to accept this view, namely that where the law permits two remedies a party who avails himself of one remedy after another should not get, so to say, as much compensation as he would otherwise get. What the law allows must be awarded by the Courts which administer the law. The remedies are moreover different. The law gives a party both remedies and it is not right in our opinion to take away so to speak by a judicial decision what the law gives in cases of this kind. The amount awarded by the Court below is Rs. 1500 whereas the amount claimed is Rs. 5250.

The learned Judge who tried the case has given reasons for assessing the damages at Rs. 1500 and no attempt has been made to show that these reasons are not well founded beyond relying on the decision in A I R 1936 Rang 332.[1] In a case of this kind, it is not possible for the Court to assess the damages at an exact figure giving absolutely convincing reasons for so doing. This observation is made necessary by the fact that an attempt was made to argue that the lower Court should have allowed only proportionate costs in view of the fact that only Rs. 1500 was decreed in respect of a claim of Rs. 5250. Parties cannot be expected to assess the damages in an exact manner. Especially in a case of this kind where loss of reputation is suffered in respect of the virginity or purity of an unmarried girl like the plaintiff it is impossible to say that a claim for Rs. 5250 is unreasonable. It is enough to refer to the case reported in 51 All 509[2] where in appeal full costs were given though the amount decreed was only Rs. 200 in respect of a claim for Rs. 5100. Another reason is that we ourselves should have been prepared to enhance the amount of damages but for the fact that the memoranda of cross-objections in which an extra amount of Rs. 1000 was claimed by the plaintiff-respondent was not pressed before us by her advocate. We therefore see no reason to interfere with the order regarding costs made by the lower Court. The appeal is accordingly dismissed with costs of the plaintiff-respondent. The memorandum of objections not being pressed is also dismissed but without costs.

C.R.K./D.S. *Appeal dismissed.*

---

[1] ('36) 23 A I R 1936 Rang 332 = 164 I C 385, Ma Sein Tin v. U Kyan Maung.

[2] ('29) 16 A I R 1929 All 214=115 I C 458 = 51 All 509 = 1929 A L J 303, Rahim Buksh v. Bachchar Lal.

A. I. R. 1940 Madras 881

WADSWORTH J.

Sistla Saraswatamma — Appellant.

v.

Paruvada Maki Naidu and others — Respondents.

Second Appeal No. 25 of 1938, Decided on 8th August 1939, against order of Sub-Judge, Chicacole, D/- 22nd November 1937.

(a) Civil P. C. (1908), S. 47—Mortgage suit —Subsequent purchaser impleaded as party — Application for personal decree against mortgagor – Purchaser not made party to this application — Mortgagee proceeding to attach property in execution of personal decree — Claim by purchaser that property attached was his property held came within S. 47.

The governing factor with reference to S. 47 is not whether the disputants were parties to the decree, but whether the disputants were parties to the suit in which the decree was passed. [P 881 C 2]

In a mortgage suit the subsequent purchaser of the property was impleaded as a party. After the sale of the hypotheca had not realized the full amount of the mortgage decree, an application was made for a personal decree against the mortgagors and to this application the subsequent purchaser was not made a party. When the decree-holder came to attach part of the personal property of the mortgagors, there was a claim preferred by the purchaser on the ground that the property attached was his property by virtue of a sale executed after the passing of the personal decree :

Held that the personal decree arising out of a mortgage suit was a decree passed in the mortgage suit; and though the purchaser was not given notice of the application for a personal decree, he was a party to the suit in which the decree was passed and the question was one relating to the execution of that decree. S. 47 therefore governed the investigation of the claim. [P 881 C 2 ; P 882 C 1]

(b) Civil P. C. (1908), S. 47 and O. 21, R. 58—Difference between proceedings under O. 21, R. 58 and those under S. 47 explained.

There is a difference between proceedings under O. 21, R. 58 and those under S. 47. For the purpose of deciding a claim under O. 21, R. 58, the Court is bound to find who was in possession at time of the attachment. It is not bound to find who had the title to the land attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under S. 47, it is necessary to go into all the contentions of the parties including the contention as to title. The scope of the inquiry cannot be restricted merely to the question of possession at the time of the attachment. The difference between the two inquiries is therefore not a difference in procedure so much as a difference in the scope of the inquiry. [P 882 C 1]

P. Somasundaram and S. Ramamurty — *for Appellant.*

N. Vasudeva Rao for V. Govindarajachari — *for Respondents.*

Judgment. — This is an appeal against an order of remand in a matter arising out of a claim in execution of a personal decree passed in a mortgage suit. The appellant is a mortgage decree-holder; the respondent is defendant 8 impleaded in the mortgage suit as a subsequent purchaser of one of the items mortgaged. After the sale of the hypotheca had not realized the full amount of the mortgage decree, an application was made for a personal decree against the mortgagors and to this application the present respondent (defendant 8) was not made a party. When the decree-holder came to attach part of the personal property of the mortgagors, there was a claim preferred by the present respondent on the ground that the property attached was his property by virtue of a sale executed after the passing of the personal decree. Now, the claim preferred by the respondent was drafted as a claim by a stranger to the decree under O. 21, R. 58 and it was investigated on that basis and though the learned District Munsif does go to some extent into the validity of the title claimed by the respondent, he expressly says that the only point for determination is, who was in possession of the attached land at the time of the attachment. He found that the respondent herein was not in possession and he dismissed the petition. Thereupon, the respondent instead of filing a suit to contest the correctness of this order, discovered that the order was one under S. 47, Civil P. C., he having been a party to the suit; and he filed an appeal. The learned Subordinate Judge hearing the appeal agreed with the contention that the matter was one falling under S. 47 and remanded the suit for a fresh hearing on the ground that the lower Court erred in disposing of the claim summarily.

It seems to me quite clear that the learned Subordinate Judge is right in holding that S. 47 covers the dispute between the parties. It is contended on the strength of certain observations in 59 Mad 188[1] that the proceeding for obtaining a personal decree is a separate proceeding from the trial of the suit and that the decree is a distinct decree and that therefore any person who is not a party to the personal decree proceedings but claims property attached under the personal decree is a stranger claimant to whose claim O. 21, R. 58 will apply. This contention seems to overlook the wording of S. 47 with reference to which the governing factor is not whether the disputants were parties to the decree, but whether the disputants were parties to the suit in which the decree was passed. There can, I think, be no question that the personal decree arising out of a mortgage suit is a decree passed in the mortgage suit; and though the respondent was not given notice of the application for a personal decree, he was a party to the suit in which the decree was passed and the question is one relating to the execution of that decree. S. 47 therefore governs the investigation of the claim.

---

[1] ('36) 23 A I R 1936 Mad 34=160 I C 270=59 Mad 188 = 69 M L J 765 (F B), Paliniappa Chettiar v. Narayanan Chettiar.

Now the learned Subordinate Judge ordered a remand on the ground that the trial Court was wrong in disposing of the claim summarily. It seems to me that this statement does not quite indicate the difference between proceedings under O. 21, R. 58 and those under S. 47. For the purpose of deciding a claim under O. 21, R. 58, the Court is bound to find who was in possession at the time of the attachment. It is not bound to find who had the title to the land attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under S. 47, it is necessary to go into all the contentions of the parties including the contention as to title. The scope of the enquiry cannot be restricted merely to the question of possession at the time of the attachment. The difference between the two enquiries is therefore not a difference in procedure so much as a difference in the scope of the enquiry. It is suggested that the trial Court in this case has taken all the evidence that was available and has really gone into the question of the title of the claimant. It seems to me probable that the evidence was recorded as fully as was necessary. But, undoubtedly, the learned District Munsif has considered himself bound only to decide the question of possession. It follows therefore that the remand for an enquiry under S. 47 into the claim of the respondent was necessary. But it seems to me that the learned Subordinate Judge was quite wrong in ordering costs up to the date of his order to abide by the result. The respondent himself was entirely to blame for the way in which the matter proceeded in the trial Court and it was owing to his own error that the appeal and the remand became necessary. He took the position of a stranger claimant and asked the Court to investigate his claim under O. 21, R. 58 which was done without any question as to the propriety of the provision of law under which investigation was sought. Then when an adverse decision was given, respondent took advantage of his own error in order to claim a right of appeal and get that decision set aside. The result is that all the time and money spent both in the original enquiry and the lower Appellate Court have been wasted owing to the error of the respondent.

The proper order is therefore that the respondent here (defendant 8) do pay all the costs of the appellant up to and including the stage of the order of remand by the lower Appellate Court. In other respects, the appeal is dismissed and I think it proper that the appellant should pay the respondent's costs in second appeal since she has failed on the substantial grounds.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 882

PANDRANG ROW J.

Sankamma Hengsu — Petitioner.

v.

H. Anantha Kamath and others — Respondents.

Civil Revn. Petns. Nos. 1041 and 1042 of 1936, Decided on 7th August 1939, to revise decrees of Sub-Judge, South Kanara, D/- 24th June 1936.

Companies Act (1913), S. 179 (f) — Indorsement of promissory notes — Liquidator derives his power to indorse from S. 179 (f)— Power cannot be delegated — Indorsement by Liquidator's agent conveys no title to assignee — No question of ratification by liquidator arises.

The liquidators have no power whatever to delegate their powers to any one else. The power of the liquidators themselves is derived from S. 179 and so far as indorsements of promissory notes are concerned, from cl. (f) of that Section. The power given to the liquidator to indorse promissory notes being a power given by the statute cannot be delegated in the absence of a statutory provision for such delegation. Consequently an indorsement of a promissory note by the agents appointed by the Liquidators conveys no title in law to the assignees. An assignment of a promissory note by the agent being void ab initio no subsequent ratification by the liquidator can validate it: *(1876) 2 A C 366, C. R. P. No. 22 of 1934, Rel. on;* *Expl. and disting.* [P 883 C 1, 2]

B. Sitarama Rao and T. Krishna Rao — *for Petitioner.*

K. P. Sarvothama Rao and A. Narayana Pai — *for Respondents.*

Order. — These connected revision petitions arise out of two connected Small Cause Suits instituted by two different persons claiming to be assignees or indorsees of two different promissory notes under indorsements purporting to have been made by Rao Saheb P. U. Narayana Iyer and P. Ramayya Alva as joint holders of a power of attorney granted to them by the liquidators of the National Live-stock Registration Bank Ltd., Madras. The suits were dismissed mainly on the ground that the indorsements were not valid and conveyed no interest to the assignees. In one of these revision petitions namely, C. R. P. No. 1041 of 1936, the only question that arises is whether the indorsement by the agents of the liquidators is valid in law. This very point arose in connexion with a similar case in C. R. P. No. 22 of 1934 in which it was held by Sir Owen Beasley C. J. that the liquidators had no power whatever to delegate their powers to any one else. The power of the liquidators themselves is derived from S. 179, Companies Act, and so far as indorsements of promissory notes are concerned, from cl. (f) of that Section. In other words, the power given to the liquidator to indorse promissory notes is a power given by the statute, and it is a well established principle that a statutory power cannot be delegated in the absence of a statutory provision for such delegation. It is not pretended that there is any such statutory provision for delegation in a case of this kind, and it is clear, as was held in C. R. P. No. 22 of 1934, that the indorsement by the agents appointed by the liquidators conveys no title in law to the assignees. It follows from this that C. R. P. No. 1041 must fail as no question of ratification, such as is raised in the other revision petition, arises in this case.

The question of ratification also can be disposed of briefly. It is said that on 15th May 1932 all the previous indorsements made by the power of attorney agents were ratified by the sole liquidator, the other liquidator having resigned his office. Mr. Sitarama Rao relied on (1876) 2 A C 366[1] and particularly on the observations at p. 375. I am however of opinion that those observations really do not bear on the present case. They show that though the original act would have required the sanction of a majority of the entire body of shareholders, nevertheless, an act done by a director in excess of his authority may be ratified by a majority vote of the shareholders actually present at an extraordinary meeting convened with the express object of ratifying the act that was done in excess of authority due notice of which having been given. In other words, that case is an authority for the proposition that in every case it is not necessary that the very authority which could have validly authorized the act at its inception could alone ratify such act. It does not in any way take away the force of the general rule which is embodied in Art. 25 in Bowstead on Agency at p. 47, 8th Edn., to the effect that it is only an act which is capable of being done by means of an agent that can be ratified by the person in whose name or on whose behalf it was done. In other words, if, as in this case, the liquidator could not validly in law appoint an agent to assign promissory notes by means of a general authority, no subsequent ratification of what was ab initio void could make that act valid.

It has been argued that a distinction must be drawn between this case and a case where the principal himself has decided the matter or in other words, decided to make the particular assignment or indorsement, and merely leaves it to his power of attorney holder to sign the indorsement on his behalf. But in this case there is nothing to show that at the very inception the liquidator had decided to assign the promissory note in question and merely employed his power of attorney agents to sign on his behalf. If that was the case, there would have been no necessity to plead ratification at all because the original act itself would have been valid, the mere affixing of signature on behalf of the principal being a mere ministerial act the validity of which does not rest on any statutory provision. No such case was set forth by the petitioner in the lower Court, and there is certainly no material available which would justify a finding to the effect that before the assignment by the agents the liquidators themselves had applied their minds to the question and had decided to make the assignment. It follows therefore that this Revision Petition (No. 1042 of 1936) also must fail. Both the revision petitions are accordingly dismissed with costs.

C.R.K./G.N. *Petitions dismissed.*

---

[1] (1876) 2 A C 366=46 L J P C 87=37 L T 176 =25 W R 682, Irwin v. Union Bank of Australia.

A. I. R. 1940 Madras 884

PANDRANG ROW AND HORWILL JJ.

Nunna Satyanarayanamurthy and another — Appellants.

v.

Avva Krishnamoorthy and others — Respondents.

Appeal No. 328 of 1937 and Civil Misc. Petn. No. 201 of 1940, Decided on 6th February 1940, against decree of Sub-Judge, Masulipatam, in O. S. No. 56 of 1936, etc.

(a) Mortgage—Executory contract can amount to discharge of mortgage — But mere recital in plaint in mortgage suit that plaintiff had entered into contract with mortgagors that they should sell their property to mortgagee is not admission that mortgage is discharged.

It is undoubtedly true, that an executory contract can amount to a discharge of a mortgage debt; but there is no presumption in law that it does so. Ordinarily, one would not expect a person to give up his rights under a mortgage until he had got something concrete in its place. However, the circumstances may be such as to show that the mortgagee intended even from the day of the execution of the contract to give up his rights under the mortgage. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors and their descendants that the defendants should sell their property to the mortgagees, is not tantamount to an admission that the mortgage is no longer in existence: *A I R 1937 Mad 261 and AIR 1937 Mad 714, Ref.* [P 885 C 1]

(b) Practice—Pleading—Appeal—New plea.

A plea not raised in the written statement cannot be entertained in the High Court. [P 885 C 1]

P. Satyanarayana Rao and M. V. Nagaramayya — *for Appellants.*

B. Sitarama Rao and N. Vasudeva Rao — *for Respondents.*

Horwill J.—This was a suit on a mortgage. Defendants 1 to 9 are mortgagors or their descendants and defendants 10 and 11 are purchasers of the equity of redemption in execution of a small cause decree held by themselves. The suit was allowed and defendants 10 and 11 have appealed. The principal contention in the lower Court—as well as in this Court—is that the suit mortgage was discharged by the execution of a contract of sale on 8th October 1933. Defendant 10 obtained his decree on 23rd June 1933; but before he could attach the property in execution of his decree, the contract relied on by defendants 10 and 11 had been executed. It is not now denied that the plaintiff enjoyed the crop raised in Fasli 1344. The attachment was on 17th February 1934, and defendant 10 took delivery of the land on 23rd November 1935, while the crop presumably raised by the plaintiff's tenants was still on the ground. That crop was the subject of criminal litigation and, finally, the plaintiff succeeded in obtaining that also. Defendant 10 then filed proceedings under S. 145, Criminal P. C., and was maintained in his possession pending the result of civil litigation. That led the plaintiff to file the present suit, in which he says that he had intended to realize his mortgage debt by getting the defendants to sell the land to him and then executing a contract to that effect; but that as that contract had been made impossible of performance he had been compelled to bring this suit on his mortgage. Defendants 10 and 11 cannot succeed on the issues raised. The case of defendants 10 and 11, as argued in this Court and in the Court below, is that the suit mortgage was discharged by the execution of the contract of 8th October 1933. That case however was never definitely put forward in the written statement. The defendants obviously desired to defeat the plaintiff without committing themselves to the definite case that the contract was true. Defendants 10 and 11 began para. 3 of their written statement by saying:

> Whatever be the truth or falsity in respect of the sale contract referred to in para. 6 of the plaint . . . as the plaintiff believes it to be true according to his contentions, he may take further steps according to law on the strength of that contract but to file a suit on the deed of mortgage is opposed to law.

The rest of the paragraph then sets out particulars of the various admissions made by the plaintiff from time to time in the criminal proceedings above referred to. It is thus seen that the plea of the defendants in this paragraph is not so much a plea of discharge as a plea that the suit, as framed, is not maintainable. Turning to the plaint itself, it is clear that the contention of defendants 10 and 11 that the suit, even as framed, is not maintainable is not correct. It is true the plaintiff in para. 6 of the plaint says that the plaintiff, with the object of purchasing lands as a discharge of the mortgage debt, obtained a contract of sale from defendants 1, 2, 3 and 7 and the other mortgagors and that the plaintiff took possession of the lands mentioned in the contract. In para. 7 he says:

> The said petition under S. 145, Criminal P. C., was decided in favour of defendant 10. Thus the said contract became infructuous and impossible of performance. By its terms and according to law the said contract became useless.

It is undoubtedly true, as has been

pointed out in 71 M L J 850[1] and (1937) 2 M L J 922,[2] an executory contract can amount to a discharge of a mortgage debt; but there is no presumption in law that it does so. Ordinarily, one would not expect a person to give up his rights under a mortgage until he had got something concrete in its place. However, the circumstances may be such as to show that the mortgagee intended even from the day of the execution of the contract to give up his rights under the mortgage. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors and their descendants that the defendants should sell their property to the mortgagees, is not tantamount to an admission that the mortgage is no longer in existence. We cannot therefore agree that on the plaint, as it stands, the suit is not maintainable. On this question therefore the appellants have to fail; for the suit is maintainable as framed and these defendants have not set up a definite plea of discharge. The plaintiff is therefore entitled to a mortgage decree. A minor question has been raised as to whether credit should be given to the appellants for certain crops that were enjoyed by the plaintiff. This plea was not raised in the written statement and we are not prepared to entertain it here.

Our attention has been drawn to a small mistake in the drafting of the decree by which the plaintiff is given liberty to proceed against defendants 10 and 11 not only for the costs of the suit, but for the balance of the mortgage amount which may remain after the property has been sold. This was clearly wrong and is not in accordance with the judgment. In so far as this is concerned, therefore the appeal has to be allowed. A petition (C. M. P. No. 201 of 1940) has been filed by respondent 4 to have the decree debt scaled down. This petition will be sent for disposal to the lower Court and the decree here passed will be subject to the result of that application. Except as above mentioned the appeal is dismissed with the costs of the plaintiff.

C.R.K./D.S. *Order accordingly.*

---

[1] Krishnasami Rao v. Srinivasadesikan, (1937) 24 AIR Mad 261=168 I C 699=71 MLJ 850.

[2] Sura Reddi v. Ramanarasu, (1937) 24 AIR Mad 714=176 I C 444=(1937) 2 M L J 922.

A. I. R. 1940 Madras 885

WADSWORTH J.

Amatipati Bhadrachalam and others — Petitioners.

v.

Ramineedi Nagarupavatamma and another — Respondents.

Civil Revn. Petn. No. 978 of 1938, Decided on 15th April 1940, to revise order of Sub-Judge, Cocanada, D/- 17th August 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 4 (h)—Debt due to two women jointly or as co-owners—Interest of each woman in debt and assets of each woman apart from debt must be considered in order to determine whether each woman is entitled to claim exemption under S. 4 (h).

When a debt is due to two women jointly or as co-owners and relief is claimed by the debtor under the Act, in order to determine whether either of the creditors is entitled to resist that relief, the Court must look to the amount of the debt due to that particular creditor the amount of other debts due from agriculturists to that particular creditor and the possession of other property by that creditor not covered by the explanation, that is to say, when the Court has to adjudicate under the Act on a debt due to two women jointly or as co-owners, the interest of each woman in the debt and the assets of each woman apart from the debt must be taken into consideration in order to determine whether each woman is entitled to claim the exemption under S. 4 (h). [P 886 C 2; P 887 C 1]

G. Balaparameswari Rao — *for Petitioners.*

D. Narasaraju — *for Respondents.*

Order.—This revision petition raises the question of the effect of S. 4 (h), Madras Agriculturists' Relief Act, upon the liabilities of the parties when the debt sought to be scaled down is a debt owned in common by two women. I have found considerable difficulty in dealing with the questions of law raised by this petition owing to the absence of any clear findings of fact in the lower Court's judgment. So far as the evidence goes, the position seems to me to be as follows: The petitioners are the judgment-debtors under a decree for Rs. 625, the decree-holders being two sisters. These two sisters had been given a sum of money by their father and this sum of money was originally invested in a mortgage executed by the present petitioners which was discharged in 1936 by payments amounting in all to a sum variously estimated at Rs. 4000 and Rs. 4500. According to the evidence of the respondents' father, the whole of the payments in discharge of this mortgage went towards three documents Exs. 1, 2 and 4. Ex. 1 is a mortgage in favour of the two sisters, the respondents, for the sum of Rs. 408 dated 23rd October 1936. Ex. 2 is a similar mortgage for a sum of Rs. 1475 in favour of the same two sisters dated 24th February 1936 ; and Ex. 4 is a sale deed for Rs. 1000 executed by the present petitioners, mortgagors, in favour of the respondents' father. It provides that the sale price having been adjusted against the mortgage debt due to the vendee's daughters, the vendee is to pay the sale price of his daughters. The father of the respondents has given evidence to the effect that this sum of Rs. 1000 was used to discharge debts incurred for the marriage of one of the daughters which took place in 1935 and also to purchase jewels for the daughters. So according to his evidence this sum of Rs. 1000 has to be left out of account for the purpose of Sec. 4 (h) of the Act.

The learned Subordinate Judge does not say whether he accepts or rejects this evidence. But his whole judgment seems to proceed on the basis that the two daughters are together possessed of assets worth more than Rs. 4000. He does not find what those assets are. Exs. 1 and 2 cannot account for much more than Rs. 2000 allowing for interest. If, on the other hand, the balance is made up of jewels and the money spent on the marriages of the two daughters, whether the two daughters are treated as one unit or as two units for the purpose of S. 4 (h) of the Act, they are not shown to be possessed of unexpected property other than the suit debt and the two mortgage debts. If, on the other hand, the evidence of the father is not believed, it would seem to follow that they must be possessed either of an interest in the land sold under Ex. 4, the purchase price for which really came out of their money, or of other assets which have not been disclosed. It seems to me impossible to dispose of this petition without first recording a finding on the question whether either or both of these ladies did own any other property excluding those classes of property covered by the explanation. The learned Subordinate Judge has gone at length into the question whether the mortgages, Exs. 1 and 2 are immovable properties or not. This question seems scarcely to arise. For, if these two mortgages are debts due from agriculturists, seeing that they together do not exceed Rs. 3000 they would clearly not bar the respondents from getting the benefit of cl. (h), provided that cl. (h) has any application to a case of joint creditors or co-owners. If, on the other hand, Exs. 1 and 2 are not debts due from agriculturists, they do not come within the definition of debts under the Agriculturists' Relief Act and must therefore be regarded as other property, whether they be regarded as moveable property or immovable property, and the existence of any other property not covered by the explanation will take the ladies out of the exemption in cl. (h) of S. 4 having regard to the decision to which I was a party in (1940) 1 M L J 534.[1]

The question whether cl. (h) of S. 4 applies to a debt owed by an agriculturist to two women is not without difficulty and the working out of the effects of the dual ownership of the debt under this clause is also clothed with difficulty. Ordinarily speaking, unless there is anything repugnant in the context the singular includes the plural (*vide* S. 3 (35), Madras General Clauses Act). Both sides here, in fact, contend that the words in cl. (h) 'any debt or debts due to a woman' would apply to a debt or debts to two women and I can see no reason for rejecting this view, unless it be that the clause does not make any clear provision for the consequences of a plurality of female creditors. Assuming that cl. (h) does apply to a debt due to two women and having regard to the fact that it imposes a limit of wealth below which a woman may claim to be exempted from the purview of the Act, it would to my mind follow that the same financial limit, cannot have been intended to apply to a number of joint creditors as to a single creditor and that the limit must have been imposed with reference to the debt owed to each one of those joint creditors and the property owned by that creditor and not to the debt due to all of them jointly and their joint property. This is substantially the view taken by the lower Court. A reasonable interpretation of this clause seems to me to be that when a debt is due to two women jointly or as co-owners and relief is claimed by the debtor under the Act, in order to determine whether either of the creditors is entitled to resist that relief, the Court must look to the amount of the debt due to that particular creditor the amount of other debts due from agriculturists to that particular creditor and the possession of other property by that creditor not covered by the explanation, that is to say, when the Court has to adjudicate under the Act on a debt due to two women jointly or as co-owners, the interest of each woman in the debt and the assets of each woman apart, from the debt must be taken into consideration in order to determine whether each woman is entitled to claim the exemption under Section 4 (h).

---

[1] Ramasami Reddi v. Alagayammal, (1940) 27 AIR Mad 421 = (1940) 1 M L J 534 = I L R (1940) Mad 688.

As the facts have not been found so as to enable me to apply the provisions of the Act to these facts, the petition will be remanded to the lower Court for disposal in the light of this judgment. Costs throughout to abide by the result.

C.R.K./D.S. *Case remanded.*

A. I. R. 1940 Madras 887

WADSWORTH J.

Kanthasami Reddiar — Petitioner.

v.

Pethusami Reddiar — Respondent.

Civil Revn. Petn. No. 1406 of 1937, Decided on 12th April 1940, to revise decree of Dist. Munsif, Koilpati, D/- 9th October 1937.

Limitation Act (1908), Arts. 64 and 85 — Defendant opening his account in plaintiffs' shop by writing his own name at top of account and also writing subsequent entries therein — About a year after opening of account defendant striking balance in his own handwriting — Account held did not fall under Art. 64 in absence of authentication by defendant and inasmuch as there were credit entries showing counterclaim by defendant and shifting balance at times against plaintiff case fell under Art. 85.

The account of the defendant in the plaintiff's shop started approximately one year before the settlement with the writing of the heading by the defendant. Then followed a series of entries all in the handwriting of the defendant and a mere pencilled totalling and striking of the balance. There was nothing in the way of an authentication of the balance or an express indication that the writer accepted it as binding upon himself and authenticated it as accepted by the person whose name appeared at the head of the account:

Held that the writing of the name at the head of the accounts could not be regarded as an authentication of the balance finally struck approximately one year later and therefore Art. 64 did not apply:

Held further that inasmuch as there were a number of credit entries constituting counterclaims for the defendant and shifting the balance at times against the plaintiff in the same account the case was governed by Art. 85. [P 888 C 1]

A. Swaminatha Iyer and S. Thayagaraja Iyer — *for Petitioner.*

K. S. Champakesa Iyengar — *for Respondent.*

Order. — The petitioner was the defendant in a small cause suit for a sum of Rs. 232-2-2 due on account of dealings had by defendant with plaintiff from 6th March 1933 to 1st March 1934. The plaint was certainly based on a settlement of account on 1st March 1934. The defendant raised pleas of discharge and also alleged that the suit was barred by limitation. The trial Court found against the pleas of discharge, there being no oral evidence adduced for the defendant. That decision of fact cannot be canvassed here. The learned District Munsif also held that the suit was in time having regard to Art. 64, Limitation Act. Now, the actual page of the account bearing this alleged settlement entry is proved to be all in the handwriting of the defendant who was employed by the plaintiff. The heading shows that it is the account of Kandasami Reddiar, the defendant, in the plaintiff's cotton shop. That also was in the handwriting of the defendant. The first entry in that page is dated 6th March 1933 and the account closes with a small credit for cotton supplied by the defendant to the plaintiff on 1st March 1934. Then the credit and debit entries are totalled in pencil, and there is another pencil entry striking the balance at Rs. 230-2-2. These pencil entries are also in the handwriting of the defendant.

The learned District Munsif has held that, having regard to the fact that the defendant has written his own name at the top of the account and that the final balance is in the handwriting of the defendant, the decisions in 31 Cal 1043[1] and 5 Bom 88[2] warrant the conclusion that there is a statement of account signed by the defendant sufficient for the purpose of Art. 64, Limitation Act. Now, it is difficult to support this conclusion. The cases referred to deal with accounts bearing the name of the debtor at the head and at the foot an authentication in the manner customary amongst the class of people to which the writer belongs indicating that he is the writer of the balance and accepts it as correct, he being also the writer of the name at the head. The Courts, having regard to the commercial practice of authenticating accounts in this way, have held that the authentication at the foot of the account and the name at the head may be taken together to spell out a signature of the settled account. There are no such facts in the

---

1. ('04) 31 Cal 1043=9 C W N 83, Sadasookh Agarwalla v. Baikanta Nath.
2. ('80) 5 Bom 88, Andarji Kalyanji v. Dula' Jeevan.

present case. All we have is an account starting approximately one year before the settlement with the writing of the heading by the defendant. This must have been written at the time when the account was blank. Then follow a series of entries all in the handwriting of the defendant and a mere pencilled totalling and striking of the balance. There is nothing in the way of an authentication of this balance or an express indication that the writer accepts it as binding upon himself and authenticates it as accepted by the person whose name appears at the head of the account and the writing of the name at the head of the accounts cannot possibly be regarded as an authentication of the balance finally struck approximately one year later. It seems to me clear that Art. 64, Limitation Act, does not apply.

There is no reference in the judgment to any other Article of the Limitation Act. But the learned District Munsif gives findings of fact which clearly bring the suit within Art. 85, Limitation Act. He finds that there are a number of credit entries showing sales of cotton by the defendant to the plaintiff which constitute counterclaims for the defendant and that in the same account the balance shifts at times against the plaintiff. There was no necessity for the learned District Munsif to record these findings unless he had in mind the considerations governing the disposal of a case falling under Art. 85. It is not at all likely that any further evidence of value would be forthcoming if the suit were sent back for an express finding whether Art. 85 does apply. On the accounts before me, the findings recorded by the learned District Munsif appear to be correct and the suit appears to be clearly within time having regard to Art. 85, Limitation Act. This being revision petition, it does not seem to me in the circumstances of the case necessary to interfere with the decision of the trial Court though the finding that the case is within time having regard to Art. 64, Limitation Act, seems to me to be erroneous. To my mind, the suit is within time, though the wrong Article has been quoted. In the result therefore this petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 888

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Tajbi — Appellant.

v.

Nattar Sheriff — Respondent.

Second Appeal No. 49 of 1937, Decided on 9th April 1940, against decree of Sub-Judge, Ellore, in A. S. No. 105 of 1936.

Mahomedan Law—Dower — Divorce by husband before consummation—Wife receives only half her specified dower even though prompt.

If the husband divorces his wife before consummation she receives half her specified dower even if the dower was prompt. [P 888 C 2]

A. K. Pavithran — *for Appellant.*

M. S. Ramachandra Rao and D. R. Krishna Rao — *for Respondent.*

Leach C. J. — The appellant, who is a Sunni and therefore governed by the Hanafi law, brought this suit in the Court of the District Munsif of Ellore to recover a sum of Rs. 725 which she claimed as mahar. She was married to the respondent on 31st March 1930 when she was only nine years of age. On 24th November 1932, before the marriage had been consummated, the respondent divorced her. It is common ground that the respondent agreed at the time of the marriage to pay the appellant the sum of Rs. 725 as mahar, but it was contended in the trial Court that the appellant was only entitled to half the amount as the marriage was never consummated. The District Munsif gave a decree for the full amount, but this decree was set aside by the Subordinate Judge of Ellore on appeal. The Subordinate Judge held that the defence was well founded and gave the appellant a decree for Rs. 362-8-0 only. The appellant has appealed to this Court. It is quite clear that the decision of the Subordinate Judge was correct. Hedaya, Book II, Chap. 3, p. 124, expressly states that if the husband divorces his wife before consummation she receives half her specified dower. The authority of this statement cannot be questioned. In fact it is unreservedly accepted by the learned authors of textbooks on Mahomedan law. The learned advocate for the appellant has contended that inasmuch as the Mahar in this case was prompt and not deferred, she was entitled to the full amount as soon as the marriage contract was completed irrespective of the consummation of the marriage. This statement runs contrary to direct authority and cannot be accepted. The appeal will be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 889

ABDUR RAHMAN J.

Rachamadugu Narayanaswami Chetti — Petitioner.

v.

R. Venkata Reddi and others — Respondents.

Civil Revn. Petn. No. 2174 of 1939, Decided on 3rd May 1940.

(a) Madras Debt Conciliation Act (11 of 1936), S. 25—S. 25 applies even to execution proceedings.

The words in S. 25 are quite general and apparently intended to cover every proceeding, whether in the nature of an execution or otherwise. An application for execution, although arising out of a suit after a decree is passed therein is nonetheless a proceeding and there is no justification for restricting the words only to miscellaneous proceedings other than those in execution. It is not necessary that the proceedings must necessarily be independent of the suit in which the decree was passed. [P 889 C 1, 2]

(b) Madras Debt Conciliation Act (11 of 1936), Ss. 2 (f) and 25—Mortgage decree falls within purview of Act.

A debt has been defined to cover a secured debt as well and whether it is payable under a decree of a Civil Court or otherwise. Hence a decree passed on the basis of mortgage deed falls within the purview of the Debt Conciliation Act: *AIR 1939 Mad 215, Rel. on.* [P 889 C 2]

T. K. Srinivasa Thathachariar and C. Balakrishna Menon — *for Petitioner.*

T. Kumaraswamiah — *for Respondents.*

Order.—This is a revision from an order passed by the learned Subordinate Judge of Chittoor dismissing an application made by a judgment-debtor under the Debt Conciliation Act, with the object of securing a stay of the execution of a mortgage decree passed against him. The two grounds on which the execution Court refused to accede to the petitioner's request were, (1) that S. 25 of the Act did not apply to execution proceedings; (2) that a decree passed on the basis of a mortgage deed does not fall within the purview of the Debt Conciliation Act.

As to the first ground of the learned Subordinate Judge's decision, I find the words in S. 25 to be quite general and apparently intended to cover every proceeding, whether in the nature of an execution or otherwise. An application for execution, although arising out of a suit after a decree is passed therein is nonetheless a proceeding and there seems to be no justification for restricting the words only to miscellaneous proceedings other than those in execution. The words of the Section leave no scope for the argument that the proceedings must necessarily be independent of the suit in which the decree was passed. As to the second ground, the learned Subordinate Judge's attention does not seem to have been drawn to the definition of the word 'debt' which has been given in S. 2 (f), Debt Conciliation Act. A debt has been defined to cover a secured debt as well and whether it is payable under a decree of a Civil Court or otherwise. A secured debt has been defined in sub-cl. (i) of the same Section to include a mortgage debt or any debt for which there is security, lien or charge on immovable property. The result of these definitions would be that "when an application has been made to a Board under S. 4, any suit or other proceeding including a proceeding in execution of a decree, pending before a Civil Court in respect of any debt, secured or otherwise, for the settlement of which application has been made" cannot be proceeded with until the Board has dismissed the application. A reference to S. 18 (3) and S. 19 (4) (b) appears to be beside the point. S. 18 (3) only provides that certain decrees would not be executable after the registration of an agreement under S. 14 (2) against the assets set apart in the agreement until all amounts recorded as payable under such agreements have been paid. S. 19 (4) (b) makes an application for execution of a decree suspended under S. 18 (3) to be unexecutable by a Civil Court. Neither of these Sections have any relevancy to the consideration of the question to be decided in this case; or suggest an inference that a secured creditor stands in any position different from that of a simple creditor so far as S. 25 is concerned.

A Division Bench of this Court took the same view in (1938) 2 M L J 1032.[1] This is binding on me. It is true that it does not consider the points raised in this revision specifically; but unless that was the opinion of the learned Judges, they could not have arrived at the decision to which they did. For the above reasons, the revision must be accepted and is allowed with costs.

C.R.K./D.S. *Revision allowed.*

---

[1] ('39) 26 A I R 1939 Mad 215=180 I C 783=(1938) 2 M L J 1032, Hirannayya v. Thippeswami.

A. I. R. 1940 Madras 890

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

A. L. S. P. P. L. Subramanian Chettiar by agent Narayanan Chettiar — Petitioner.

v.

Muthuswami Goundan — Respondent.

Civil Misc. Petn. No. 4901 of 1939, Decided on 11th April 1940, for leave to appeal to Federal Court against judgment and order of High Court, in C. R. P. No. 825 of 1939, D/- 2nd May 1939.

(a) Government of India Act (1935), S. 205 (1)—Construction—Effect.

The effect of S. 205 (1) is that where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs. 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Code of Civil Procedure, then the Federal Court is empowered to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case. [P 891 C 1]

(b) Civil P. C. (1908), S. 111-A — Construction—Object.

The object of S. 111-A is to bring the Code of Civil Procedure into line with S. 205, Government of India Act. The two provisos to S. 111-A make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-s. (1) of S. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Government of India Act is involved. [P 891 C 2]

(c) Civil P. C. (1908), O. 45, R. 17, Proviso (a)—Construction.

The addition of the words to O. 45, R. 3, Civil P. C., effected by proviso (a) to O. 45, R. 17 makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. 45, R. 2, Civil P. C., the question whether there is a substantial question of law involved as to the interpretation of the Government of India Act, 1935. [P 892 C 1]

(d) Government of India Act (1935), S. 205 (1)—Revision petition dismissed by single Judge of High Court — Order of dismissal certifying that case involved question of law as to interpretation of Government of India Act—Appeal to Federal Court from order of dismissal is competent—S. 111-A, Civil P. C., is no bar.

An order of a single Judge of the High Court dismissing a revision application is a final order of the High Court. Consequently when the order certifies that the matter involved a substantial question of law as to interpretation of the Government of India Act an appeal to the Federal Court from the order is competent. S. 111-A, Civil P. C., is no bar. [P 892 C 1]

V. V. Srinivasa Iyengar and P. S. Sarangapani Iyengar—*for Petitioner.*

B. K. B. Naidu and R. Muthialuswami—*for Respondent.*

Leach C. J. — This is an application for leave to appeal to the Federal Court from an order of Wadsworth J. which involves a substantial question of law as to the interpretation of the Government of India Act, 1935. The application is opposed and it is necessary to set out the course of events preceding the order of the learned Judge and to examine the provisions of the Act and the amendments which have been made to the Civil Procedure Code by the Government of India (Adaptation of Indian Laws) Order, 1937. On 21st November 1934 the petitioner obtained a money decree for Rs. 7569-0-9 with interest and costs against the respondent in the Court of the Subordinate Judge of Coimbatore. At that time the Madras Agriculturists' Relief Act had not been placed on the statute book. It came into force however on 22nd March 1938 and in accordance with its provisions the judgment-debtor applied for an order scaling down the decretal amount. His application was granted and as the result of the investigation it was found that taking into account the scaling down provisions the debt had been completely discharged. Consequently, the judgment-debtor applied to the Subordinate Judge for an order directing full satisfaction to be recorded and this application was granted. The petitioner then applied to this Court to revise the Subordinate Judge's order on the ground that the Madras Agriculturists' Relief Act was ultra vires the powers of the Provincial Legislature and to set aside the order for scaling down and the order directing satisfaction to be recorded.

The application for revision came before Wadsworth J. on 2nd May 1939. By that time the question of the validity of the Madras Agriculturists' Relief Act had been considered by a Full Bench of this Court in I L R (1939) Mad 151.[1] The Full Bench held that the Act was intra vires the powers of the Provincial Legislature. As he was bound to do in the circumstances, Wadsworth J. dismissed the revision petition, but as it involved an important question as to the interpretation of the Government of India Act, 1935, he granted a certificate under S. 205 (1) of the Act. It is in respect of that order of dismissal that the petitioner wishes to appeal to the Federal Court. The respondent says there is no appeal from the order of a single Judge of a High Court and in this connexion relies on the provisions of S. 111 (a), Civil P. C. An examination of that section fails to reveal any support for the argument. S. 205 (1), Government of India Act, reads as follows :

---

[1] ('39) 26 A I R 1939 Mad 361 = 180 I C 994 = I L R (1939) Mad 151 = (1939) 1 M L J 272 (F B), Nagaratnam v. Seshayya.

> An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.
>
> (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

The effect of this Section is this. Where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs. 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Code of Civil Procedure, then the Federal Court is empowered to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case. It will be observed that the Section also provides that the Federal Court can itself give special leave on other points. By the Government of India (Adaptation of Indian Laws) Order, 1937, two additions were made to the Code of Civil Procedure. The first is the insertion of S. 111-A which reads as follows :

> Where a certificate has been given under S. 205 (1), Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court :
>
> Provided that
>
> (a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said act, or any order in Council made thereunder, has been wrongly decided;
>
> (b) in determining under cl. (c) of S. 109 whether the case is a fit one for appeal, and, under S. 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said act, or any order in Council made thereunder, shall be left out of account.

The object of this Section is to bring the Code of Civil Procedure into line with S. 205, Government of India Act. The two provisos make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-s. (1) of S. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Government of India Act is involved. The provisos to S. 111-A have been expressed in very compact language, but when it is followed there is no doubt left as to its effect. The second addition is to O. 45, Civil P. C. An additional rule has been here inserted, R. 17, and it reads as follows :

> Where a certificate has been given under S. 205 (1), Government of India Act, 1935, the provisions of this order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this order to His Majesty in Council and to any order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court. Provided that
>
> (a) Rule 3 of this order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words 'apart from any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder.'
>
> (b) Where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in R. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.

Rule 3, as it stood before the amendment, provided that every petition for leave to appeal to His Majesty in Council should state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to His Majesty in Council. The addition of the words to R. 3 effected by proviso (a) makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. 45, R. 2 the question whether there is a substantial question of law involved as to the interpretation of the Government of India Act, 1935. That matter has already been dealt with under S. 205 (1) by the High Court on the passing of its judgment, decree or final order. Proviso (b) emphasizes that it is unnecessary for the petitioner to apply for a certificate or for the Court to grant one. The order of Wadsworth J. was a final order of this Court. Cl. 15, Letters Patent, prohibits an appeal from an order passed by the Court in the exercise of its revisional powers. The learned Judge considered whether the matter involved a substantial question of law as to the interpretation of the Government of India Act, 1935, and he has certified that his order does involve such a question. No other question is involved and therefore this appeal must be admitted.

C.R.K./G.N. *Appeal admitted.*

A. I. R. 1940 Madras 892

LAKSHMANA RAO J.

In re *Kuruba Anjanappa and another* — Appellants.

Criminal Appeal No. 532 of 1939, Decided on 21st November 1939, against order of Dist. Court, Anantapur, D/- 14th August 1939.

Criminal P. C. (1898), S. 476 — S. 476 held not applicable to departmental enquiry.

An amin of a District Court who was entrusted under a warrant of that Court to sell certain properties obtained false endorsement on the back of the warrant of two villagers that he (amin) had been to the village to conduct sale but was unable to do so owing to the absence of the sureties. When the District Judge was holding an enquiry into a report against the amin for the above conduct it transpired to him that these two villagers had deposed falsely in an enquiry before the Tahsildar to save the Village Munsif who was guilty of dereliction of duty by absenting himself on the day of sale. The District Judge ordered prosecution of those two villagers for offence under Ss. 191 and 193, Penal Code:

Held that the enquiry held by the District Judge was a departmental enquiry and hence S. 476 did not apply. [P 892 C 2]

Kasturi Seshagiri Rao — *for Appellants.*

A. S. Sivakaminathan for Public Prosecutor — *for the Crown.*

Facts.—The amin of the District Court, Anantapur, by name Satyanarayana was entrusted under a warrant of that Court to sell certain properties belonging to the judgment-debtors in certain suit and attached under a warrant and left in the possession of two sureties in the village. When the amin went to the village the sureties were absent and so he could not get at the properties and the Village Munsif was also absent and the amin got an endorsement from three persons in the village on the back of the warrant setting out his presence there and his inability to hold the sale on account of absence of the sureties. The Government was the decree-holder in the suit and the Collector reported to the District Judge that the amin never went to the village and his report that he went there to conduct the sale and the endorsement and signature of the three persons of the village endorsing the report of the amin were false and ordered the Tahsildar to hold an enquiry. In the enquiry before the Tahsildar two of the attesting witnesses in the warrant deposed that the signatures in the warrant were not theirs and that the amin never came to the village. Later, on enquiry by the District Judge himself, it transpired that these two persons, who are the accused and the appellants in this criminal appeal had deposed falsely in the enquiry before the Tahsildar to save the Village Munsif who was guilty of dereliction of duty by absenting himself from the village on the day the sale was to be conducted by the amin, and when the amin was there. The District Judge ordered proceedings under Ss. 195 and 476, Criminal P. C., for offences against the two villagers (the appellants) under Ss. 191 and 193, I. P. C., and preferred a complaint. Against this complaint the present criminal revision case was filed on the ground that the enquiry held by the District Judge was a departmental enquiry and that he was not acting as a Civil Court, and that S. 476, Criminal P. C., was not applicable to such departmental enquiries.

Judgment.—The enquiry held by the District Judge was a departmental enquiry and S. 476, Criminal P. C., is not applicable. The appeal is therefore allowed and the complaint filed against the appellants will be withdrawn.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 893

SOMAYYA J.

Muthukrishna Raja and another — Appellants.

v.

Viswalinga Kadavarayar and others — Respondents.

Appeal No. 14 of 1936, Decided on 28th April 1939, against appellate order of Sub-Judge, Kumbakonam, D/- 20th March 1935.

(a) Civil P. C. (1908), O. 21, R. 17 (2) — Mere non-mentioning list of properties in original execution application does not deprive decree-holder of benefit of O. 21, R. 17 (2).

The mere fact that a list of the properties was not given in the original execution application does not deprive the decree-holder of the benefit of O. 21, R. 17 (2). [P 894 C 2]

(b) Limitation Act (1908), Art. 182 (5) — Mere claiming more money than due does not render application one not in accordance with law.

The mere fact that the decree-holder claims more than what he is entitled to according to the judgment-debtor does not render the application itself one not in accordance with law : *A I R 1931 Pat 274, Not applied.* [P 895 C 1]

(c) Execution — Final order on execution application dismissing it on ground that security was not furnished for amount already drawn by decree-holder — Application cannot be said to be dismissed for non-prosecution.

Where final order on an application for execution is passed dismissing it for the reason that security was not furnished for the amount already drawn by the decree-holder, it cannot be said that the application was dismissed for non-prosecution, in which case the question might arise whether such an order would be a "final order" within the meaning of Art. 182 (5). [P 895 C 1, 2]

(d) Decree — Compromise decree providing that certain sum with certain rate of interest from date of plaint to date of compromise should be paid within certain time—No provision that after expiry of period amount shall carry interest—Post diem interest held could be claimed by decree-holder.

A decree which merely embodied the terms of a compromise provided that certain sum with interest at six per cent. per annum from the date of plaint to date of the compromise should be paid within six months from the date of the decree and that in default execution was to be taken against the properties and against the person of the defendant and the amount recovered. There was no provision that after the expiry of six months the amount shall carry interest :

Held that this was a case to which the rule that a compromise decree partakes of the nature of the contract was applicable and under this decree post diem interest could be claimed by the plaintiffs at the rate of six per cent. per annum which was the rate fixed for the period between the date of the plaint and the date of the decree and it made no difference that no provision was made for interest between the date of the decree and the date when the amount was payable. [P 896 C 1]

(e) Limitation—Certification.

There is no limitation for a decree-holder to certify and if the decree-holder rea at one stage, the judgment-deb' take advantage of it and requ Court to record satisfaction to t

(f) Execution—Admission by karta tion application that previous next frien minor decree-holders had received decreta amount would not entitle judgment-debtor to have satisfaction entered regarding minors' shares.

The admission by the karta or manager of the family made in the application for execution that a previous next friend of the minor decree-holders had received the amount due under decree would not entitle the judgment-debtors to have satisfaction entered as regards the minors' shares, particularly if no security was given by the person who received the amount. [P 896 C 2]

T. K. Subramania Pillai — *for Appellant.*

S. Parthasarathy and V. K. Thiruvenkatachari — *for Respondents.*

Judgment. — This is an appeal against the order of the Subordinate Judge of Kumbakonam in A. S. No. 18 of 1935 by which he confirmed the order of the District Munsif passed in E. P. No. 620 of 1933 in O. S. No. 113 of 1921. O. S. No. 113 of 1921 was filed by three plaintiffs who were all minors on that date represented by their mother as next friend. The suit was to recover a sum of Rs. 2468-14-9 on a charge of the plaint properties. It appears that the amount was claimed as being the balance of the purchase money due to the plaintiffs. There was a compromise on foot of which there was a consent decree passed on 31st March 1922. The decree, which merely embodied the terms of the compromise, provided that a sum of Rs. 1700 with interest at six per cent. per annum from the date of plaint to date of the compromise should be paid within six months from the date of the decree and that in default execution was to be taken against the properties and against the person of the defendant and the amount recovered. As the plaintiffs were minors, it was also said that the money when paid into Court should be drawn on furnishing security. A similar provision was made that security should be given when execution was taken out and the money realized. There were a number of execution petitions filed to enforce this decree. The first of them was filed in the year 1925 by the mother acting as the next friend. It is said that there were a number of irregularities in that application and we may leave it out.

The second application was filed by plaintiff 1 who attained majority in the meanwhile. This application was filed on 10th

March 1928 by plaintiff 1 for himself and as the next friend of plaintiffs 2 and 3. This was dismissed on 9th July 1928 and it is said that in this execution petition the relief that was asked was one that could not be claimed under the terms of the compromise decree and so we shall leave this also out of consideration. The next execution application was filed by plaintiff 1 for himself and on behalf of plaintiffs 2 and 3. This was filed on 16th August 1929. The application did not originally contain a schedule of the properties sought to be brought to sale and there were also some other defects. The application was returned for amendment and it was re-presented with the amendments including a list of the properties sought to be sold. It was finally dismissed on 16th January 1930 on the ground that plaintiff 1 did not furnish security for the amount which was already drawn either by him or by his mother. Then a fourth application was filed on 1st March 1930 by plaintiff 1 for himself and on behalf of plaintiffs 2 and 3. This again was dismissed on 30th June 1930. The Court directed plaintiff 1 to deposit into Court the amount which was already received by him or his mother and as the amount was not paid or security given for that amount, the application was rejected on 30th June 1930. The present execution application was filed on 10th April 1933. The question is whether this execution application is within time. Both the lower Courts rejected the application as barred by limitation.

It is urged for the appellants that until 1927 or 1928 plaintiff 1 was a minor and that until then limitation would not begin to run as all of them were minors. This is not disputed by the respondents. Limitation can therefore start only after plaintiff 1 attained majority, which we will take, was in the year 1927 as contended by the respondents' advocate. The applications which plaintiff 1 filed on 16th August 1929 and 1st March 1930 have been translated and placed before me. If these two applications were in accordance with law, then under Art. 182, cl. 5 limitation has to be counted from the date when the final order was passed on these applications. Taking the first of these applications, what is urged is that, to start with, the schedule of properties was not given, that post-diem interest was claimed when it was not permissible under the decree, that certain payments which had been made to the decree-holders were not given credit to in the execution petition and lastly that plaintiff 1 did not get himself appointed as next friend of plaintiffs 2 and 3. On these grounds the respondents' learned advocate asks me to say that the application was not one in accordance with law. He also says that the order rejecting the application is not a "final order" within the meaning of Art. 182, cl. 5, Limitation Act, as amended recently.

Under O. 21, R. 17, Civil P. C., when an execution application returned for satisfying any of the requirements under O. 21, Rr. 11 to 14 is re-presented, the effect is that the re-presentation dates back to the date of the original presentation. Under O. 21, R. 11, the decree-holder is bound to give particulars of the property which he wants to be sold for realizing the amount of the decree. Since these particulars were not given in the original execution application, the Courts as provided by R. 17, cl. (1) ascertained whether the requirements of Rr. 11 to 14 were complied with and returned the application giving a time within which the defect was to be remedied. Cl. (2) of R. 17 says that where an application is amended under the provisions of sub-r. (1) it shall be deemed to be an application in accordance with law and presented on the date when it was first presented. I have not been referred to any authority which lays down that the mere fact that a list of the properties was not given in the original execution application deprives the decree-holder of the benefit of O. 21, R. 17 (2). In this case the Court instead of rejecting the application straightway returned it calling upon the decree-holders to make the amendment and the decree-holders complied with the requirement within the time limited. In this case there is no warrant for saying that O. 21, R. 17 (2) does not apply. Next it is urged that the decree-holders claimed post-diem interest and that therefore the execution application is not in accordance with law. This depends upon the construction of the decree with which I shall deal later on. As I am deciding that post-diem interest is claimable under the decree, this objection has no force.

The next objection is that some amounts which had already been collected were not certified and were not given credit to. The mere fact that more money was claimed than what was due does not in my opinion render the application one not in accordance with law. A decision of the Patna High

Court in 10 Pat 183[1] is brought to my notice. There the decree-holder was adjudged to be entitled only to one-sixth of the decree amount. This was in the first execution application. In a later execution application instead of claiming that one-sixth alone which he was adjudged to be entitled to in the previous execution petition, he claimed the whole amount. That petition was for some reason dismissed and a still later application was filed and the question was whether the intermediate application saved limitation. The learned Judges held that because it had been finally decided that the decree-holder was entitled to one-sixth he had no right to claim recovery of the whole amount by the intermediate application and that therefore the said application was not in accordance with law. It seems to me with great respect that that decision is open to serious objection. The mere fact that a decree-holder claims more than what he is entitled to is not a ground for saying that the application itself is not in accordance with law. It is not every defect contained in an execution application which renders it unavailing for the purpose of saving limitation under Art. 182, cl. 5. This apart, there is no order in this case by which the Court adjudged that the decree-holders are not entitled to post-diem interest. Therefore the decision in 10 Pat 183[1] does not apply and apart from it I see no justification for the contention that the mere fact that the decree-holder claims more than what he is entitled to according to the judgment-debtor renders the application itself one not in accordance with law.

Then the fact that plaintiff 1 did not get himself appointed as next friend, it is urged, is a circumstance which would render the application not in accordance with law. There is no provision in the execution chapter that when plaintiff 1 attained majority, he should get himself appointed as next friend before filing the execution application. It is in the execution petition that he has to describe himself as the next friend and file an affidavit or an application to get himself recognized as next friend. This objection again has no force. I therefore hold that the application filed on 16th August 1929 was one in accordance with law and it saves limitation. The final order on that application was passed on 16th January 1930 dismissing it for the reason that security was not furnished for the amount already drawn by the plaintiffs' mother or by plaintiff 1. This is not a case in which it can be said that the application was dismissed for non-prosecution, in which case the question might arise whether such an order would be a 'final order' within the meaning of Art. 182 (5). Going to the next application which was filed on 1st March 1930, the objections taken are that post diem interest was claimed and that satisfaction of the amount already recovered was not reported. I have dealt with the question of interest and the remarks made by me as regards the previous application apply to this. So also with regard to the omission of the plaintiffs to give credit to the amount already recovered. I hold therefore that the fourth execution application is one in accordance with law and the order dated 30th June 1930, dismissing it for the reason that plaintiff 1 did not deposit the amount as required by the previous order is a final order on this execution petition. The present application was filed within three years of this date and therefore there is no reason for holding that the present application is barred.

Some other questions are raised which may be disposed of before remanding the execution application for further orders. It is contended by the learned counsel for the respondents that under the terms of this decree post-diem interest cannot be claimed by the decree-holders. The material portions of the decree have already been set out. The decree was passed on 31st March 1922. Six months' time was given for payment of the amount agreed upon, and the compromise decree states that Rs. 1700 with interest from date of the plaint to the date of the decree shall be paid within six months from that date. There is no provision that after the expiry of six months the amount shall carry interest. But in such cases I think the principle laid down in the case of contracts between parties in the decisions reported in 20 Mad 371[2] and in 23 I A 138[3] applies. As pointed in 20 Mad 371,[2] there is nothing in the document to indicate that the parties did not intend that interest should be paid after the expiration of the period, and it is plainly the intention of the parties in this case that interest should continue to be paid until liquidation of the debt. There is absolutely no reason to suppose that the parties intended that the defendant should benefit by his own default and escape payment of interest if he did not pay the amount in time.

---

[1] ('31) 18 A I R 1931 Pat 274 = 131 I C 815 = 10 Pat 183 = 13 P L T 70, Durga Prasad v. Mt. Powdharao Kuer.

[2] ('97) 20 Mad 371, Nityananda Patnayudu v. Sri Radha Cheranadeo.

[3] ('97) 19 All 39 = 23 I A 138 = 7 Sar 88 (P C), Mathura Das v. Raja Naraindar Bahadur Pal.

It is urged by the learned counsel for the respondents, placing reliance on the decision of the Calcutta High Court in 53 Cal 42[4] that the principle laid down therein applies to this case. There the decree was one passed after contest and simply directed payments of certain sums of money on certain dates and contained no provision for interest. It was held that the executing Court has no jurisdiction to give interest when the decree itself is silent about interest. It is doubtful whether the decision would be the same, if for example the decree had provided that the defendant should pay the sum adjudged within a particular time with interest and nothing more was said. It would be a question whether in such a case the executing Court could not take it that the decree provided for interest subsequent to the time fixed. However that might be, the Court in this case, in passing the decree which it did, did no more than adopt the contract between the parties, the parties having settled privately the amount to be paid. The terms of the compromise were reduced to writing and placed before the Court and the Court simply adopted it after sanctioning it as being beneficial to the minor plaintiffs. This is a case to which the rule that a compromise decree partakes of the nature of a contract is applicable and I hold therefore that under this decree post-diem interest can be claimed by the plaintiffs at the rate of 6 per cent. per annum which is the rate fixed for the period between the date of the plaint and the date of the decree and I do not think it makes any difference that no provision was made for interest between the date of the decree and the date when the amount was payable.

The next question that is urged is, that various sums of money amounting in all to Rs. 1183-1-0 were paid from time to time and that credit ought to be given by the plaintiffs in the present execution application. It is said that Rs. 537 of this sum was paid into the hands of the mother when she was the next friend of the plaintiffs and that Rs. 636 was paid to plaintiff 1. It is also said that plaintiff 1 actually certified that he had received his full share of the decree amount and had filed a petition asking the Court to enter up satisfaction so far as his own share is concerned. It is therefore contended that so far as his share, at any rate is concerned, satisfaction should be recorded and that he ought not to be allowed to execute the decree to that extent. With reference to this last question I agree with the contention of the learned advocate for the respondents that plaintiff 1 should not be permitted to execute the decree as regards his own share. In the execution application filed on 16th August 1929 he admitted receipt of the amount in question and prior to it he had already filed an application for entering up satisfaction to the extent of his share.

On that occasion the Court thinking that he ought not to be permitted to report satisfaction because it would be prejudicial to the interests of the other plaintiffs, declined to enter satisfaction. But that is no ground for allowing the plaintiffs to execute the decree for the full amount. There is no limitation for a decree-holder to certify and if the decree-holder really had certified at one stage, the judgment-debtor is entitled to take advantage of it and request the executing Court to record satisfaction to that extent. Satisfaction will therefore be entered as regards plaintiff 1's one-third share. As regards the share of plaintiffs 2 and 3, it is said that some amounts were paid into the mother's hands, but she had no right to receive the amount out of Court without giving security. These payments are therefore not binding on the minor sons and these amounts cannot be given credit to. Again it is said that plaintiff 1 admitted these payments in the execution application filed on 16th August 1929, but it is admitted that so far as this sum of Rs. 537 is concerned, it was paid into the mother's hands. Plaintiff 1 may be the karta or manager of the family but he did not receive the amount. Therefore his admission, that a previous next friend had received the amount would not in my opinion entitle the judgment-debtors to have satisfaction entered as regards the minors' shares, particularly because no security was given by the person who received the amount. The orders of both the lower Courts are set aside and the execution application is remanded for further execution as regards the shares of plaintiffs 1 and 2. Each party will bear his costs in this and in the lower Appellate Court. The costs of the first Court will abide and follow the result. Leave to appeal is refused.

C.R.K./D.S. *Order set aside.*

---

[4] ('26) 13 AIR 1926 Cal 505=94 I C 997=53 Cal 42, Naresh Chandra v. Krishna Bhobini Dasi.

A. I. R. 1940 Madras 897

LEACH C. J. AND PATANJALI SASTRI J.

K. Ranganayaki Ammal — Appellant.

v.

K. Sampathkumaran and others — Respondents.

Appeal No. 20 of 1938, Decided on 10th August 1939, against order of Wadsworth J. D/- 28th October 1937.

Registration Act (1908), Ss. 17 (1) (b) and 17 (2) (b)—Compromise during pendency of suit—Document embodying terms of agreement relating to other matters as well as suit property — Parties agreeing to file compromise in Court and obtain decree in terms thereof—Document held fell within S. 17 (2) (b) and not S. 17 (1) (b).

During the pendency of the suit the parties agreed to a compromise decree being passed. There were other disputes besides the dispute which led to the filing of the suit. These disputes related inter alia to two other houses besides the house in suit and the parties met to settle all their differences. The terms of settlement having been agreed upon they were put in writing in order that there should be no dispute with regard to them. The parties agreed that the document embodying the terms of the compromise should be filed in Court and a decree obtained in terms thereof:

Held that the document in question was not intended to declare the rights of the parties in the immovable properties, but those rights were to be declared in a decree of the Court, and consequently it fell within the purview of S. 17 (2) (b) and not Section 17 (1) (b). [P 898 C 2]

V. V. Srinivasa Ayyangar, M. Chelva Ayyangar and V. R. Venugopalan — *for Appellant.*

A. Seshachariar — *for Respondents.*

Leach C. J.—The appellant was the plaintiff in a suit filed on the original side of this Court against her husband, her two sons, and her grandson for possession of a house known as No. 9, Dewan Ramiengar Road, Vepery, Madras. She claimed that the house was her absolute property. The defence was that the house was built in part by monies belonging to the defendants and that they had an interest in it. During the pendency of the suit the husband died and subsequently the parties agreed to a compromise decree being passed. The agreement which was entered into comprised disputes relating to other matters. The terms agreed upon were embodied in a document and the sons filed an application asking for formal leave to compromise the suit and for a decree in the terms of the compromise so far as it related to the suit property. It was necessary for the Court to give formal leave as the grandson was a minor. Notice of this application was served upon the appellant, who resisted it. Before the filing of this suit the appellant was living in the house with the defendants. The filing of the suit led to great bitterness and the appellant went to reside elsewhere. She asked the Court to refuse to record the compromise on the ground that it was a condition precedent to the agreement that she should be taken back into the family. Holding that there was no such condition and that the suit had been compromised on the terms set out in the document filed in Court, Wadsworth J. passed a decree in accordance with the agreement. The appellant asks that the compromise decree be set aside for the reason she advanced before the learned Judge.

It is conceded by the appellant's learned advocate that on the evidence as it stands on the record the learned Judge's finding cannot be questioned. He says, however, that the admission of the agreement was wrong because it required registration and not having been registered the document cannot be put in evidence. S. 17 (1) (b), Registration Act, requires registration of a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest, whether vested or contingent, in immovable property of the value of Rs. 100 and upwards. The contention is that the agreement on which the respondents moved for a decree is in law a document which falls within S. 17 (1) (b) and therefore cannot be received in evidence as the provisions of S. 49 stand in the way. The document must be read as a whole and in the light of the surrounding circumstances, and when this is done it is manifest that it does not fall within the purview of S. 17 (1) (b). As I have indicated, there were other disputes besides the dispute which led to the filing of the suit. These disputes related inter alia to two other houses and the parties met to settle all their differences. The terms of settlement having been agreed upon they were put in writing in order that there should be no dispute with regard to them. The document is headed with the cause title of the suit and the document says that it was the intention of the parties that the terms of the compromise should be embodied in a decree of the Court. Cl. K reads as follows:

> This compromise shall be filed in this High Court, each party shall bear his or their own costs, a report shall be made to the effect that the matter of this suit has been settled (out of Court) and a compromise decree shall be obtained in terms of this compromise.

There can be no doubt that the document in question was not intended to declare the rights of the parties in the immovable properties, but those rights were to be declared in a decree of the Court. Cl. K leaves no other conclusion open. A memorandum of agreement, which this document is, requires registration if the parties intend it to be a declaration of rights and it is so worded, but a memorandum drawn up for the purpose of obtaining another document to declare rights, in this case the decree, does not require registration. S. 17 (2) (b), Registration Act, expressly exempts from registration a document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of Rs. 100 and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. And a decree or order of a Court does not require to be registered except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is subject-matter of the suit or proceeding. In this case the compromise decree was registered and the Registration Act was therefore complied with. The learned Judge rightly admitted this document in evidence and it shows conclusively that there is no substance in the appellant's case. The appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 898

LAKSHMANA RAO J.

In re Pattammal—Appellant.

Criminal Appeal No. 654 of 1939, Decided on 25th April 1940, against order of Sess. Court, Chingleput Division, in C. C. No. 26 of 1939.

Penal Code (1860), S. 201 — False information to screen offender need not be given to police or Magistrate—Whether information is volunteered or given in reply to enquiry is immaterial.

False information with intent to screen an offender from legal punishment need not be given to the police or the Magistrate under S. 201 : *3 M H C R 251, Rel. on.* [P 899 C 1]

It is immaterial whether that information is volunteered or given in reply to enquiries: *10 Bom 124 and 1 Weir 118, Rel. on.* [P 899 C 1]

V. T. Rangaswami Ayyangar — *for Appellant.*

Public Prosecutor—*for the Crown.*

Judgment.—The appellant is a dancing girl and she was charged with the murder of her paramour Murugesa Mudali. She was acquitted of that offence and has been convicted under S. 201 (1), Penal Code, for giving false information with intent to screen the offender from legal punishment and sentenced to rigorous imprisonment to three years. Murugesa Mudali went to the house of the appellant about 3 P. M. on 15th July last and P. W. 5 the sweeper woman found him and the appellant lying and chatting on a cot when she left the house about 4-30 P. M. There was none else in the house and the appellant came out some time later and shouted "Akka, Akka, see the aniyayam." The mother and sisters of the appellant who were near their house close by rushed into the house and P. Ws. 13 and 14 who were near P.W. 13's house next door ran up. The appellant requested them not to crowd and closed the door against them and P. Ws. 13 and 14 returned. But P. Ws. 15 and 16 who were near the opposite house went and knocked the door and the sister of the appellant opened it. P. Ws. 15 and 16 then went in and they found Murugesa Mudali partially reclining on the chest of the appellant in the room which was almost closed. He was unconscious and breathing heavily and P. Ws. 15 and 16 enquired what the matter was. The appellant stated that Murugesa Mudali complained of stomach-ache, had a motion and was reduced to that condition and P. Ws. 15 and 16 suggested that he should be brought to the verandah. This was done and one of the sisters of the appellant asked P. W. 15 to fetch her paramour, Sundaresa Pillai. He was brought and P. W. 8 was sent for. He was absent from his house and his son P. W. 6 was informed. P. W. 6 informed his brother P. W. 4 who was in the house of Murugesa Mudali and P. Ws. 4, 6 and 7 rushed to the spot. Murugesa Mudali was lying unconscious and P. W. 2 the Mission Doctor was sent for. P. W. 4 asked the appellant what the matter was and she stated:

> We were chatting and lying. Mudaliar suddenly complained of stomach-ache. He went to the latrine. He passed no stools. He returned. He had a hic cup. He passed stools in his bed and then he became unconscious.

But Murugesa Mudali was in fact reduced to that condition by throttling and he died on 18th July of pnuemonia due to throttling. The information given by the appellant was therefore false and on her own statement to P. W. 4 there was none else in the house and she and Murugesa Mudali were lying and chatting. There is also the evidence of P. W. 5 the sweeper woman to the effect and whether or not the appellant had any hand in the matter Murugesa Mudali could not have been throttled without her knowledge. The information was thus false to her knowledge and it is obvious that it was given with intent to screen the offender from legal punishment. The information need not be given to the police or the Magistrate under S. 201, I. P. C., *vide* 3 M H C R 251,[1] and it is immaterial whether that information is volunteered or given in reply to enquiries: *vide* 10 Bom 124[2] and 1 Weir 118.[3] The conclusion under S. 201, I. P. C., is therefore correct and in the circumstances of the case the sentence is not excessive. The conviction and sentence are therefore confirmed and the appeal is dismissed.

C.R.K./G.N. *Appeal dismissed.*

---

1. ('67) 3 M H C R 251=1 Weir 179, Queen v. Subramania Pillai.
2. ('86) 10 Bom 124, Queen-Empress v. Ramji Sajaba Rao.
3. ('67) 1 Weir 118, Acting Public Prosecutor v. Chinnappa Reddi.

A. I. R. 1940 Madras 899

WADSWORTH J.

Nukala Surya Rao — Petitioner.

v.

Yedida Bullemma and another — Respondents.

Civil Revn. Petn. No. 1821 of 1939, Decided on 12th April 1940, to revise order and decree of Dist. Munsif, Amalapuram, D/- 6th September 1939.

Madras Debt Conciliation Act (11 of 1936), S. 25—Sale of hypotheca in execution of mortgage decree—Application by judgment-debtor under O. 21, R. 90, Civil P. C., is proceeding in respect of debt within purview of S. 25.

When there has been a decree on a mortgage debt and the hypotheca has been sold and an application is filed under O. 21, R. 90, by the judgment-debtor to set aside the sale on the ground of material irregularity, etc., that proceeding is a proceeding in respect of a debt within the purview of S. 25, Madras Debt Conciliation Act. [P 899 C 1, 2]

P. Somasundaram and G. Balaparameswari Rao — *for Petitioner.*

Order.—This petition canvasses the correctness of a decision to the effect that when there has been a decree on a mortgage debt and the hypotheca has been sold and an application is filed under O. 21, R. 90, by the judgment-debtor to set aside the sale on the ground of material irregularity, etc., that proceeding is not a proceeding in respect of a debt within the purview of S. 25, Madras Debt Conciliation Act, 11 of 1936. S. 25 runs as follows:

> When an application has been made to a Board under S. 4 any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application.

The decree in this case was passed in a suit of 1934. The petition under O. 21, R. 90 was E. A. No. 756 of 1937 and it was actually pending when the petitioner applied under E. A. No. 776 of 1939 for a stay of the earlier application on the ground that he had on 31st August 1939 filed an application before the Debt Conciliation Board for the settlement of all his outstanding debt including the debt embodied in the decree. The learned District Munsif holds that a proceeding under O. 21, R. 90 is not a proceeding in respect of a debt and dismisses the petition. He gives no reasons in support of his conclusion. When a sale has been held in execution of a decree for the payment of a debt, the decree is not satisfied until the sale is confirmed and the decree-holder is permitted to draw out of Court the money in deposit. When there is an application pending under O. 21, R. 90 the Court has no power to confirm the sale till that application has been decided: *vide* R. 92. So long as the purchase price remains in Court deposit, and the sale is unconfirmed, the decree is not satisfied and the essential nature of the inquiry under R. 90 is an adjudication of the question whether the sale held is valid and whether the money in deposit can be withdrawn by the decree-holder in satisfaction of his decree. That is to say, the effect of proceedings under O. 21, R. 90 is to decide whether a particular property has been validly sold in discharge of the decree debt and whether the purchase price deposited as a result of that sale shall go in liquidation of this debt. It seems to me that such proceedings must come within the very wide terms of the phrase "proceedings in respect of a debt" used in S. 25, Madras Act 11 of 1936. I therefore allow the revision petition and direct the trial Court to restore the application to file and dispose of it according to law. The petitioner will be entitled to his costs in revision.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 900

HORWILL J.

Kulikarai Viswanathaswami Temple by trustee, Bawa C. Gopalasami Mudaliar—Petitioner.

v.

Assistant Engineer for Surveys, Electricity Department, Trichinopoly and another—Respondents.

Civil Revn. Petns. Nos. 309 and 310 of 1937, Decided on 23rd April 1940, to revise order of Dist. Court, East Tanjore at Negapatam, D/- 5th October 1936.

Telegraphs Act (1885), S. 18 — S. 18 does not contemplate direct action of cutting down trees by Telegraph Authority itself — S. 18 applies only to cutting down of trees after line has been erected.

Section 18 contemplates action by a Magistrate on the application of the Telegraph Authority; but not direct action of cutting down trees by the Telegraph Authority itself. Moreover, S. 18 only applies to the cutting down of the trees after a line has been erected. Where a line is laid across a tope it would first of all be necessary to cut down certain trees in order that the line might be laid. It might then be desirable that certain other trees, which do prevent the laying of the line, should be cut down because they are so close as to be a potential danger to the line. In such cases, the Engineer has no power to cut the trees himself. He must apply to the Magistrate who presumably would have to exercise his discretion as to what trees the owner is bound to clear away. If the Engineer cuts down some trees without any application to the Magistrate he is bound to award compensation. [P 900 C 2]

R. Sundaralingam—*for Petitioner.*

Government Pleader—*for Respondents.*

Order. — In laying a line for the conveyance of electric power in connexion with the Pykara scheme it was necessary to take it through a tope of the petitioner situated in Anavadapathi village. It appears that the engineer in charge of the scheme proceeded to cut down certain trees in the petitioner's tope and when he objected, the engineer applied to the Sub-Magistrate under S. 18 (1), Telegraphs Act, which Act applies also to electric power lines, and the Magistrate ordered the petitioner not to interfere with the engineer in the cutting down of the trees. Apparently acting under S. 18 (2), he passed an order which has been filed as Ex. IV, which evaluates all the trees which were cut by the engineer. The petitioner then applied to the District Judge under S. 16 (3) of the same Act with regard to the quantum of compensation awarded. The learned District Judge thought that S. 16 (3) did not apply; and held that the case of the petitioner was covered by S. 18, which says that the Magistrate's order is final and the District Judge has no jurisdiction to entertain any complaint about the inadequacy of the compensation awarded.

Section 18 contemplates action by a Magistrate on the application of the telegraph authority; but not direct action of cutting down trees by the telegraph authority itself. Moreover, S. 18 only applies to the cutting down of the trees after a line has been erected; because S. 18 (1) begins "if any tree standing or lying near a telegraph line." If a telegraph line does not exist, there can be no tree standing near a telegraph line. On the other hand, S. 10 (d) gives the telegraph authority power to lay a telegraph line upon any immovable property and to do necessary damage for the proper laying of the lines. It is authorised to pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers. Where a line is laid across a tope it would first of all be necessary to cut down certain trees in order that the line might be laid. It might then be desirable that certain other trees, which do prevent the laying of the line, should be cut down because they are so close as to be a potential danger to the line. In such cases, the engineer has no power to cut the trees himself. He must apply to the Magistrate who presumably would have to exercise his discretion as to what trees the owner is bound to clear away. Admittedly, the engineer did cut down some trees without any application to the Magistrate, and he could only have cut those trees by exercising authority under S. 10 (d). For that purpose he was bound to award compensation; and if we assume that the values of the trees which he considered to be proper is that set out in Ex. IV, then that award is open to reconsideration by the District Judge upon the present application under S. 16 (3). Any other trees that had to be cut down for the laying of the line would also be governed by S. 10 (d), even though the Magistrate passed orders concerning them. Those trees which were cut down after the line was erected on the order of the Magistrate would be covered by S. 18, and the Magistrate's valuation would be final.

These petitions are therefore allowed and the petitions before the lower Court remanded for disposal according to law. Costs of these applications will be costs in the cause and provision will be made by the learned District Judge for them in his final order. As the applications were dismissed on a preliminary point before the parties had any opportunity of letting in evidence, it of course follows that they will have to be given an opportunity to let in evidence on the relevant points raised.

C.R.K./D.S. *Petitions allowed.*

*** A. I. R. 1940 Madras 901**

WADSWORTH J.

Chadalavada Anandaramayya — Appellant.

v.

Chadalavada Subbayya — Respondent.

Appeal No. 93 of 1937, Decided on 11th September 1939, against appellate order of Dist. Court, Guntur, D/- 29th September 1936.

(a) Partition — Decree directing party to pay certain amount towards his share of marriage expenses—Absence of notice of marriage held could be taken into consideration in admitting or rejecting items of expenditure.

Under a decree in a partition suit a member of the family was required to pay certain sum towards his share o the marriage expenses of his sisters. The member objected to pay the amount on the ground that he was not given notice of the marriage:

Held that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure. [P 901 C 2]

*** (b) Contract — Public policy — Marriage performed outside British India to evade provisions of Sarda Act is not opposed to public policy—Contribution towards it can be recovered in execution of decree.**

The power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. Clearly, the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But there is no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal. Hence a marriage performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act is not one opposed to public policy, and contribution can be recovered towards it in execution of a decree: *63 Cal 1153, Disting.* [P 902 C 2]

K. Kotayya — *for Appellant.*

P. Satyanarayana Rao—*for Respondent.*

Judgment. — This appeal arises out of the execution of a decree in a partition suit whereunder the appellant was required to pay a sum not exceeding Rs. 1000 towards his share of the marriage expenses of each of his sisters. The youngest sister was married on 7th March 1935 and it was admitted by the father (the respondent) that he had the marriage celebrated within the Hyderabad State because it would have been illegal under the Child Marriage Restraint Act (19 of 1929) had it been performed in British India. There is no suggestion that any of the parties belonged to or was domiciled in Hyderabad. The appellant objects to pay the amount due under the decree towards this marriage firstly because the marriage was one opposed to public policy and secondly because he was not given notice of the marriage. As to the second point the trial Court rejects the respondent's assertion that he sent an invitation to the appellant for the wedding. It is of course, not unlikely that the appellant knew all about the marriage as the parties were living in the same village. But whether this be so or not though the judgment of the Full Bench which eventually decided the litigation contemplates previous notice to the appellant the decree is silent on the point. The utmost therefore that could be said is, in my opinion, that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure.

I turn next to the more substantial question whether a marriage performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act, is one opposed to public policy, towards which no contribution can be recovered in execution of a decree. My attention has been drawn to a decision of Panckridge J. reported in 63 Cal 1153.[1] The learned Judge declined to sanction payment of money by a Court's receiver for the purpose of solemnization of a marriage outside British India which would have been illegal if celebrated in British India, where the parties were domiciled. I see no reason to differ from the conclusions arrived at by the learned Judge in that case. But it seems to me very evident that a refusal of the Court to make a discretionary payment towards a marriage the object of which was clearly to avoid the law of British India is quite a different matter from the refusal of the Court to direct a payment unconditionally required under the Court's decree, on the ground that the object for which the payment was to be made was one which would have been illegal if performed in British India.

---

[1] ('36) 63 Cal 1153, Pan Mal Lodha v. Gad Mal Lodha.

It is well established that the power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. Clearly the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But I see no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal. If it had been the policy of the Legislature to prevent British Indian subjects from going into another State to celebrate marriages which would be prohibited under Act 19 of 1929 in British India, then surely the Legislature would have made provision in the statute itself to restrain such migrations for matrimonial purposes. The Act as passed originally was very restricted in its scope and was surrounded by many safeguards to prevent it from being operated in an oppressive manner. One is not justified in importing into the Act an intention which the Act itself does not declare to regulate the conduct of British Indian subjects when outside the territories to which the Act applies. I must therefore hold that the learned District Judge was right in declining to accept the contention that the amount payable under the decree towards this marriage should be refused on grounds of public policy. The appeal is therefore dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 902

HORWILL J.

Kowtha Suryanarayana Rao—Appellant.

v.

Patibandla Subrahmanyam and others—Respondents.

Second Appeal No. 640 of 1936, Decided on 27th October 1939, against decree of Sub-Judge, Bezwada, in A. S. No. 36 of 1935.

(a) Society — Acts of management within powers of society—Disputes between members and persons responsible for management—Disputes should be decided by machinery provided by rules of society and not by Civil Court — Civil Court has jurisdiction only when act complained of is ultra vires the society.

It is a well established principle that, provided that the acts of the management are within the powers of the society itself any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of law. It is only when an act is ultra vires the society that a member is entitled to come to a Civil Court and have the act of the management which is ultra vires declared to be void. [P 903 C 1]

(b) Association — Association maintained by subscriptions from members and donations is not club — Member cannot sue management unless he be damnified by expulsion, punishment or by loss to joint property.

An Association which is maintained not by mere subscriptions from its members but by donations is not a club. A member of an association cannot sue the management because it does some act of which he disapproves, provided of course that he is not personally damnified by expulsion or punishment or by loss to property of which he may be a joint owner. [P 903 C 1]

S. Parthasarathy and V. K. Thiruvenkatachari — *for Appellant.*

G. Lakhmanna and G. Chandrasekhara Sastri — *for Respondents.*

Judgment. — The plaintiffs are five members of an Association called the Ram Mohan Roy Free Library and Reading Room Association, which was registered in 1914 under the Societies Registration Act 21 of 1860. Defendants 1 to 9 are the members of the managing committee of that Association and defendant 10 is a person who, according to the findings of the lower Appellate Court, has given an unconditional gift of an upstairs room erected above the original premises of the Association. The managing committee has permitted defendant 10 to have embedded in three walls plates with the name "Kowtha Suryanarayana Rao Public Hall" engraved. The plaintiffs have brought this suit to restrain the defendants from affixing plates of cast letters of this description or any other letters either cast or written or of any kind except those bearing the words, Ram Mohan Roy.

It is argued not only that the managing committee acted ultra vires in permitting defendant 10 to place plates with this inscription on the walls of the upstair room; but that the grant of such permission was ultra vires of the association itself. This last contention seems so ludicrous as not to need any argument to refute it. There is certainly nothing in the rules which prevents the association from naming any hall or room in any manner it pleases; and the giving of a particular name cannot be in contravention of any rules of the association relating to the aims and objects of the society. If, as defendant 10 alleged in his written statement, his gift had been subject to conditions, it might well be argued that those conditions were not in consonance with the objects of the association; but with that case of defendant 10 we are not concerned, in view of the findings of the lower Appellate Court that the gift was unconditional. It is a well-established principle that, provided that the acts of the management are within the powers of the society itself, any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of law. If disgruntled members were allowed to air their domestic grievances in Court, orderly management of the affairs of societies and corporations would be impossible. If the society as a whole does not approve of the acts of its management, it has every power by summoning a general meeting and passing a resolution to correct and control the acts of the management. In the suit society the acts of the managing committee are subject to the control of the general committee of which every member of the society is a member. It is only when an act is ultra vires the society that a member is entitled to come to a Civil Court and have the act of the management which is ultra vires declared to be void.

The Courts below seem to have come to their conclusions on the assumption that this Ram Mohan Roy Free Library and Reading Room Association was a members' club; but it is clear that the Association is maintained not by mere subscriptions from its members but by donations; and it is therefore difficult to see how it can be a club. However, for the purposes of this appeal, it is immaterial whether the society is a club or not; for even a member of a club cannot sue the management because it does some act of which he disapproves, provided of course that he is not personally damnified by expulsion or punishment or by loss to property of which he may be a joint owner. The decisions of the Courts below are therefore wrong; and the matter in dispute being one that should be decided by the Association itself, the suit has to be dismissed. In order that the gift of this room and the inscriptions on it should not cause further disharmony between the members of the Association, defendant 10 is willing to delete the word "public" from the inscriptions. He undertakes through his advocate to do this within three months of this date. As defendant 10 has given this undertaking, this appeal is allowed and the suit dismissed. The plaintiffs will pay the costs of defendant 10 in this Court only. Leave refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 903

HORWILL J.

P. R. Govindaswami Naicker — Appellant.

v.

Pukhraj Sowcar and another — Respondents.

Misc. Appeal No. 21 and Civil Revn. Petn. No. 127 of 1939, Decided on 8th November 1939, against order of City Civil Judge, Madras, D/- 16th January 1939.

Transfer of Property Act (1882), S. 69 — Suit for injunction restraining mortgagee from selling mortgaged property and for scaling down mortgage debt under Madras Agriculturists Relief Act — Mortgaged property improperly sold—Purchaser cannot be impleaded on ground of fraud — Cause of action against him is entirely different—Rule of lis pendens is inapplicable.

Unless there is fraud, the only remedy of the mortgagor is by way of damages against the mortgagee who brings the property improperly to sale. If there is fraud, then there may be a cause of action against the purchaser to have the sale declared void or to have it set aside on the ground of fraud. After the sale of the mortgaged property it will be clearly improper to club together a suit against the purchasers on the ground of fraud and a suit against the mortgagee on the question of the amount still due on the mortgage. The suits against the mortgagee and the auction-purchasers would have entirely different causes of action and the subject-matter of the two suits would be altogether different; they could not possibly form the subject of one joint suit against the mortgagee and the purchasers. Consequently in a suit by the mortgagor for an injunction restraining the mortgagee from putting the mortgaged property to sale and for scaling down the mortgage-debt under the Madras Agriculturists Relief Act the purchasers of the mortgaged property at an improper sale by the mortgagee without the intervention of the Court cannot be impleaded. Nor can the purchasers be impleaded on the ground that they would be bound by the doctrine of lis pendens. [P 904 C 1, 2]

S. Krishnamachariar and K. Subba Rao — *for Appellant.*

V. S. Arunachalam — *for Respondents.*

Judgment. — The appellant in Civil Miscellaneous Appeal No. 21, who is also the petitioner in Civil Revision Petition No. 127, brought a suit for a permanent injunction restraining the second mortgagee, defendant 1, from bringing the suit property to sale without the intervention of Court in accordance with the terms of the mortgage bond, on the ground that he was an agriculturist, that the debt had to be scaled down, and that until that was done the property could not properly be brought to sale. An application was also put in for a temporary injunction during the pendency of the suit. Defendant 1 contended that an injunction could not properly be granted and that the remedy of the mortgagor was by way of an application under S. 69, T. P. Act. This contention met with approval in the trial Court; but this Court held in appeal that the appellant (petitioner) had a right to have his debt scaled down and to be protected from having his property sold until that was done, and that it was not a sufficient answer to the plaintiff's objection to tell him that he would have some remedy if a wrong by way of sale was done to him. A temporary injunction was granted on terms, but the terms were not fulfilled; and so defendant 1 brought the property to sale and the respondents in the Civil Miscellaneous Appeal were the purchasers. The plaintiff thereupon sought to amend his plaint by impleading the purchaser and by seeking a relief against him on the ground that he was the nominee of defendant 1 and that the property was purchased collusively and fraudulently. The trial Court rejected this application; and an appeal has been preferred against the order refusing to implead the purchasers and a Civil Revision Petition has been filed against the order refusing an amendment of the plaint.

Section 69, T. P. Act, says that when a sale has been made in the professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. So that it is clear that unless there was fraud, the only remedy of the appellant (petitioner) is by way of damages against the mortgagee who brought the property improperly to sale. If there was fraud, then there may be a cause of action against the respondents in the appeal to have the sale declared void or to have it set aside on the ground of fraud. But it will be clearly improper to club together a suit against the purchasers on the ground of fraud and a suit against the mortgagee on the question of the amount still due on the mortgage. The suits against the mortgagee and the auction purchasers would have entirely different causes of action and the subject-matter of the two suits would be altogether different, they could not possibly form the subject of one joint suit against the mortgagee and the purchasers.

One additional ground for impleading the purchasers is said to be that they would be bound by the doctrine of lis pendens. I doubt very much whether the doctrine of lis pendens would apply, because the matter in dispute between the mortgagor and the mortgagee is the amount of the mortgage debt remaining due; but even if it be considered that there was some right in immovable property in question, to apply the doctrine of lis pendens would only mean that the auction purchaser would be bound by the finding of the Court with regard to the mortgage amount remaining due. That would not affect his rights, because S. 69, T. P. Act, would still give the purchasers a right to retain the property. The lower Court's order refusing to allow an amendment of the plaint and to implead the purchasers was therefore a proper one. The appeal is dismissed with costs and the civil revision petition without costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 904

LAKSHMANA RAO J.

Muthuswami Thevar — Petitioner.

v.

Rajakumar B. Rajdram Pandian — Respondent.

Criminal Revn. Case No. 56 and Petn. No. 53 of 1940, Decided on 3rd April 1940, to revise order of Joint Magistrate, Ramnad, D/- 27th November 1939.

Criminal P. C. (1898), S. 145—Party claiming to be in possession of entire village—Magistrate cannot declare him entitled to possession of undivided share of village.

Where a party claims to be in possession of an entire village it is not permissible under S. 145 for a Magistrate to declare him entitled to possession of an undivided share of the village. [P 904 C 1; P 905 C 2]

K. S. Jayarama Iyer—*for Petitioner.*

U. Somasundaram — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order. — The respondent claimed to be in possession of the entire village and the Joint Magistrate has declared him to be entitled to possession of an undivided 5/8ths of the village. This is not permissible under S. 145, Criminal P. C., and the order declaring the respondent to be entitled to possession of 5/8ths of the village is set aside.

C.R.K./G.N. *Order set aside.*

A. I. R. 1940 Madras 905

HORWILL J.

Kodali Ramakoteswara Rao — Petitioner.

v.

Kodali Suryanarayana and another — Respondents.

Civil Revn. Petn. No. 1149 of 1939, Decided on 15th April 1940, to revise order of Dist. Munsif, Ellore, D/- 11th November 1938.

(a) Arbitration — Minor party to — Arbitration is not void but voidable at minor's option.

It is not open to a party who is a major to have an award which was made at his instance set aside, merely on the ground that one of the parties to it was a minor. An arbitration to which a minor is a party, is not in itself void but is voidable at the instance of the minor. [P 905 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 15—Matter in dispute between parties to suit referred to arbitration — Arbitrator need not examine one party in presence of other parties—It is otherwise with regard to examination of other persons whose testimony might be impugned for some reason—Incarceration of one party preventing examination of one party in presence of other parties — Award cannot be set aside.

No doubt an arbitrator ought to examine a party in the presence of all the other parties but there is no principle of equity or justice which enjoins him to do so. It is otherwise of course with regard to the examination of other persons, whose testimony might be impugned for some reason or other. Consequently where the incarceration of a party is an obstacle known to all the parties concerned to the examination of one party in the presence of the other parties the award cannot be set aside on the ground of misconduct on the part of the arbitrator: *A I R 1930 Mad 646 and A I R 1923 Mad 301, Disting.* [P 905 C 2 ; P 906 C 1]

V. Viyanna — *for Petitioner.*

P. Satyanarayana Rao—*for Respondents.*

Order.—During the trial of O. S. No. 462 of 1937 on the file of the District Munsif's Court of Ellore, the matter in dispute was referred to arbitration. The arbitrator was given full power to examine or not to examine witnesses and after he had given his decision largely in favour of the respondents, the matter came before the District Munsif for hearing objections. A number of points were raised which were all decided against the petitioner. The two objections that are re-asserted in this revision petition are (1) that the award was void because respondent 1 was a minor (an award not binding a minor) and (2) that the arbitrator acted improperly in examining the plaintiff's next friend in the absence of defendant 1.

There is nothing in the first point; because an arbitration to which a minor is a party is not in itself void, but is voidable at the instance of the minor. The minor in the present case (or rather his next friend), far from attempting to set aside the award, supports it. It is not open to defendant 1, who is a major, to have an award which was made at his instance set aside, merely on the ground that respondent 1 was a minor.

The main complaint in this petition is that the respondents—the next friend of the plaintiff and defendant 2—were examined in the absence of defendant 1. These persons are parties to the suit; and I can see no principle of equity or justice which requires the examination of a party in the presence of all the other parties. It is clearly necessary for an arbitrator to enquire of the parties what their case is and on what basis they found their claims. I can see no reason why, in making these enquiries, it is necessary for the other parties to be present. It is otherwise of course with regard to the examination of other persons, whose testimony might be impugned for some reason or other.

The learned advocate for the petitioner relies on the decision of Madhavan Nair J. in A I R 1930 Mad 646,[1] in which the binding nature of an award was discussed. He seems to have been of opinion, following 47 Mad 30,[2] without giving any reasons of his own, that the examination of a party in the absence of another party amounted to improper conduct which would vitiate an award. He did not however find that there was any such improper conduct as alleged and he did not find it necessary to remand the suit for a finding on that point; because he had already found that the award on some other ground was void and not binding on the parties. 47 Mad 30[2] which was followed by Madhavan Nair J. without discussion, was a case in which a minor sought to set aside an award, in which case it might be argued

---

1. Venkatasubbayya v. Venkataramanayya, (1930) 27 A I R Mad 646=126 I C 735.
2. Sanyasi Rao v. Venkata Rao, (1923) 10 A I R Mad 301 = 73 I C 470 = 47 Mad 30 = 44 M L J 263.

that special care should be taken to protect the minor's interests. Both these cases may however be distinguished from the present case; for, it was impossible to examine defendant 2 and the next friend of the plaintiff in the presence of defendant 1 because defendant 1 was in jail. The arbitrator visited defendant 1 in jail and there is no reason to think that he did not ask defendant 1 about his case and the grounds on which he supported it. The plaintiff's next friend and defendant 2 could not have been present at the examination of defendant 1 and defendant 1 therefore knew that if the plaintiff's next friend and defendant 2 were examined, he could not be present there.

It might perhaps be argued in a case where these special circumstances did not exist that the parties would take it for granted that the arbitrator would not examine the opposite party in their absence and that if the arbitrator did so, it would amount to misconduct; but there can be no such ground for setting aside the award in the present case, where the incarceration of defendant 1 was an obstacle known to all the parties concerned to the examination of one party in the presence of the other parties. I therefore find no ground for disagreeing with the lower Court. The petition is accordingly dismissed with the costs of respondent 1.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 906

BURN J.

Surisetti Seethayyamma — Appellant.

v.

Surisetti Venkataramana and another — Respondents.

Second Appeals, Nos. 149 and 185 of 1937, Decided on 16th February 1940.

Husband and wife — Husband found not to be entitled to decree for restitution of conjugal rights — Wife should be given decree for separate maintenance.

It is not necessary that the wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. It is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights, the wife should be held entitled to a decree for a separate maintenance: *A I R 1936 Mad 609, Rel. on.* [P 906 C 2]

M. S. Ramachandra Rao and D. R. Krishna Rao — *for Appellant.*

S. Parthasarathy and V. K. Thiruvenkatachari — *for Respondents.*

Judgment. — These are cross-appeals. The appellant in S. A. No. 149 of 1937 is the wife of the appellant in S. A. No. 185. In O. S. No. 9 of 1934 on the file of the Subordinate Judge of Vizagapatam the wife sued her husband and his father for separate maintenance alleging abandonment and cruelty. In O. S. No. 26 of 1934 the husband sued the wife for restitution of conjugal rights alleging that she was staying away from him without proper cause. The learned Subordinate Judge tried both the suits together and came to the conclusion that the husband was not entitled to restitution of conjugal rights because he had virtually abandoned his wife and because his offers to maintain her were not genuine or bona fide. The learned Subordinate Judge therefore dismissed the husband's suit and gave the wife a decree for maintenance at the rate of Rs. 10 per mensem with Rs. 130 for arrears of maintenance. The unprofitable character of this litigation is sufficiently shown by the fact that the learned Subordinate Judge felt himself compelled to order the plaintiff who had sued in forma pauperis to pay to the Government Rs. 269-15-0 for court-fee due on the plaint. On appeal to the District Judge, the husband's appeal against O. S. No. 26 of 1934, was dismissed but his appeal from the decree in O. S. No. 9 of 1934 was allowed and the decree for maintenance in favour of the wife was set aside. The memorandum of cross-objections filed by the wife regarding the rate of maintenance was also dismissed by the learned District Judge.

Mr. Ramchandra Rao for the wife has laid strong emphasis upon the unsatisfactory result of the decision pronounced by the learned District Judge. He contends that the learned District Judge having found in agreement with the learned Subordinate Judge that the husband was not entitled to a decree for restitution of conjugal rights ought thereupon to have confirmed the decree in favour of the wife for separate maintenance. This contention appears to me to be correct. It is not, as has been frequently stated, necessary that the wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. On the other hand, it is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights, the wife should be held entitled to a decree for a separate maintenance: *see* the case in 71 M L J 499.[1]

---

[1] ('36) 23 AIR 1936 Mad 609=165 I C 314=71 M L J 499, Venkatapathi Nayani Varu v. Puttamma Nagith.

It seems to me therefore that the appeal of the wife, in S. A. No. 149, must be allowed and the decree of the Subordinate Judge in her favour restored. The District Judge found that the rate of maintenance, Rs. 10 a month, awarded by the learned Subordinate Judge was suitable and I have not been asked to say that the learned District Judge was wrong in that respect. The appeal of the husband must, on the facts found, be dismissed. It is found that he did abandon his wife and that he did not genuinely want her back. The appellant in S. A. No. 149 will be entitled to her costs from the respondents in this Court and in the lower Appellate Court. S. A. No. 185 is dismissed but without costs. Leave to appeal is refused.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1940 Madras 907

HORWILL J.

Ganapathi Bhatta — Petitioner.

v.

A. M. L. D'Souza and others — Respondents.

Civil Revn. Petn. No. 1048 of 1938, Decided on 24th April 1940, to revise order of Dist. Munsif, Karkal, D/- 26th July 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 19 — " Judgment-debtor " does not include his assignee.

The word "judgment-debtor" in S. 19 does not include an assignee from a judgment-debtor and consequently a purchaser of the equity of redemption from the judgment-debtor is not entitled to the benefit of S. 19 : *13 I C 659, Rel. on ; 30 Mad 537, Expl.; A I R 1939 Mad 186, Disting.* [P 907 C 2]

K. Srinivasa Rao — *for Petitioner.*

V. Thyagarajan and G. A. Pais — *for Respondents.*

Order.—The first respondent obtained a mortgage decree, and the petitioner purchased the equity of redemption from the receiver in the insolvency of the judgment-debtor. The petitioner applied in R. I. A. No. 470 of 1938 on the file of the District Munsif of Karkal under S. 19, Madras Agriculturists Relief Act, to have the decree debt scaled down as against him. The lower Court held that he was not a judgment-debtor and that therefore S. 19 did not apply to his debt. S. 19 says :

> Where before the commencement of this act a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist. . . . apply the provisions of this act to such decree and . . . . amend the decree accordingly. . . . . .

It is thus seen that the petitioner cannot have the advantage of this section unless he is a judgment-debtor. The Agriculturists Relief Act does not define the word 'judgment-debtor' and so we must take it that the ordinary meaning is assigned to that expression. "Judgment-debtor" is defined in the Civil Procedure Code (Act V of 1908) in S. 2 (10) as meaning "any person against whom a decree has been passed or an order capable of execution has been made." Clearly, the petitioner is not a judgment-debtor in that sense. The learned advocate for the petitioner has referred to an old ruling of this Court in 30 Mad 537,[1] in which it was held that the provisions of S. 258, Civil P. C., Act XIV of 1882, applied not only to judgment-debtors but to those claiming through them or in their right. But even there it was not said that persons claiming through judgment-debtors were also judgment-debtors. It only says that S. 258 applied to those claiming through them and in their right as well as to judgment-debtors. We are however not concerned with the Code as it stood then ; but with the present Code. It cannot be said that there is anything in the present Code which suggests that "judgment-debtor" may sometimes mean more than it is defined to mean. No example has been cited to me in which a wider meaning has been given to the word "judgment-debtor" than is found in the definition itself. It was expressly held in 13 I C 659,[2] that in O. 21, R. 58 "judgment-debtor" does not include the assignee of a judgment-debtor.

Reliance has been placed on a decision of this Court in (1938) 2 M L J 1068,[3] which is a decision under this very Act. The learned Judges there were not concerned with the definition of judgment-debtor, but with the definitions of "debt" and "debtor". There, the purchaser of the equity of redemption was made a party to the suit and a decree was passed against him ; and so he was undoubtedly a judgment-debtor; but it was argued in that case that as he was not liable personally, his property only being liable, he was not a debtor. That argument was repelled; and it was held that

---

1. ('07) 30 Mad 537=17 M L J 417, Panduranga Mudaliar v. Vythilinga Reddi.
2. ('12) 13 I C 659, Thiruvengadam Pillai v. Venkatasubbiah.
3. ('39) 26 AIR 1939 Mad 186=182 I C 879=I L R (1939) Mad 218 = (1938) 2 M L J 1068, Perianna Goundan v. Sellappa Goundan.

there was nothing in the Madras Agriculturists' Debt Relief Act which distinguished between a personal obligation to pay a debt and an obligation under which only a man's property is liable. This application was therefore rightly decided; for the petitioner was not entitled to the benefit of S. 19. The petition is accordingly dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 908

HORWILL J.

Nithoor Thimmanna Bhat— Petitioner.

v.

Aithappa Adyanthaya—Respondent.

Civil Revn. Petn. No. 356 of 1937, Decided on 23rd April 1940, to revise decree of Dist. Munsif, Puthur, in S. C. S. No. 208 of 1936.

(a) Limitation Act (1908), S. 4—Applicability — Pronote — On last day of limitation for suit Court closed for summer recess—On reopening day payee assigning pro-note — Assignee filing suit on same day — Suit held not barred.

The wording of S. 3 indicates that S. 4 does not lengthen the period of limitation prescribed. So that suits to which S. 4 can be applied are therefore clearly not suits instituted during the period of limitation prescribed. S. 4 deals with one of the exceptions to the general rule that a suit filed after the period of limitation prescribed shall be dismissed. [P 909 C 1]

On the last day of limitation for filing a suit on the pronote the Courts were closed for the summer recess. On the reopening day the payee under the promissory note assigned his rights in the promissory note and on the very same day the assignee filed the suit on the pronote:

Held that on the date of the reopening of the Court there was an enforceable debt and that S. 4 directly applied to the case and the suit was therefore maintainable: *A I R 1932 Mad 287, Rel. on; 15 Bom L R 348, Expl., and held not good law; A I R 1937 Mad 367, Ref.* [P 908 C 2; P 909 C 1]

(b) Limitation — Expiry of—Debt does not cease—Nor does relation of creditor and debtor.

All that happens after the lapse of three years after the creation of a debt is that the debt cannot be enforced in a Court of law. The debt does not cease to exist; nor does the relationship of creditor and debtor. [P 908 C 2]

P. Sridhara Rao — *for Petitioner*,

T. Krishna Rao—*for Respondent.*

Order.—The promissory note on which the petitioner sued was dated 10th May 1930. There was an endorsement of payment on 8th May 1933, which gave a fresh period of limitation; and so the suit had to be filed on or before 8th May 1936. On that date, however, the Courts were closed for the summer recess. On the reopening day, 1st June 1936, the payee under the promissory note assigned his rights in the promissory note to the present petitioner, and on the very same day the petitioner filed the suit. The District Munsif of Puthur, in whose Court the suit was filed, held that the suit was barred by limitation. He relied on the observation of the Chief Justice in the Full Bench decision of this Court in 55 Mad 630,[1] to the effect that S. 4 did not extend the period of limitation. He was of opinion that as at the time when the assignment was made the suit was barred, no rights passed to the assignee under the assignment. He therefore, although finding all the other points raised in favour of the petitioner, dismissed the suit.

All that happens after the lapse of three years after the creation of a debt is that the debt cannot be enforced in a Court of law. The debt does not cease to exist; nor does the relationship of creditor and debtor. As Beasley C. J. said in 55 Mad 630,[1] there was on the date of the reopening of the Court an enforceable debt. The question that arose in that appeal was whether a person who could have filed the suit on the reopening of the Court but was unable to do so because the debtor was adjudged an insolvent, could prove in insolvency; and S. 46, Presidency Towns Insolvency Act, came up for consideration. That section says that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in insolvency; and the Full Bench held that on the date of the insolvency, which was the day when the Court reopened, i. e., more than three years after the debt had been incurred, the debtor was still subject to the debt. If on the date of the assignment there was a debt, then there was nothing to prevent the creditor assigning it to some other person. A debtor might well pay his debt even though it were barred by limitation and one would expect an honourable debtor to do so. The lower Court is therefore clearly wrong in saying that on the date of the assignment there was no interest that could be assigned.

A decision of Beaman J. in 15 Bom L R 348[2] has been referred to by the learned advocate for the petitioner in support of his contention that the petitioner was entitled to sue; but that learned Judge, differing from a Bench decision of his own

---

[1] ('32) 19 A I R 1932 Mad 287=136 I C 822=55 Mad 630 = 62 M L J 256 (FB), Fatma Bi v. Nagoorkhan.

[2] ('13) 15 Bom L R 348=19 I C 820, Visram Vasudeo v. Tadaji Balaji.

Court in 26 Bom 782,[3] adopted a reasoning which has since been held to be erroneous both in his own Court and in other Courts. As to the actual point that is raised here, Beaman J. had very little to say. He argued on an analogy from a case where an acknowledgment took place during the Court recess after the period of limitation had expired. A decision on which some reliance has been placed by the other side is one of King J. in 45 M L W 72.[4] That was a case where an acknowledgment took place beyond the period of limitation but during the recess. S. 19, which saves limitation in the case of certain acknowledgments made within the period of limitation prescribed, says that :

> Where before the expiration of the period prescribed for a suit . . . . in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing . . . . a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

The wording of S. 3, Limitation Act indicates that S. 4 does not lengthen the period of limitation prescribed; for it says :

> Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted . . . after the period of limitation prescribed therefor . . . . . shall be dismissed.

So that suits to which S. 4 can be applied are therefore clearly not suits instituted during the period of limitation prescribed. S. 4 deals with one of the exceptions to the general rule that a suit filed after the period of limitation prescribed shall be dismissed. Whether, on the date of the reopening of the Court the petitioner could maintain the suit against the respondent would depend on the wording of S. 4, which permits of a suit being filed on the reopening of the Court beyond the period of limitation. S. 4 runs :

> Where the period of limitation prescribed for any suit . . . . expires on a day when the Court is closed, the suit . . . . may be instituted . . . . on the day that the Court reopens.

The period of limitation prescribed for the filing of the suit with which we are now concerned expired while the Court was closed; and S. 4 says that when that is the case, the suit may be instituted on the date when the Court reopens. S. 4 therefore directly applies to the present case and the suit was therefore maintainable, and should have been decreed in the petitioner's favour. The petition is accordingly allowed and the suit decreed with costs. The respondent has filed an application under S. 8, Madras Agriculturists Relief Act, for scaling down the debt. That application will be transferred to the lower Court for disposal; and the decree passed by this Court will be subject to the result of that application.

C.R.K./G.N. *Petition allowed.*

---

[3] Bai Hemkore v. Masamalli, (1902) 26 Bom 782 =4 Bom L R 608.

[4] Chidambaram Chettiar v. Venkatasubba Naick, ('37) 24 A I R 1937 Mad 367 = 169 I C 653= (1937) 1 M L J 262=45 M L W 72.

A. I. R. 1940 Madras 909

WADSWORTH J.

Charapotta Kanur Kesavan Nayar — Petitioner.

v.

Kummankuzhi Ezhuvan Kunchu's son Velu — Respondent.

Civil Revn. Petn. No. 534 of 1937, Decided on 1st May 1940, to revise order of Dist. Munsif, Alatur, D/- 5th November 1936.

Madras Village Courts Act (1 of 1889), S. 73 —Village Court satisfying by consideration of admitted circumstances that promissory note was executed by defendant — Mere lack of direct evidence of execution of pronote is not material irregularity justifying interference in revision.

Where the village Court was satisfied by comparison of the signature with that found on an admitted document and by a consideration of the admitted circumstances that the promissory note was executed by the defendant the mere fact that a decree was given on a lesser degree of proof than would have been required by the Court of a District Munsif is not sufficient to constitute a material irregularity justifying interference in revision. [P 909 C 2]

K. Kesavan Nair — *for Petitioner.*

K. V. Gopalakrishna Nair — *for Respondent.*

Order. — I do not consider that the District Munsif is right in treating the lack of direct evidence of execution of the promissory note as a material irregularity sufficient to justify interference under S. 73, Village Courts Act. The Village Court was satisfied by comparison of the signature with that found on an admitted document and by a consideration of the admitted circumstances that the promissory note was executed by the defendant. The mere fact that a decree was given on a lesser degree of proof than would have been required by the Court of a District Munsif is not sufficient to constitute a material irregularity justifying interference in revision. There has been no injustice. I set aside the order of the District Munsif and restore the decree with costs here and in the District Munsif's Court.

C.R.K./D.S. *Order set aside.*

A. I. R. 1940 Madras 910

WADSWORTH AND PATANJALI SASTRI JJ.

Motam Kotayya — Petitioner.

v.

Singampalli Venkata Punnayya — Respondent.

Civil Revn. Petn. No. 1317 of 1938, Decided on 26th April 1940, to revise order of Dist. Munsif, Tenali, D/- 9th July 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 8 — Debt incurred before 1st October 1932 but ripened into decree after commencement of Act cannot be scaled down in accordance with S. 8.

The reference to decrees in Ss. 7, 8 and 9 is intended only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force. Hence, a debt for the re-payment of which a decree has been passed after the commencement of the Madras Agriculturists Relief Act, 1938, is not liable to be scaled down in accordance with S. 8 of the Act, when the debt is one incurred before 1st October 1932 : *A I R 1940 Mad 432, Dissented from and held no good law.* [P 911 C 1]

A. Lakshmayya — *for Petitioner.*

M. Subramania Sarma—*for Respondent.*

Wadsworth J. — I agree with the conclusion and reasoning of the judgment which my learned brother is about to deliver. I only wish to add that after hearing a fuller argument and having the benefit of discussion with my learned brother, I am of opinion that my decision in 1940 M W N 338=(1940) 1 M L J 600[1] is erroneous.

Patanjali Sastri J.—The question that falls to be decided in this revision petition is whether a debt for the repayment of which a decree has been passed after the commencement of the Madras Agriculturists Relief Act, 1938, is liable to be scaled down in accordance with S. 8 of the Act when the debt is one incurred before the 1st October 1932. The facts are simple and not in dispute. The respondent sued the petitioner in S. C. S. No. 4 of 1938 on the file of the Court below for recovery of the principal and interest due on a promissory note executed on 29-10-1929. The suit was brought on 3-1-1938 and the petitioner filed his written statement on 30-1-1938. Though the Act came into force when the suit was pending, the petitioner failed to put forward a claim to have the debt scaled down in accordance with the Act, and a decree was passed on 18-4-1938, for the full amount claimed by the respondent. Soon after the passing of the decree, however, the petitioner applied to the Court on 29-4-1938 to scale down the debt and the application was dismissed on the ground that there is no provision in the Act for scaling down a debt in respect of which a decree has been passed after the Act came into force. The petitioner has preferred this revision petition and contests the correctness of that view.

It is argued that the *non obstante* clause in S. 7 and the words "whether the debt or other obligation has ripened into a decree or not" in S. 8 indicate that all debts incurred before the commencement of the Act should be scaled down irrespective of any decrees passed in respect of them, whether such decrees were passed before or after the commencement of the Act. These provisions are not free from ambiguity and may, at first blush, appear to lend some countenance to the contention of the petitioner. But on a closer examination of these sections in the light of other provisions of the Act and the scheme revealed thereby, it is fairly clear that the reference to decrees is intended only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force. The provisions appear to envisage the state of things on 1st October 1937 and the reference to contracts obviously relates to contracts made prior to that date. It is therefore reasonable to assume that the word 'decree' which occurs in the same context is also used subject to the same qualification. It is significant that the machinery provided in Ss. 19 and 20 for 'amendment' of decrees by scaling them down in accordance with the Act, and for stay of execution pending proceedings for such amendment, are made applicable only to decrees passed before the commencement of the Act and there are no similar provisions in respect of decrees passed after the Act came into force.

Similarly, S. 18 provides for 'amendment' of decrees passed before the Act in suits instituted after 1st October 1937, by a proportionate reduction of costs also. These provisions which, in the case of decrees passed before the Act, expressly supersede the finality which attaches to decrees under the general law seem to indicate that, in the contemplation of the Legislature the relief which the Act provides for agriculturists should be claimed and obtained before decree, where such decree happens to be passed after the commencement of the Act, and that the principle of finality should operate unimpaired in such cases. Indeed, if the Legislature intended to exclude the operation of this principle in the case of all decrees against agriculturists whether passed before or after the commencement of the Act, the provisions of S. 19 and the latter part of S. 18, sub-s. (1) relating to 'amendment' of decrees passed before the commencement of the Act would be meaningless and otiose.

---

[1] ('40) 27 AIR 1940 Mad 432=(1940) 1 M L J 600 = 1940 M W N 338, Kankarazu v. Achutaramanarazu.

Nor is there any apparent reason to suppose that the Legislature intended to introduce into the Act such a startling departure from the basic principle of all judicial proceedings, namely, that all available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree. It is one thing to provide relief to agriculturists by way of scaling down their debts even when such debts had already ripened into decrees before such relief was thought of, but it is a different thing to declare that even if they failed to claim, when they could have claimed, such relief before a decree was passed, they should nevertheless be entitled to claim it at any time afterwards. It may be laudable to rehabilitate agriculturists by a compulsory scaling down of their debts but it could be no part of this object to condone, and thereby encourage, their laches in the conduct of legal proceedings. On the other hand, having regard to the expropriietary nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion reading the Act as a whole, that the word 'decree' in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act.

The petitioner's learned counsel placed reliance upon the decision of my learned brother Wadsworth J. in 1940 M W N 338[1] as supporting his contention. The judgment is very brief and the question does not appear to have been fully argued and considered and my learned brother is now inclined, in the light of the fuller argument before us, to agree with the view expressed above. In 1940 M W N 412[2] the suit was dismissed by the trial Court as barred by limitation but was decreed by this Court on appeal. An application for scaling down the debt was made to this Court before the decree was drafted and issued, along with another application to stop the drafting of the decree pending the disposal of the former application. This Court held that in those circumstances the judgment debtor was entitled to have the debt scaled down. The broader question arising for decision in the present case was raised but the learned Judges observed that it was not necessary to deal with it on the facts before them. This decision therefore does not assist the petitioner. A decision of the Allahabad High Court in I L R (1938) All 305[3] was also brought to our notice but it relates to the construction of differently worded provisions in the U. P. Agriculturists Relief Act and has no bearing on the interpretation of the provisions of Madras Act IV of 1938. This revision petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

---

[2] ('40) 27 AIR 1940 Mad 478=1940 M W N 412, Somasundaram Chettiar v. Peria Karuppan Chettiar.

[3] ('38) 25 AIR 1938 All 153=174 I C 659=I L R (1938) All 305=1938 A L J 107, Abdul Noor v. Brijmohan Saran.

A. I. R. 1940 Madras 911

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Maddipati Narasimhamurti and *others* — Appellants.

v.

Hayat Khan and others — Respondents.

Second Appeal No. 341 of 1935, Decided on 1st May 1940, against decree of Sub-Judge, Ellore, D/- 19th September 1934.

Civil P. C. (1908), O. 41, R. 27 — Additional evidence merely for purpose of providing corroboration for oral testimony which had been disbelieved by trial Judge cannot be allowed.

Where additional evidence is allowed for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge and the oral evidence was complete had it been believed, the additional evidence, not being necessary for the Court to appreciate a party's case or to pronounce judgment on it, cannot be allowed under O. 41, R. 27 : *31 Bom 381 (P C) and A I R 1931 P C 143, Rel. on.* [P 912 C 2]

V. Govindarajachari—*for Appellants.*

P. Somasundaram — *for Respondents.*

Leach C. J. — Respondent 1 filed this suit in the Court of the District Munsif of Kovvur for the redemption of a usufructuary mortgage created on 20th April 1877 in respect of 2.61 acres of land. Respondent 1's case was that this property was mortgaged by his great-uncle, one Sujayat Beg, in favour of the predecessors in title of the appellants, that the period for which the mortgage was created expired in 1927 and that he was entitled to three quarters of Sujayat Beg's estate, to the extent of a quarter as the result of succession and to the extent of a half as the result of a purchase made by his mother. In order to establish a right to any portion of the property, it was incumbent upon respondent 1 to prove his mother's relationship to the mortgagor and that the persons who sold their interests to his mother were also heirs of Sujayat Beg. The appellants, in addition to denying the relationships set out by respondent 1, averred that they had acquired title by adverse possession. The District Munsif held that respondent 1 had not proved the relationships with Sujayat Beg which were necessary to support his case and he also found against him on the issue of adverse possession. The District Munsif found that the appellants had perfected their title to the land by adverse possession for the statutory period. On appeal to the Subordinate Judge of Ellore both these findings were reversed. In deciding that respondent 1 had established the relationships with Sujayat Beg he relied on documentary evidence which was not tendered in the trial Court but was produced while the appeal was pending. The first question which has to be decided in this appeal is whether the Subordinate Judge was entitled to have regard to this further evidence. For reasons which will be stated presently, it is clear that he adopted a wrong course both in admitting and in acting upon this additional evidence.

Order 41, R. 27 (1) states that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court; but if (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (b) the Appellate Court requires any document to be produced or any witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined. The Privy Council has in two cases laid down the scope of this rule. In 31 Bom 381,[1] Lord Robertson in delivering the judgment of the Board observed that the legitimate occasion for the application of S. 568, Civil P. C. of 1882 (which corresponds to O. 41, R. 27) was when on examining the evidence some inherent lacuna or defect became apparent, not where a discovery was made to import it. In 10 Pat 654,[2] the Judicial Committee re-affirmed this statement of law and went on to observe:

> It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands.

Now, what is the position here? In the first place the Subordinate Judge has not recorded his reasons for admitting the evidence which he is required to do by O. 41, R. 27 (2). An application by respondent 1 for the admission of these documents was made before the appeal was heard, but it was not considered until the appeal itself was being argued. Having heard the arguments the Subordinate Judge said that he was inclined to admit them for reasons to be mentioned in his judgment. But his judgment contains no reasons for the admission of the documents. This may be an oversight but it is an oversight which involves failure to comply with mandatory provisions of the Code of Civil Procedure. But assuming that the Subordinate Judge had given his reasons, it would not affect the result of this appeal because it is quite clear that the admission of these documents was not for the purpose of remedying some inherent lacuna or defect but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. The oral evidence was complete and if it had been believed, it would have substantiated respondent 1's case. Therefore there was no question of any lacuna or inherent defect. The additional evidence admitted in this case was not necessary for the Court to appreciate respondent 1's case or to pronounce judgment on it. As the result of the admission of additional evidence the Subordinate Judge has disposed of the appeal on a wrong basis.

The appeal will be allowed and the case remanded to the Subordinate Judge with direction to examine the evidence which was tendered in the trial Court and to decide the case according to law. The appellants are entitled to their costs in this Court and will be entitled to a refund of the Court-fee paid on the memorandum of appeal.

C.R.K./D.S. *Case remanded.*

---

[1] ('07) 31 Bom 381 = 34 I A 115 = 9 Bom L R 671 (P C), Kessowji Issur v. G. I. P. Ry Co.

[2] ('31) 18 A I R 1931 P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C), Parsotim Thakur v. Lal Mohar Thakur.

A. I. R. 1940 Madras 913

PANDRANG ROW AND ABDUR RAHMAN JJ.

Sri Rajah Bommadevara Venkatarayulu Naidu — Appellant.

v.

Kopalle Raghunadha Rao and others— Respondents.

Appeal No. 66 of 1937, Decided on 27th September 1939, against order of Sub-Judge, Masulipatam, D/- 26th November 1936.

(a) Mesne profits—*A* holding land under *B*—*B* granting patta of same land to *C* — *C* dispossessing *A* — *B* not shown to have taken part in dispossessing *A* — *B* held not liable to *A* for mesne profits.

No doubt ordinarily a liability to pay mesne profits goes with the actual possession of the land or in other words it is the person in wrongful possession who is generally sought to be made liable for mesne profits, but it does not follow that one who is not in actual wrongful possession cannot be made liable, for, if the dispossession which is the basis of the claim for mesne profits is one in which a person who did not actually take possession or continue in possession participated, or, in other words, if the dispossession can be regarded as a joint act of several persons every person who takes part in such dispossession would be liable for mesne profits even though the actual profits were received only by some of the persons who took part in the dispossession. They would in such circumstances be regarded as joint tort-feasors. But the mere grant of a patta or a lease by itself is not sufficient to constitute the grantor of the patta a joint tort-feasor in respect of any tort that the lessee or the pattadar may think of committing later on. [P 914 C 1]

A held land under *B*. *B* granted patta of the same land to *C* who dispossessed *A*. There was no evidence to show that *B* took part in dispossessing *A*. In a suit by *A* for possession and mesne profits:

Held that the mere grant of a patta by *B* to *C* taken along with the subsequent actual dispossession by *C* could not be regarded as a sufficient basis for coming to the conclusion that the dispossession of *A* was dispossession by *B* acting jointly with *C*. Hence *B* was not liable for mesne profits: *6 Cal L R 357*, *Expl.* [P 914 C 1, 2]

(b) Tort — Tort cannot be presumed.

There is no presumption in law of the commission of any wrong, and a tort cannot be presumed. The abetment of a tort being itself a tort it cannot be presumed; and if a liability arises only by reason of the abetment of a tort or the taking part in a tort it must be established by some kind of evidence just like any other fact. [P 914 C 2]

P. Somasundaram — *for Appellant.*

N. Rama Rao and B. V. Ramanarasa — *for Respondents.*

Pandrang Row J. — This appeal has been preferred under rather peculiar circumstances. There was a suit instituted in 1930, (O. S. No. 9 of 1930) on the file of the District Court of Kistna which was subsequently transferred to the Subordinate Judge's Court of Masulipatam for disposal in which the plaintiffs four in number sued for a declaration of their right to certain property as against the defendants five in number and also for recovery of possession thereof from defendants 1, 2, 4 and 5 in case the Court found that the plaintiffs were not in possession and also for mesne profits as against all the five defendants. Defendant 3 was the zamindar under whom the plaintiffs claimed to hold the properties as part of their holding. Defendants 1 and 2 obtained a patta from defendant 3 in respect of the plaint property and they were found to have been in possession of the property along with their sub-tenants defendants 4 and 5. The suit was not resisted by defendant 3 who allowed it to proceed ex parte. The judgment in the suit was pronounced on 22nd November 1932. The only question that was really decided therein was that the plaintiffs had title to the suit property and that defendants 1 and 2 had none. Then followed the usual direction that there would be a decree as prayed for by the plaintiffs with costs.

The decree that was actually drawn up and dated 22nd November 1932 said nothing as to who should pay the mesne profits to the plaintiff though a direction was given for an inquiry being held as to the amount of mesne profits during a certain period mentioned therein. Though, in the earlier part of the decree it was only defendants 1, 2, 4 and 5 that were directed to put the plaintiffs in possession of the property nevertheless in the later portion of the decree relating to the inquiry about mesne profits there was a reference to the relinquishment of possession by defendants 1 to 5. The inclusion of defendant 3 in this part of the decree was objected to by defendant 3 in his petition dated 6th November 1936, that is to say, nearly four years afterwards. He applied that instead of the words defendants 1 to 5 found in this part of the decree the words defendants 1, 2, 4 and 5 should be substituted and this application was allowed by the lower Court in its order dated 26th November 1936, but at the same time that order made another amendment in the decree which had the result of making defendant 3 also liable for the mesne profits along with the other four defendants. In other words for the first time by this amendment made by the Court either suo motu or at the instance of the plaintiffs in the suit a liability in respect of mesne profits was fixed upon defendant 3, and it is from this amended decree making him liable for mesne profits that the present appeal has been preferred.

A civil revision petition has also been filed apparently in accordance with the usual practice of observing abundant caution. The question for determination in this appeal seems to be comparatively simple, namely whether there is any basis for making defendant 3 liable for mesne profits. No doubt he allowed the suit to proceed ex parte but that does not absolve the plaintiffs from the necessity of adducing some prima facie evidence which would be sufficient in law to establish a liability in respect of mesne profits on defendant 3. The evidence is absolutely silent as to any part taken by defendant 3 in the dispossession of the plaintiffs. All that is said therein is that defendant 3 granted a patta in respect of the properties in favour of defendants 1 and 2. Nor can the mere grant of a patta by defendant 3 to defendants 1 and 2 taken along with the subsequent actual dispossession by defendants 1 and 2 be regarded as a sufficient basis for coming to the conclusion that the dispossession of the plaintiffs was dispossession by defendant 3 acting jointly with defendants 1 and 2; or to put it in other words could it be said that defendant 3 took an active part in the dispossession of the plaintiffs?

No doubt ordinarily a liability to pay mesne profits goes with the actual possession of the land or in other words it is the person in wrongful possession who is generally sought to be made liable for mesne profits, but it does not follow that one who is not in actual wrongful possession cannot be made liable, for, if the dispossession of the plaintiffs which is the basis of their claim for mesne profits is one in which a person who did not actually take possession or continue in possession participated, or, in other words, if the dispossession can be regarded as a joint act of several persons every person who takes part in such dispossession would be liable for mesne profits even though the actual profits were received only by some of the persons who took part in the dispossession. They would in such circumstances be regarded as joint tort-feasors. But we are not aware of its having been decided in any case that the mere grant of a patta or a lease by itself is sufficient to constitute the grantor of the patta a joint tort-feasor in respect of any tort that the lessee or the pattadar may think of committing later on. Such a contention is in our opinion opposed to all principle and really finds no support in any of the decisions that have been quoted to us on behalf of the plaintiffs-respondents.

The case which gives them the most assistance is the one reported in 6 C L R 357.[1] But even in that case there was an actual finding that all the persons who were sought to be made liable for mesne profits had joined together in keeping the plaintiffs out of possession and because these were the facts reliance was placed on the decision in (1840) 12 A & E 40.[2] Their Lordships of the Privy Council who had to express an opinion as regards (1840) 12 A & E 40[2] in 8 Pat 516[3] at pp. 526 and 527 after stating the facts of that case, viz. (1840) 12 A & E 40,[2] pointed out that that case settled no principle at all as the Court merely held in that case that there was evidence on which a jury might properly find that Warren had made himself a party to the tort. It follows therefore that there is no basis in the evidence to support any finding that defendant 3 is also liable for mesne profits in this case. As mentioned already the evidence connecting defendant 3 with the trespass is really nil. It is not stated in the evidence that either he himself or his servants took part in the trespass. All that is elicited in the evidence is that he had granted a patta. That does not mean that he even encouraged the pattadars defendants 1 and 2 to take possession wrongfully or forcibly. There is no presumption in law of the commission of any wrong, and a tort cannot be presumed. The abetment of a tort being itself a tort it cannot be presumed; and if a liability arises only by reason of the abetment of a tort or the taking part in a tort it must be established by some kind of evidence just like any other fact and there is no presumption which can be availed of in this case by the plaintiffs-respondents. It follows from this that our finding on the only point for determination in this appeal must be in favour of the appellant, namely that he is not liable for mesne profits. The appeal is therefore allowed and the decree of the lower Court modified by deleting defendant 3 from the defendants who are made liable for mesne profits. The appellant will be entitled to his costs of this appeal from the plaintiffs-respondents.

---

[1] ('80) 6 C L R 357, **Mudun Mohun Singh v. Ramdas Chuckerbutty.**

[2] (1840) 12 A & E 40 = 54 R R 523, **Deo v. Harlow.**

[3] ('29) 16 A I R 1929 P C 69 = 114 I C 604=56 I A 93 = 8 Pat 516 (P C), **L. P. E. Pugh v. Ashutosh Sen.**

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1940 Madras 915

WADSWORTH J.

T. P. Chandrasekara Iyer — Petitioner.

v.

The Official Receiver, West Tanjore — Respondent.

Civil Revn. Petn. No. 1257 of 1939, Decided on 23rd July 1940, to revise order of Dist. Court, West Tanjore at Tanjore, D/- 7th July 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 3 — Phrase "quit rent, jodi, kattubadi, poruppu or the like" in S. 3 refers only to payment in nature of quit rent on inam and does not include charges for police, for roads, for water and similar dues levied by state or local body.

The terms jodi, kattubadi and poruppu all denote quit rent on inams payable to a superior landlord or to the Government. Consequently the phrase "quit rent, jodi, kattubadi, poruppu or the like" in S. 3 refers only to payments in the nature of quit rent, on inams, whatever be the name by which they are denoted and does not include charges for police, for roads, for water and similar dues levied for services rendered by the State or by a local authority: *21 Mad 116 (F B), Rel. on.* [P 915 C 2]

S. Panchapakesa Sastri and T. K. Sundararaman — *for Petitioner.*

K. S. Desikan — *for Respondent.*

Order. — The only question for decision in this civil revision petition is whether the petitioner can be deemed to be an agriculturist with reference to the definition in S. 3 of Madras Act, 4 of 1938. The objection raised was that he was the landholder of an estate in respect of which a sum exceeding Rs. 100 was paid as "quit rent, jodi, kattubadi, poruppu or the like." The learned District Judge has not given a precise finding as to the amount payable by the petitioner in respect of the eight villages of which he admits possession but has come to the conclusion that on his admissions the petitioner is disqualified from claiming to be an agriculturist. In the memorandum dated 6th July 1938 the petitioner has admitted possession of eight villages in respect of which he pays as jodi, Rs. 6-4-0 only, though he pays approximately Rs. 72,339 and 244 respectively for kaval fees, road cess and water charges. The learned District Judge has lumped all these four charges together and has treated them as coming within the description of "quit rent, jodi, kattubadi, poruppu or the like," so as to disqualify the petitioner from claiming to be an agriculturist. I do not know the source from which the phrase just quoted was taken in drafting this Act, but a similar phrase is found in the Full Bench ruling of this Court reported in 21 Mad 116[1] at page 122, where Subramania Iyer J. refers to

> the amount of quit rent or kattubadi, jodi, poruppu or by whatever other name it may be known, payable by them to zamindars or others under grants creating inams.

Wilson's Glossory defines jodi, kattubadi and poruppu all as meaning quit rent; and it is, I think, a matter of common knowledge that in revenue parlance these four terms are used according to precedent or local custom without any appreciable difference in their significance, that is to say, all four terms denote quit rent on inams payable to a superior landlord or to the Government. When it is conceded that the four specified terms all mean quit rent, I think, it follows that the phrase "or the like" must be also taken to denote any other payment in the nature of quit rent on an inam. If it had been the intention to take into consideration payments to Government for services rendered such as kaval fees, payments to local authorities for the maintenance of communications such as road cess or payments to the revenue department for the supply of additional water such as water cess, the Legislature would have indicated more clearly that such charges had to be taken into consideration. I am therefore of opinion that the phrase "quit rent, jodi, kattubadi, poruppu or the like" refers only to payments in the nature of quit rent, on inams, whatever be the name by which they are denoted and does not include charges for police, for roads, for water and similar dues levied for services rendered by the state or by a local authority. The revision petition is therefore allowed with costs and the District Judge will be directed to dispose of the petition after recording findings on the several contentions raised. Both sides will be permitted to adduce evidence. Costs here will come out of the insolvent's estate.

C.R.K./G.N. *Petition allowed.*

---

[1] ('98) 21 Mad 116=8 M L J 43 (FB), Lakshminarayana Pantulu v. Venkatarayanam.

A. I. R. 1940 Madras 916

LEACH C. J. AND KUNHI RAMAN J.

M. L. N. Mahalingam Chettiar
—Petitioner.

v.

Raja Srimathu Muthu Vijia Raghunatha Doraisingam—Respondent.

Civil Revn. Petn. No. 1262 of 1936, Decided on 19th July 1939, to revise decree of Sub-Judge, Sivaganga, D/- 28th July 1936.

(a) Madras Elementary Education Act (8 of 1920), Ss. 36 and 34 (2)—Education tax under Act is levied by District Board and not by Government.

The levy of the education tax under the Act is by the District Board and not by the Government though the District Board has to obtain the previous sanction of the Local Gevernment for its imposition. The tax is levied not for the benefit of the Government, but for the purpose of elementary education in the particular District. [P 916 C 2]

(b) General Clauses Act (1897), S. 3 (21)—Word "Government "does not include District Board.

The words "Government" or "the Government" in S. 3 (21) do not include a District Board or any local authority. [P 916 C 2]

T. M. Ramaswamy Iyer — *for Petitioner*.

C. Narasimhachariar and M. E. Rajagopalachari—*for Respondent*.

Leach C. J. — On 20th March 1887 the respondent's predecessor-in-title granted to the petitioner's predecessor-in-title a lease in perpetuity of five villages in the Sivaganga Zamindari in the Ramnad District at an annual rental of Rs. 5000. The deed provided that the lessee should be liable for the road cess and the mahimai payable in respect of the villages. It contained the further provision that the lessee should "deliver the account asked for as well as the tax etc., levied from time to time by the Government." At the time of the execution of the document, the only local tax was the road cess, but as the result of the passing of the Madras Elementary Education Act, 1920, the District Board imposed an education tax. The respondent was compelled by the local authority to pay this tax and he filed the suit out of which this revision application arises in the Court of the Subordinate Judge of Sivaganga to recover from the petitioner what he had paid by way of education tax for faslis 1342, 1343 and 1344. He averred that by reason of the terms of the document the petitioner was bound to pay the tax. The Subordinate Judge held in favour of the respondent and granted him a decree for Rs. 250. This suit was a small cause suit and as no appeal lay the petitioner filed this application in revision. His contention is that the Subordinate Judge has misread the document. He says that it imposes no liability on him to pay the education tax.

The petitioner's case is well founded. The document states what the petitioner shall pay. He has to pay the road cess and any tax levied from time to time by the Government. The education tax is not a tax levied by the Government. It is levied by the District Board. It is true that S. 34 (2), Madras Elementary Education Act, 1920, provides that a District Board must obtain the previous sanction of local Government, unless it is directed by the local Government to levy the tax, but in any event the levy is by the District Board and not by the Government. The tax is levied not for the benefit of the Government, but for the purpose of elementary education in the particular District. S. 36 read with S. 34 (2) provides that the tax shall be deemed to be an addition to a tax levied under all or any of the following heads, namely, land cess, profession tax and house tax. But in no sense is the tax levied by the Government. Mr. Narasimhachariar has asked the Court to hold that the word "Government" should be interpreted as including the District Board. To do so would, in my opinion, be to distort true meaning of the word. Moreover, S. 3 (21), General Clauses Act, 1897, says that "Government" or "the Government" shall include the local Government" as well as the Government of India. No reference is made to local authorities. There is a further answer to Mr. Narasimhachariar's argument. If one turns to the sentence which preceds the provision in the deed with regard to the levy of tax by the Government one sees that the parties used the word "Government" in its proper sense. The lessee shall

> monthly deliver in the taluk cutcherry the accounts relating to Avari (indigo) cotton etc., regarding the said villages to be submitted to the Government.

These accounts have not been submitted to a local authority. No provision having been made in the document for the payment by the lessee of any local tax other than the road cess the respondent cannot in law claim to recover his payment in respect of the education tax from the lessee by virtue of the deed, and the decree passed against the petitioner on the basis of the deed is contrary to law. Mr. Narasimhachariar has asked that he be given leave to amend his plaint in order to plead the right to recover half the amount under the provisions of S. 88, Madras Local Boards Act, 1920. Mr. T. M. Ramaswami Iyer, the learned advocate for the petitioner, has no objection to the amendment being allowed provided he is allowed to plead to the amended plaint. As a matter of fact, in the grounds of appeal he raised the same contention himself as an alternative to his plea of complete non-liability. In these circumstances we will grant the respondent leave to file an amended plaint in the trial Court with liberty to the petitioner to amend his written statement should he so desire. The case will be remanded to the trial Court to be dealt with according to law after amendment of the pleadings. The decree which has been passed is set aside and the petitioner is entitled to his costs in this Court. The costs in the trial Court will abide the further hearing.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 917

HORWILL J.

Dara Tripura Sundaralingam — Petitioner.

v.

Vinjamuri Venkataramanayya — Respondent.

Civil Revn. Petn. No. 2461 of 1939, Decided on 3rd May 1940, to revise order of Sub-Judge, Vizagapatam, D/- 14th November 1939.

(a) Madras Debt Conciliation Act (11 of 1936), S. 25 — In staying proceedings under S. 25 Court cannot impose any condition.

The Court, upon its attention being drawn to the fact that proceedings are pending before the Debt Conciliation Board, is bound to stay whatever proceedings are before it in connexion with that debt. It does not matter whether or no the Court is of opinion that the proceedings before the Debt Conciliation Board are frivolous or intended to delay justice; and no petition for stay is necessary. In staying proceedings under S. 25 the Court cannot impose any condition. The imposition of a condition is therefore ultra vires. [P 917 C 2]

(b) Civil P. C. (1908), S. 151 — Stay of execution under inherent powers — Court can impose terms.

The Court has power, when it orders stay of execution by virtue of its inherent power to do so, to impose such terms as it thinks fit. [P 917 C 2]

P. Somasundaram — *for Petitioner.*

V. Venkataramanayya—*for Respondent.*

Order.—The petitioner brought an application before the Subordinate Judge of Vizagapatam, purporting to be under S. 25, Madras Debt Conciliation Act and S. 151, Civil P. C., asking for a stay of the execution of a money decree pending proceedings before the Debt Conciliation Board under S. 4 of the Act. When the application was filed, a copy of the petition was filed before the Debt Conciliation Board. A counter was filed making the usual allegations of frivolity and so on against the petitioner; and the Court passed an order staying the disposal of the execution application on condition of the petitioner's paying up the costs of the suit or of depositing them into Court on or before a certain date. The petitioner contends that this condition imposed by the order of the Subordinate Judge was ultra vires. Under S. 25, Madras Debt Conciliation Act, the Court is bound to stop all proceedings in connexion with the debt which is being considered by the Debt Conciliation Board. The wording of the section is most peremptory:

> When an application has been made to a Board under S. 4, any suit or other proceeding . . . . in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Court has dismissed the application.

So that the Court, upon its attention being drawn to the fact that proceedings are pending before the Debt Conciliation Board, is bound to stay whatever proceedings are before it in connexion with that debt. It does not matter whether or no the Court is of opinion that the proceedings before the Debt Conciliation Board are frivolous or intended to delay justice; and no petition for stay is necessary. It is not necessary even to call upon the other side for a counter. The Court may require the petitioner to produce proof that he has filed the petition before the Debt Conciliation Board and that it has not been dismissed; and if the petitioner can satisfy him on those points, the Court has no discretion but to stay. The petitioner added S. 151, Civil P. C., as one of the sections under which he asked the Court to exercise its powers; and there can be no doubt that the Court has power, when it orders stay by virtue of its inherent power to do so, to impose such terms as it thinks fit. It was however unnecessary in this case to invoke the inherent powers of the Court under S. 151. What in effect the petitioner did was to draw the attention of the Court to the fact that an application before the Debt Conciliation Board was pending. In staying proceedings under S. 25 the Court cannot impose any condition; for, the power to impose a condition implies a corresponding power to dismiss the application if the condition is not fulfilled. If a conditional order is made under S. 25 staying the suit or other proceeding, the Court cannot dismiss the application upon the non-fulfilment of the condition. From this it follows that the imposition of a condition is ultra vires. This petition is therefore allowed and the condition attached to the order of stay cancelled. The petitioner is entitled to his costs in this Court from the respondent.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 918

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

S. V. S. Nelliappa Pillai — Appellant.

v.

Sethuramalingam Pillai and others — Respondents.

Letters Patent Appeal No. 11 of 1939, Decided on 5th December 1939, against order of Abdur Rahman J., in C. M. A. No. 124 of 1937, D/- 8th November 1938.

Deed—Construction—Suit by *A* for recovery of share in certain property—Suit dismissed—*A* appealing—*B* agreeing to finance appeal—*A* executing document agreeing that in event of appeal being successful *B* should get half share in suit properties as compensation for his trouble — Deed held did not give *B* present interest in suit properties.

A instituted a suit for recovery of share in certain properties. The suit was dismissed. Thereupon *A* appealed and *B* agreed to finance the appeal. By executing a document *A* agreed that *B* should help him financially and in the event of appeal being successful and *B* being able to collect properties belonging to *A*, *B* should divide the properties and should get half share as compensation for his trouble:

Held that the deed did not operate to give *B* a present interest in *A*'s properties: *35 All 273 (PC), Applied.* [P 919 C 1]

N. Somasundaram — *for Appellant.*

K. Venkateswaran — *for Respondents.*

Leach C. J. — The appellant financed an appeal filed by one Avudayappa Pillai in a suit which Avudayappa Pillai had instituted to recover a half share in certain immoveable properties situated in Tinnevelly which he claimed formed part of the joint family estate. It was held that the properties in suit were the separate properties of Baliah Pillai, the deceased brother of Avudayappa Pillai. The suit was dismissed by the trial Judge, the Subordinate Judge of Tinnevelly, and an appeal was filed to the District Court. During its pendency Avudayappa Pillai died and the appellant in this Letters Patent Appeal applied to be brought on the record in his place under the provisions of O. 22, R. 10, Civil P. C. He claimed that he had acquired a half of Avudayappa Pillai's interest in the suit properties by virtue of a deed dated 12th of February 1934. The District Judge allowed the application, but on an appeal to this Court his decision was overruled by Abdur Rahman J., from whose judgment this Letters Patent Appeal has been filed. The learned Judge held that the document on which the appellant relied did not operate to give him a present interest in Avudayappa Pillai's share in the suit properties. He considered that the case fell within the decision of the Privy Council in 35 All 273.[1] The decision of the appeal turns on the effect to be given to cl. 5 of the deed. The clause reads as follows :

> You should render help to me pecuniarily and prefer an appeal, etc., in the Tinnevelly District Court against O. S. No. 22 of 1936 of Tinnevelly Sub-Court on my behalf, and conduct necessary proceedings in the High Court thereon if necessary. In connexion therewith you might engage vakils you like, give vakalat and pay them fees etc., appoint agents and conduct all proceedings in respect of other properties in this District which are not included in the above suit and wherein I should get a share, i. e., in respect of shops and lands purchased by Eswaran Pillai in the name of his wife Sitalakshmi Ammal out of a portion of the money brought from Colombo and belonging to us, you should get my share by conducting proceedings or by a suit according to your discretion. Similarly, you should, on my behalf conduct all necessary proceedings for getting my share in the pangus, in the soda mill, cash shop, license shop, outstandings, cash amounts pertaining to the immovable properties and shops at Colombo, and get a share peacefully or by conducting proceedings as you like. You should spend money as you like in respect of all that and keep accounts yourself. I should, without raising any objection, accept the accounts which may be given by you in respect thereof. The said amounts would bear interest at one per cent. per mensem. You should adjust and take the said principal amounts with interest at one per cent. per mensem out of the properties which I may get for my share. The remaining properties should be divided in equal halves and one-half should be taken by you as compensation for your trouble. The remaining one-half should be delivered to my possession. You are entitled to join as party and conduct proceedings in the above suits.

On the same day on which this agreement was executed Avudayappa Pillai executed a power of attorney in favour of the appellant in order to enable the appellant to conduct the appeal on his behalf and collect the properties awarded to him in the event of the appeal being successful. I am unable to read into cl. (5) a transfer of half share in Avudayappa Pillai's interest. There are no words there implying transfer and when the document is read as a whole what it amounts to is that in the event of the appeal being successful and the appellant being able to collect the properties belonging to Avudayappa Pillai he was to divide them and give one moiety to Avudayappa Pillai and retain the other moiety for himself. The words "on my behalf," which are used twice in the clause, indicate that the appellant was merely acting on behalf of Avudayappa Pillai and not in his own behalf. The words "one half should be taken by you as compensation for your trouble," are definitely opposed to any idea of a present interest. Therefore I am of the opinion that the reading of Abdur Rahman J., of this clause is correct. The statement "you are entitled to join as party and conduct proceedings in the above suits" amounts to nothing if the document does not confer upon the appellant an absolute transfer of a half share, and I hold that it does not. In 35 All 273[1] the agreement said that the financier "will be a cosharer of one-half share" and

---

[1] ('13) 35 All 273=19 I C 340 = 40 I A 86=16 O C 136=11 A L J 469 (P C), Basant Singh v. Mahabir Prasad.

> that in case of success he will be entitled to proprietary possession of the share entitled in para. 1 of this document.

The Judicial Committee said that these provisions did not confer upon the financier a then present right to possession of a share in the property which was the subject-matter of the suit. By the agreement it was contracted that till the suit was successful the financier should be merely a partner or co-owner in a certain undivided fraction of the property. There was no personal grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this that, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned. That seems to me to be the position here and I agree with Abdur Rahman J., that 35 All 273[1] has direct application. I would dismiss the appeal with costs.

Krishnaswami Ayyangar J. — The language of the agreement is by no means as clear as one might wish. I was at first impressed with the argument of the learned advocate for the appellant that a definite right to have the property divided was conferred by this document and there remained nothing further to be done by Avudayappa Pillai for the appellant getting that right. But at the same time I find that there are no words of transfer capable of conferring an immediate right on the appellant. Though the sentence "you are entitled to join as party and conduct proceedings in the above suits" might be regarded as indicating the creation of a present right in the appellant, effect cannot be given to it when the entire document is read as we must read it in the circumstances in which the parties were placed. I therefore agree that the appeal must be dismissed.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 919

KING J.

Gandikota Kamanna — Petitioner.

v.

Tondapu Satti Reddy — Respondent.

Civil Revn. Petn. No. 863 of 1939, Decided on 24th July 1940, to revise decree of Sub-Judge, Coconada, in S. C. S. No. 15 of 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), proviso B—Assessment for four consecutive half years is not necessary.

Under S. 3 (ii), proviso B the assessment for four consecutive half years from October 1935 to September 1937 is not required. [P 919 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), proviso B — It is not necessary that assessment must have been valid.

It is wrong to say that it is only a person who has been validly assessed who is excluded from the definition of agriculturist. [P 919 C 2]

P. Somasundaram and P. Suryanarayana — *for Petitioner.*

K. Kameswara Rao — *for Respondent.*

Order.—I see no ground for revision. It is quite clear from the language of S. 3 (ii), proviso B of Act 4 of 1938 that assessment for four consecutive half years from October 1935 to September 1937 is not required as if that were so, the word "throughout" would be found in the place of the word "within". The second argument is that it is only a person who has been validly assessed who is excluded from the definition of agriculturist. I see nothing in the language of the proviso to support this view. The words are simple "has been assessed" and they are qualified by no adverb relating to the correctness or validity of the assessment. The petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 920

LEACH C. J. AND KUNHI RAMAN J.

Gokuldoss Jamnadoss and Co. — Appellants.

v.

M. Lakshminarasimhalu Chetti and others — Respondents.

Appeal No. 84 of 1937, Decided on 22nd August 1939, from judgment and decree of Wadsworth J., D/- 21st September 1937.

(a) Religious endowment — Dedication complete — Subsequent misapplication of income by donor would not affect its validity.

If there was a completed dedication by the donor for religious purposes the subsequent misapplication of the income by the donor would not affect its validity and would not re-invest him : *A I R 1938 P C 73, Rel. on.* [P 922 C 1]

(b) Limitation Act (1908), Art. 134 (before amendment of 1929)—Art. 134 did not apply to transfer under which possession was not taken by transferee.

Article 134 as it stood before amendment of 1929 did not apply to a transfer from a trustee or mortgagee under which possession was not taken by the transferee : *A I R 1919 Mad 972 (F B), Foll.* [P 923 C 1]

T. R. Venkatarama Sastriar and V. Radhakrishnayya — *for Appellants.*

K. E. Rajagopalachari and K. S. Champakesa Ayyangar—*for Respondents.*

Leach C. J.—There are two questions raised in this appeal. The main question is whether certain immovable property has been dedicated absolutely for religious purposes or only made subject to a charge. The second question is whether the suit out of which the appeal arises is barred by the law of limitation. The plaintiffs in the suit were respondents 1 and 2, both of whom were minors at the time of the institution of the suit on 23rd April 1934. The respondent 1 attained majority soon after the plaint was filed. The grandfather of respondents 1 and 2, one Munnalur Narasimhalu Chetti, was a resident of Madras and possessed three lots of immovable property within the City, namely a house known as Nos. 101 and 102 in the Devaraja Mudali Street, seven houses and shops known as Nos. 133 to 139 in the same street, and a garden known as Nos. 27 and 28, Mundakanniammal Temple Street. The suit was filed to recover possession of the property known as Nos. 101 and 102 in Devaraja Mudali Street. It was the respondents' case that this property was dedicated by their grandfather in 1890 to the deity Sri Tholasingaperumalswami of the Sri Parthasarathi temple, Triplicane, and that he constituted himself the trustee of the property. The grandfather died in the month of December 1892 leaving a widow and an adopted son Venkataraghavalu Chetti, the father of respondents 1 and 2. All the properties owned by the grandfather came into the hands of the adopted son, who by a deed of mortgage dated 28th September 1916 mortgaged the property in suit for Rs. 10,000 to the appellants, treating it as his own property. On 10th January 1921 he mortgaged the same property to the appellants to secure a further advance of Rs. 15,000. He was unable to discharge these mortgages and the appellants filed a suit to enforce them. A mortgage decree was passed on 7th March 1924. On 11th October 1924 with the consent of the Court the mortgaged property was conveyed to the appellants absolutely, the consideration being the satisfaction of the mortgage decree. The appellants were unaware that there had been any dedication of the property for religious purposes, but admittedly nothing turns on this.

On 21st October 1890 the grandfather applied to the Deputy Collector of Madras for the issue of an "A" form certificate declaring the title to the property to be in the deity. Such a certificate is of the nature of a patta and sets out the name of the owner of the property and the land tax payable to Government. The application was made because the grandfather had decided to dedicate this property to the deity mentioned. The application has been put in evidence and prays

> that an A form certificate may be issued to Tholasingaperumal of Triplicane after the usual enquiry under the rules of the Registration Department.

The application also embodied the following statement :

> The certificate of the house herein mentioned is in my name and as I set apart this house as a perpetual gift to Tholasingaperumal of the Parthasarathi temple, Triplicane, I request your honour to issue the certificate in the name of Tholasingaperumal of the Parthasarathi Temple of Triplicane. The property herein mentioned is one of my self acquired properties and the income (deducting the taxes and the necessary repairs) to be derived from the house herein mentioned is to be used and spent to the daily charities and the second Vidayati Utsavam of the aforesaid Tholasingaperumal of Triplicane. The above-mentioned charities are to be conducted by me till my death and afterwards by my heirs, executors, administrators, assigns or legal representatives under the supervision of the aforesaid Tholasingaperumal's trustees or dharmakarthas.

The application was granted and on 21st February 1891 the grandfather "for Tholasingaperumalswami Temple, Triplicane" executed a deed in favour of the Secretary of State undertaking to pay the land tax due to Government in respect of the property. This document constituted the "A" form certificate. There can be no doubt that this deed was executed by the grandfather as trustee of the temple. In addition to there being the words which I have just quoted the witness clause is in the following terms:

> Signed, sealed and delivered by the above-named Munnalur Narasimhalu Chetti for Tholasingaperumal of Parthasarathiswami Temple, Triplicane in the presence of . . . .

The grandfather at the same time made a similar application in respect of the property known as Nos. 27 and 28, Mundakanniamman Temple Street and although the document has not been produced it is not disputed that he also signed a similar deed in respect of that property. The grandfather died leaving a will dated 26th November 1892. The appellants claim that the will shows that there was not an absolute dedication of the property to the deity, but that the property was only charged for the purpose of providing funds for specified religious services. It is therefore necessary to examine in some detail the provisions of the will on which this argument is based. In para. 1 of the will the testator sets out and describes his immovable properties. Para. 2 reads as follows:

> The Deputy Collector's office certificate bearing No. 2826 for the houses and bazaars having door Nos. 101 and 102 in Devaraja Mudali Street, and the Deputy Collector's office certificate bearing No. 2825 for the garden having door Nos. 27 and 28 in Mundakanniammal's Street, Mylapore out of the above immovable properties were issued in the name of Triplicane Singaperumal on 21st February 1891 A. D. In the aforesaid Singaperumal's temple shall be conducted from and out of the balance left after deducting from the income coming from these aforesaid houses, bazaars and gardens, expenses for repairs, taxes, gumastas and others, nityapadi or daily offerings of three-fourths of a measure of sundal or boiled Bengal gram including the offering at Tirumalvada time at a cost of Rs. 4—rupees four per mensem, one palam of Chandanam or sandal paste at a cost of Re. 1—rupee one per mensem thirtham or blessed water and spices therein and light at Tholasujammah plant at a cost of Re. 1-8-0 — rupee one and a half, cardamoms and cloves at a cost of annas 8 — annas eight per mensem, and netti pushpamala or garland of flowers round the head of the Swami at a cost of Rs 2—rupees two per mensem. These charities shall be conducted daily. Moreover, in the Second Vidayat's Utsavam in Vidayat's festival following Brahma Utsavams the offerings of eight gunus of Akkaravadisal (Sugar rice) eight gunus of Baklabath (curd rice), six Pongal Taligas, three-fourths of a measure of Dosays (rice cakes), two measures of sundals, three-fourths of a measure of Vadapadi, one measure of Vadapappu, one viss of jaggery for panakam, and pattis, chandanam, spices and abhishekam and all the expenses shall be conducted at a cost of Rs. 125 —rupees one hundred and twenty five. From and out of the balance left after deducting from the income of immovable properties which are in the name of the aforesaid Triplicane Tholasingaperumal, the taxes, repairs, gumasta and other charges, the charities written above shall be performed permanently and without obstruction by my heirs, executors and administrators. Should there arise any increase or decrease in the income of the said houses, shops and gardens by any reason other than the default of the said persons it shall on such occasions be conducted suitably to such amounts as are realized.

In the next paragraph the testator directs the money required to defray the costs of other religious charities which are specified should be paid out of the income of the house and shop known as No. 138 in Devaraja Mudali Street. As I have indicated in this block of property are seven houses and shops but only one of the buildings is charged with these expenses. Any excess of income from this property is to be enjoyed by the testator's "heirs," etc. The testator then directs that if his adopted son should prove to be wise and behaved properly the estate should be delivered to him upon his attaining 25 years of age. If at that time he was in "wicked ways" he should only be paid Rs. 15 per mensem for his maintenance. In para. 7 the testator gives these directions:

> My wife Lakshmamma should enjoy for her life the balance left after deducting taxes and other charges from the income of the houses and bazaars having Nos. 133 to 139 in Devaraja Mudali Street and she may appropriate as she pleases the jewels which she is at present wearing.

There are other provisions but these have not been stressed in the arguments. The suit was tried by Wadsworth J., who held that the testator before his death had made an absolute dedication of the property in suit and that the will so far as the dedicated property is concerned should only be read as containing directions for the guidance of future trustees in the administrations of the trust. The plea of limitation was raised by the appellants before the learned Judge but rejected. The appellants admit that if the property has been dedicated absolutely the only other question is that of limitation. There is no evidence of the manner in which the income of the property in suit was applied from the date of the "A" form certificate, namely 21st February 1891, to the date of the testator's death, nor is there any evidence as to what became of the income after his death until about the years 1919 or 1920. There is evidence that for five or six years before 1926 the income was applied for the purposes declared by the testator but it is not disclosed whether the income was applied in whole or only in part. If the grandfather's application for a certificate in form "A" and the certificate can be read as completing the dedication it matters not what became of the income. If there was a completed dedication the misapplication of the income would not affect its validity. In 65 I A 106,[1] the Judicial Committee accepted, subject to a qualification, the following statement of the law made by the Lahore High Court:

> It is not disputed that for the foundation of a charitable endowment by a Hindu in the province no writing is required. What is necessary is that the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. Whether he has done so is to be determined by his subsequent acts and conduct. All these propositions are well established. It is not disputed that a valid endowment once created cannot be revoked by the donor.

The qualification of the Board was in these terms:

> Their Lordships agree with this statement, except that the evidence of divestitute may be contemporaneous, as in this case, and, in such a case, the subsequent acts and conduct of the donor are irrelevant and cannot reinvest him.

Now what is the position here? The grandfather, the absolute owner of the property in a written application to the Collector stated that he had set apart the property as a perpetual gift to the deity and asked that a certificate should be issued showing that the title to the property was in the deity. This application was granted and a deed was drawn up and executed by the grandfather as the trustee of the property vested in the deity by which he covenanted for himself, his heirs, executors, administrators, personal representatives, and assigns to pay the land tax to the Secretary of State for India. These documents clearly show that the grandfather had divested himself of all personal interest in the property and obtained from the Secretary of State recognition that the title was in the deity. This is not a case of a colourable transaction. It is true that here we do not know whether the grandfather utilized the income for the trust purposes but this does not matter as there was complete divestiture.

Mr. Venkatarama Sastri on behalf of the appellants has contended that in view of the provisions of the will the proper construction to be placed on the application to the Collector and the "A" form certificate is that there was merely an intention to dedicate. He has argued that a contrary construction would mean that there would be nothing left for the heirs and the testator could never have intended this. I am unable to agree that this would be the case. Of the seven shops and houses known as Nos. 133 to 139 only one was charged for religious purposes and the wording of the will indicates that it was anticipated that there would be surplus income even from this one item of property. In any event there were six houses and shops entirely uncharged. It is true that the testator directed that his widow should enjoy the income of this property for her life and there is no reference to any provision for the adopted son. The adopted son was at that time a boy and it may very well be that the testator considered that the income from the uncharged property was sufficient to support both the mother and son.

But be this as it may, para. 2 of the will is in itself opposed to the contention that there was to be merely a charge. The words "should there arise any increase or decrease in the income of the said houses, shops and gardens, by any reason other than the default of the said persons it shall, on such occasions, be conducted suitably to such amounts as are realized," mean in my opinion that if there was more income than was anticipated more should be spent on the religious objects which the testator had in mind and if the income showed a decrease less should be spent. Then in para. 3 where the charge on No. 138, Devaraja Mudali Street is created there is a special direction that the balance left over after meeting the expenses referred to should be enjoyed by the testator's heirs. There is no such provision in the clause relating to the property in suit. For these reasons I am unable to accept Mr. Venkatarama Sastri's argument that the will shows that in 1890 and 1891 the grandfather had only an intention of dedicating the property and that the dedication which only amounted to a charge was given by the will. The application to the Collector itself negatives this argument and by the deed of 21st February 1891 the intention was carried into effect. Accordingly I hold that there was a completed dedication and that the appellants acquired no title to the property. There is no doubt that they were misled. The father of respondents 1 and 2 when the property came in his possession, succeeded in getting an "A" form certificate which disclosed merely a title in him, but the appellants if they had taken the prudent course of searching the registers in the Registrar's office before accepting his title would not have been in the predicament which they are now in.

---

[1] **('38) 25 A I R 1938 P C 73 = 172 I C 993 = 65 I A 106 = 32 S L R 350 (P C), Sunder Singh Mallah Singh Sanatan Dharam High School, Trust, Indaura v. Managing Committee, Sunder Singh Mallah Singh Rajput High School, Indaura.**

The point of limitation does not require much discussion as there is the authority of this Court which bound the learned Judge and binds us. The appellants say that the article of the Limitation Act which applies in this case is Art. 134 as it stood before its amendment by the Limitation Act, 1929, which came into force on 1st January of that year. Before the amendment the article provided that the period of limitation for a suit to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration was twelve years from the date of the transfer. The amending Act makes the period run from the date when the transfer becomes known to the plaintiff. It is conceded that if the Article as it now stands applies the suit was in time but it is said that it cannot apply and that the mortgages stand as the suit was filed more than twelve years after the mortgages had been entered into. The mortgages were simple mortgages and the mortgagees were not put in possession until 11th October 1924 when the property was conveyed to them. In 40 Mad 1040,[2] which was decided before the amendment of the Limitation Act, a Full Bench of this Court held that Art. 134, Limitation Act, did not apply to a transfer from a trustee or mortgagee under which possession was not taken by the transferee. Mr. Venkatarama Sastri has conceded that in the face of this ruling he cannot maintain in this Court that the old Art. 134 applies. The appeal fails and must be dismissed with costs in favour of respondents 1 and 2. Respondents 4 and 5 will be granted their costs out of the trust property and we fix the amount at Rs. 50.

C.R.K./D.S. *Appeal dismissed.*

---

[2] ('19) 6 A I R 1919 Mad 972 = 43 I C 31 = 40 Mad 1040 = 33 M L J 320 (F B), Seeti Kutti v. Kunhi Pathuma.

A. I. R. 1940 Madras 923

KING J.

Pattu Achi — Appellant.

v.

V. Rajgopala Pillai and others — Respondents.

Second Appeal No. 518 of 1937, Decided on 3rd May 1940, against decree of Sub-Judge, Mayavaram, in A. S. No. 42 of 1936.

Hindu Law—Adoption—On death of adopted son adoptive mother making adoption to her deceased husband—Estate vested in her as heir to first adopted son is divested.

Where on the death of an aurasa or adopted son the estate which has descended to him from his father vests in his mother as heir, and she makes an adoption to her deceased husband, the estate so vested in her will be divested: *24 W R 183, Dissent.; 5 C W N 20 and A I R 1940 Cal 241, Rel. on; A I R 1936 Mad 642; A I R 1933 P C 155 and A I R 1938 Bom 383 (F B), Expl. and Disting.* [P 924 C 2]

V. V. Srinivasa Iyengar and K. Venkataraman — *for Appellant.*

T. M. Krishnaswami Iyer and C. A. Seshagiri Sastri — *for Respondents.*

Judgment. — The subject-matter of this appeal is part of the property admittedly left by one Venkatachala Pillai who died in May 1890. At that time Venkatachala Pillai was a young man, married to defendant 1 who was shortly expecting a child. She was delivered of a still born female child in July. It is not now seriously disputed that shortly before he died Venkatachala Pillai orally authorized his wife to make an adoption in case the child she was expecting should prove to be a girl. On 9th February 1891 defendant 1 adopted one Pichai Pillai who lived to become a major, but shortly afterwards (in February 1907) was murdered while still unmarried. In 1922 defendant 1 executed Ex. W, by which the estate which had originally belonged to Venkatachala Pillai and was then in her hands, was divided into two portions, the larger half being retained by defendant 1 and the smaller conveyed to Muthukumara Pillai, the nearest reversioner. In May 1926 defendant 1 made a second adoption to her deceased husband, the person chosen as adopted son being the plaintiff who happens to be the natural son of the man who was convicted and hanged for the murder of Pichai Pillai. In 1934 plaintiff filed the present suit for recovery of the property conveyed to Muthukumara Pillai and his principal opponent is defendant 2, Muthukumara Pillai's widow. The suit has been decreed by both Courts below and defendant 2 has filed this second appeal. The first point taken in the appeal is to contend that the adoption of plaintiff is invalid. It is so contended on two grounds : (i) that defendant 1's motive in making the adoption was a corrupt one. It is asserted that she adopted plaintiff only because she had been living in criminal intimacy with his father; and (ii) that the authority to adopt given by Venkatachala Pillai was confined to the adoption of Pichai Pillai. I have had to disallow any argument on the first ground. The intimacy was found against as a fact by the first Court, and the Subordinate Judge's judgment shows that no attempt whatever was made before him to challenge that finding.

The second ground also seems to me to be equally barred by the provisions of S. 100. No doubt there is no precise finding of the exact words used by Venkatachala Pillai in conferring the authority upon his wife, and two views are certainly possible on an examination of some of the exhibits filed in the case which refer to the authority (*see* Ex. B, Ex. G and Ex. J); but the learned Subordinate Judge has definitely found that Venkatachala Pillai's intention was to confer a general power of adoption on his wife and that he 'simply indicated preference' for Pichai Pillai. This finding, it seems to me, is unquestionably a finding of fact with which I cannot interfere in second appeal. The second point taken in the appeal, however, is equally undoubtedly one of law. It relates to the effect of plaintiff's adoption upon the title to the subject-matter of this suit. The argument is put in this way: When Pichai Pillai died defendant 1 succeeded to his estate in her capacity as his adoptive mother. Plaintiff's relationship to Pichai Pillai is that of brother. Of the two relations, defendant 1 and plaintiff, defendant 1 is the preferential heir. Her estate cannot therefore be divested by the adoption, and must continue till she dies. So long as she is alive defendant 2, whose title is good for her lifetime, cannot be dispossessed.

Now, if one considers this matter solely from the point of view of the devolution of property this argument would appear to be unanswerable; but unfortunately for the appellant, the authorities in this matter are almost uniformly against her. The only direct authority in her favour is found in 24 W R 183,[1] a judgment delivered so long ago as 1875. Against her is a direct authority in 5 Cal W N 20[2] followed in 44 C W N 443;[3] and also the opinion of Mayne in para. 197 of Edn. 10, of his Hindu law, where it is stated that

> where on the death of an aurasa or adopted son the estate which has descended to him from his father vests in his mother as heir, and she makes an adoption to her deceased husband, it is well settled that the estate so vested in her will be divested.

The principle of this, according to Mayne, is either that the mother elects to hold the property as her husband's property when she exercises her power of adoption or that the title of the adopted son relating back to his father's death is the necessary legal result of the power to substitute another son for the deceased. I need now refer only briefly to other cases which have been cited before me by the appellant's learned advocate. They are 44 M L W 185,[4] 38 M L W 1[5] and A I R 1938 Bom 383.[6] The first of these is a case in which it was found that though a custom amongst Nattukottai Chetties permitted the adoption of a second son even when the first adopted son had died leaving a widow that adoption did not affect the rights of that widow to the estate. The facts there are thus different and there is no direct pronouncement by the learned Judges which could be applied to the present facts. 38 M L W 1[5] is a judgment of the Privy Council in which the question at issue was the right to succeed to an impartible estate. The rival claimants were an adopted son, who was adopted after the death of a natural son who had survived his father, and a reversioner who claimed to be next in succession to the natural son. The reversioner's suit was dismissed by the Privy Council. This case affords no support to the view that the devolution of this property was unaffected by the adoption—and is of little assistance either way as no woman could ever be entitled to the property. A I R 1938 Bom 383[6] again deals with quite different facts. The widow who made the

---

1. ('75) 24 W R 183, Gobindo Nath Roy v. Ram Kandy Chowdhry.
2. ('01) 5 C W N 20, Rai Jatindranath v. Amritlal.
3. ('40) 27 A I R 1940 Cal 241=188 I C 479=71 C L J 243 = 44 C W N 443, Hamed Gazi v. Sadat Ali.
4. ('36) 23 A I R 1936 Mad 642=164 I C 977=59 Mad 1064 = (1937) 1 M L J 60 = 44 M L W 185, Subramania Chettiar v. Somasundaram Chettiar.
5. ('33) 20 A I R 1933 P C 155=143 I C 441=60 I A 242 = 38 M L W 1 = 12 Pat 642 (P C), Amarendra Man Singh v. Sanatan Singh.
6. ('38) 25 A I R 1938 Bom 383 = 177 I C 165= I L R (1938) Bom 679 = 40 Bom L R 559 (F B), Radha Bai v. Rajaram.

adoption in that case, was the widow of a man who never himself had any exclusive title to the property in dispute. Her adoption therefore could obviously never affect the devolution of her property which descended to her only through her husband's brother. In the result I see no reason at all to interfere with the decree of the lower Appellate Court and dismiss this appeal with costs. Leave granted.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 925

PATANJALI SASTRI J.

Karanam Syama Rao — Petitioner.

v.

V. Hanumantha Rao — Respondent.

Civil Revn. Petn. No. 1256 of 1939, Decided on 26th July 1940, to revise order of District Court, Kurnool, D/- 13th February 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 11 and 19 — Compromise providing that certain gross sum should be payable in full satisfaction of suit claim and costs without allocating any part of that sum specifically to costs of suit—Ss. 11 and 19 cannot be invoked by creditor.

Reading Ss. 11 and 19 together as they should be it is clear that they are applicable only to cases where any specific sum is decreed as costs by the Court. Hence where parties enter into a compromise agreeing that a certain gross sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in a case of that kind to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment-debtor applies for scaling down the decree-debt under S. 19 of the Act. [P 925 C 2]

K. S. Jayaram — *for Petitioner.*

A. C. Sampath Ayyangar — *for Respondent.*

Order. — This is a petition to revise the order of the District Judge of Kurnool scaling down the amount due to the respondent under a compromise decree passed on 31st August 1936 in O. S. No. 14 of 1936 on the file of the Subordinate Judge's Court, Kurnool. The compromise decree, so far as it is material here, runs as follows :

> In full satisfaction of the suit claim and costs, besides the sum of Rs. 1000 received by the plaintiff's next friend on 22nd August 1936, the defendant has to pay Rs. 2100 . . . . Each party shall bear the costs incurred by him.

It was admitted that the principal sum originally advanced was Rs. 2800, and the lower Court applying S. 8, Madras Agriculturists Relief Act, deducted the amount paid by the petitioner Rs. 3980-8-0 from twice the principal amount and found that the balance payable on the date of the decree was Rs. 1619-8-0. So far there is no dispute between the parties. The learned Judge, however, proceeded to apply the proviso to S. 19 to a payment of Rs. 140 made after the decree was passed and for this purpose taxed the respondent's costs of the suit at Rs. 347-3-0, and deducting Rs. 140 held that the balance Rs. 207-3-0 was also payable by the petitioner in addition to Rs. 1619-8-0 with interest on the latter sum at the statutory rate. The learned Judge observed :

> Since the decree passed was a compromise decree and the terms of the compromise were 'in full satisfaction of the suit claim and costs,' when the decree is reopened, naturally the defendant cannot have the best of both the worlds and claim reduction under the Act by reopening and amending the decree and also state that the provision of the Act that all costs lawfully extended by the decree-holder should be reimbursed to him should not come into operation.

The petitioner contends that this view of the learned District Judge is erroneous, and I am inclined to agree with him. Having regard to the definition of 'debt' in S. 3 (iii) which expressly includes sums payable under a decree, it is clear that all amounts payable under decrees are also liable to be scaled down under the provisions of the Act. S. 11, however, excepts "any sum decreed as costs by any Court" and S. 19 which provides the machinery for the scaling down of decree-debts gives effect to this exception by providing that all payments made or amounts recovered in respect of a decree should first be applied in payment of "all costs originally decreed to the creditor". Reading these provisions together, as they should be, it is clear to my mind that they are applicable only to cases where any specific sum is decreed as costs by the Court. It follows therefore that where parties enter into a compromise agreeing that a certain sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in a case of that kind to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment-debtor applies for scaling down the decree debt under S. 19 of the Act. When a suit is compromised by the parties agreeing to pay and receive a gross sum without any allocation, they do not ordinarily contemplate any specific sum as being payable by the one side or the other towards the costs of the proceedings; and it is beyond the province of the Court to allocate any portion of the consolidated amount agreed to be paid to such costs or impose any fresh liability for costs as a condition of scaling down the debt. In the present case, though the compromise referred to the defendant's liability to pay Rs. 2100 in full satisfaction of the suit claim and costs, in another place, it provided that each party shall bear the costs incurred by him. This shows, what is usually the case, that the parties had no definite idea in their mind that any part of that sum represented the liability for costs.

For these reasons, I hold that the view taken by the learned District Judge is wrong and the sum of Rs. 140 paid after the decree should go in reduction of the total sum payable under the compromise decree. With this modification, the order of the learned District Judge is confirmed. As the petitioner also raised another point which was not however seriously pressed, I direct each party to bear his own costs of this revision petition.

C.R.K./D.S. *Order modified.*

A. I. R. 1940 Madras 926

HORWILL J.

G. Chokkappa Chetty — Petitioner.

v.

M. Santhubava Rowther — Respondent.

Civil Revn. Petn. No. 475 of 1937, Decided on 25th April 1940, to revise order of District Munsif, Tiruppur, D/- 16th November 1936.

(a) Arbitration — Application to extend time for making award — Court's jurisdiction to extend time is not lost even if in interval between filing of application and passing order for extension award is actually made.

The order passed by a Court on an application to extend time for making award must refer back to the date on which the application is put in; for, it is the state of affairs on that date that the Court has to consider in making an order. If on the date of the application the Court had jurisdiction to extend the time, it cannot lose jurisdiction because in the interval between the filing of the petition and the passing of orders the award is actually made: *13 All 300 (P C), Disting.* [P926 C 2]

(b) Arbitration — Mere writing of award does not amount to making of award.

The mere writing of an award would not amount to the making of the award. There can be no finality in the writing of an award; the signing of the award gives legal effect to it. [P 927 C 2]

A. C. Sampath Ayyangar—*for Petitioner.*

T. M. Krishnaswami Aiyar and A. Balasubramania Aiyar — *for Respondent.*

Order. — The dispute between the petitioner and the respondent was referred to arbitration. The award was not made on the date prescribed, but extensions were asked for from time to time. The award was actually written on 26th August 1936; but the order of Court allowing the last extension of time was not passed until 27th August 1936, although the application had been filed in Court some days before the award was made. The principal question argued in this Court and in the Court below was whether the Court became functus officio in this matter on the day the award was made and was incompetent to pass the order on 27th August 1936 extending the time.

It seems to me that the order passed by a Court on an application must refer back to the date on which the application is put in; for, it is the state of affairs on that date that the Court has to consider in making an order. If, on the date of the application, the Court had jurisdiction to extend the time, I cannot see how it lost jurisdiction because in the interval between the filing of the petition and the passing of orders the award is actually made. There is nothing in Sch. 2, Civil P. C., which says so, and no decision has been pointed out to me in which a Court has gone so far as to say that a Court loses jurisdiction to extend the time when once the award has been made. 13 All 300,[1] is a Privy Council decision upon which much reliance has been placed by learned counsel for the petitioner. The facts of that case do not resemble those of the present nor was an order there made under the same provision of law as here; but Mr. Sampath Ayyangar relies on a few words contained in that judgment without reference to the facts of that particular case. There, the award was actually made at a time beyond the period to which the date had been extended, and their Lordships remarked that when once an award was made and delivered, the power of the Court under S. 514 was spent. The reason they gave was that

> that contention (that the award is not valid) has to support it the express statutory enactment that no award shall be valid unless made within the period allowed by the Court.

---

[1] ('91) 13 All 300 = 18 I A 55 = 6 Sar 14 (P C), Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar.

Section 521 of the old Code did in fact say: "No award shall be valid unless made within the period allowed by Court." There is no such clause in the present Act and, as has already been remarked, in the case before their Lordships the award was not made even within the extended time. In 65 M L J 376,[2] Curgenven J., doubted whether 13 All 300[1] was any longer good law. In 45 Bom 1071,[3] where an application was put in by consent for extending the time for making the award, it was held that the date of the application must be referred back to the date when it was filed in the office of the Prothonotary and not to the date when it was signed by him. That case is not similar to the present one; but it lays down the principle that an application dates back to the day of its presentation which has, I think, a wide application. Moreover, if the contention of the learned counsel for the petitioner is correct, then the arbitrators were functus officio on the date on which they should have made the award expired, and they had no power to continue the arbitration proceedings while the application was pending. If that were so, then there was no valid award made at all. It would also follow from this proposition that applications for extension would become largely fruitless because the applicants could do nothing before the applications were granted and so proceedings would drag on indefinitely. Needless to say, there is no authority, either for the original contention of Mr. Sampath Iyengar or for any of the principles that have been deduced from it. It seems to me that the arbitrators had jurisdiction to continue the arbitration subject to the result of their application to extend the time.

It has been argued on behalf of the respondent, on the authority of 65 M L J 376,[2] that a revisional Court has no jurisdiction to interfere with an award passed in these circumstances; but I do not find that 65 M L J 376[2] goes so far. There were special circumstances there which led the learned Judge to hold that the order of the lower Court filing the award was right and could not be interfered with in revision, and that the only remedy of the aggrieved person was to take separate proceedings to have the award set aside. I L R (1938) 2 Cal 482,[4] is a very important decision on the present para. 8 of Sch. 2; for it holds that the section is so widely worded that an application for extension of time put in even after the award is made can be granted; and that if it is granted the award can be filed. The wording of para. 8 is certainly wide enough to carry this meaning and with due respect I agree. I find no reason in the present provisions relating to arbitration for supposing that once an award is made the Court ceases to have jurisdiction to extend the time. The old Code did contain such a provision; but that is absent in the present Act.

The learned District Munsif has supported his finding on another ground; and that was that one must not suppose that because the award was written on 26th August 1936, it was necessarily made on that day. 22 Mad 22[5] pointed out that filing is not making, filing being a mere administrative act; but it was held in A I R 1928 Lah 753,[6] that an award has to be pronounced before it can be said to be made and that filing it in the Court is one of the ways of pronouncing it and that if the pronouncing of the award did not take place until the award was filed into Court, then the date of the making of the award was the date of the filing of it. It is unnecessary for me to consider whether this decision is correct; but it does seem to be true that the mere writing of an award would not amount to the making of the award. There can be no finality in the writing of an award and if the arbitrators choose to tear it up and write another, I can see no reason why they should not do so. It may however be argued that the signing of the award gives legal effect to it, and if so, then the award was made on the 26th, the date of writing it. The petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

---

[2] ('33) 20 A I R 1933 Mad 697=147 I C 476=65 M L J 376, Annamalai Chettiar v. Annamalai Chettiar.

[3] ('21) 8 A I R 1921 Bom 419=63 I C 929 = 45 Bom 1071=23 Bom L R 614, Gopalji Kallianji v. Chhaganlal Vithalji.

[4] ('38) 25 AIR 1938 Cal 260=180 I C 346=I L R (1938) 2 Cal 482 = 42 C W N 883, Jethalal Laxmichand v. Amrita Lal.

[5] ('99) 22 Mad 22, Arumugam Chetti v. Arunachalam Chetti.

[6] ('28) 15 A I R 1928 Lah 753 = 110 I C 748, Harbhanjan Singh v. Mewa Singh.

A. I. R. 1940 Madras 928

VENKATARAMANA RAO J.

R. K. Presanna Venkatesa Rao — Appellant.

v.

Trichinopoly District Co-operative Central Bank, Ltd. and others — Respondents.

Second Appeal No. 470 of 1937, Decided on 30th April 1940, against decree of Sub-Judge, Trichinopoly, in A. S. No. 49 of 1937.

Company — General Body can sanction payment of gratuity to ex-servant even if by-laws did not provide for its payment — Mere fact that Board of Management is delegated power to frame by-laws does not take away power of General Body to sanction gratuity.

The payment of gratuity to an officer is matter relating to the administration and management of the affairs of a company and so long as the General Body acts within the ambit of the articles of association, any act done by them in regard to the management of the company will be intra vires and not ultra vires. Even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. The fact that the Board of Management is delegated the power to frame by-laws does not take away the power of the General Body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the Board of Management. [P 928 C 2; P 929 C 1]

K. Rajah Ayyar and S. V. B. Rao — *for Appellant.*

K. V. Krishnaswamy Iyer and T. S. Krishnaswami Ayyangar — *for Respondents.*

Judgment. — The question for decision in this second appeal is whether the award of the sum of Rs. 1295 paid as gratuity to defendant 2 by defendant 1 Bank in pursuance of a resolution of the General Body, dated 23rd November 1935 is valid. The learned Judge in the Court below answered the question in the affirmative. The question is whether his view is sound. Mr. Rajah Iyer canvasses this view on two grounds: (1) The Ex-Secretary was permitted to retire on 17th March 1935 on production of a medical certificate which stated that he was suffering from chronic bronchitis and would not be in a position to attend to his duties for a period of six months. Under the Gratuity Rules which govern the payment of gratuity, the Ex-Secretary would not be entitled to claim any money as and by way of gratuity; because the rules contemplated certain conditions on fulfilment of which alone an ex-servant of the Bank can claim gratuity. However the Board of Management seems to have granted the gratuity but exception was taken by the Deputy Registrar of Co-operative Societies and the Board of Management was requested to get the sanction of the General Body to the said payment. After the receipt of that letter from the said Registrar, the Board of Management seems to have amended the by-laws by providing that in cases where the Board comes to the conclusion that an officer will have to be permanently incapacitated, though not supported by a medical certificate, it might pay gratuity. On the strength of the amended by-law, the Board of Management wanted to grant the gratuity but, however, by way of abandunt caution, they wanted to put the matter before the General Body. They accordingly framed a resolution to the following effect:

> To sanction a sum of Rs. 1295 as gratuity to the Ex-Secretary, Mr. S. R. Subramania Iyer as recommended by the Board in their Resolution No. 19 dated 2nd October 1935.

The intended resolution was circulated to the share-holders and a General Body meeting of the share-holders was held on 7th December 1935 wherein they passed a resolution sanctioning the payment of the said gratuity. It is contended by Mr. Rajah Iyer that the Board of Management had no power to give retrospective operation to the amended by-law and any payment of gratuity in pursuance of such an amended by-law would be illegal. Therefore when the General Body passed a resolution sanctioning the said sum of Rs. 1295, they were simply sanctioning an illegal resolution of the Board of Management. It must therefore be held that the payment was ultra vires. I am not inclined to agree with this contention. It cannot be denied that even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. In the particular case, how I construe the resolution of the General Body is this. They intended to pay the gratuity of Rs. 1295 and treat the resolution communicated to them by the Board of Management as a recommendation to them. It is perfectly competent to them to grant the gratuity or to decline it.

There is a statement in the resolution circulated to the share-holders that it was recommended by the Board in Resolution

No. 19, dated 2nd October 1935. But that would not invalidate the payment sanctioned by the general body. At the meeting of the general body, the general body must have been appraised that according to the old by-laws, i. e., before they were amended, the payment of gratuity to the ex-Secretary was not proper, that objection was taken by the Registrar of Co-operative Societies and that therefore the sanction of the general body was sought. Considering all these facts, the general body chose to pass the resolution which it is perfectly competent to do and Mr. Rajah Iyer has not placed before me any authority to show that it was ultra vires of them to do so. The matter only relates to the administration and management of the affairs of a company and so long as the general body acts within the ambit of the articles of association, any act done by them in regard to the management of the Bank will be intra vires and not ultra vires. It is next contended by Mr. Rajah Iyer that the power to frame by-laws in regard to the payment of gratuity was delegated to the board of management and once they passed by-laws both the board of management and the general body were bound by them. I am not prepared to agree with this contention. The fact that the board of management is delegated the power to frame by-laws does not take away the power of the general body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the board of management. This power is always vested in the general body and by the mere fact of delegation, it cannot be taken away. Mr. Rajah Iyer has again not placed before me any authority in support of his contention. Only these two contentions were advanced by Mr. Rajah Iyer and I am clearly of opinion that both the contentions are unsustainable. The appeal fails and is dismissed with costs (one set). Leave to appeal refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1940 Madras 929

VENKATARAMANA RAO AND
ABDUR RAHMAN JJ.

Chinni Venkatachalam Chetti — Appellant.

v.

Athivarapu Venkatrami Reddi — Respondent.

Appeal No. 253 of 1937, Decided on 26th April 1940.

1940 M/117 & 118

(a) Mortgage — Mortgage of moveable property is valid — Mortgage of immovable property and also of produce realized therefrom every year—Mortgage of produce operates as mortgage of moveable property — Mortgagee gets title to crop the moment it comes into existence.

Under the Indian law there can be a valid mortgage of moveable property. Under S. 3, T. P. Act, immovable property does not include growing crops. Therefore a deed of mortgage of immovable property and also of the produce realized therefrom every year operates in respect of the produce on the land as a mortgage of moveable property. The moment the crop comes into existence the mortgagee gets title to the crop: *13 Cal 262 and (1882) 19 Ch D 342, Rel. on.* [P 930 C 2]

(b) Mortgage — Mortgage of produce of land —Land subsequently leased—Standing crop on land claimed by mortgagee before its removal — Mortgagee's title must prevail over lessee with notice of mortgage.

In the case of a mortgage of produce of land realized every year so long as the mortgagee allows the mortgagor to remove the crops and does not secure them during the year the crops were raised he loses his right to them. His rights cannot prevail against a bona fide assignee from the mortgagor without notice of the mortgage in his favour. But where the lessee of land takes the assignment of the lease with notice of the mortgage of produce of that land realized every year and the mortgagee claims the standing crop on the land before it is removed the mortgagee's title to the crops must prevail over that of the lessee: *31 Cal 667 ; (1882) 19 Ch D 342 ; (1872) 14 Eq 32, Rel. on ; (1881) 16 Ch D 104, Expl. and Disting.* [P 931 C 1 ; P 932 C 1]

(c) Mortgage — Mortgage of moveable property—Mortgagee cannot claim possession—He can enforce his mortgage only by suing for sale of property mortgaged or by appointment of receiver to secure possession thereof in order to realize his security.

A mortgagee of moveable property is not entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a receiver to secure possession of it in order that his security may be realized. [P 931 C 2 ; P 932 C 1]

V. Govindarajachari — *for Appellant.*

M. S. Ramachandra Rao and D. R. Krishna Rao — *for Respondent.*

Venkataramana Rao J. — This appeal arises out of a suit to enforce two deeds of mortgage dated 24th June 1924 and 24th April 1930 executed by the deceased father of defendants 1 to 3 to the plaintiff. Both the deeds of mortgage not only gave security to the plaintiff over the immovable property comprised therein but also over the produce realised therefrom every year. The operative portions in the deeds of mortgage run thus : "The produce realised therefrom every year have been hypothecated to you." The question for decision in this appeal is whether the plaintiff is not entitled to enforce his mortgage security over a sum of Rs. 364 which was deposited into Court during the pendency of the suit being the net sale proceeds of the crops of Fasli 1345 on lands which are items 1, 2, 8, 9, 10 and 11 of Sch. A to the plaint comprised in the deeds of mortgage. The question arises in this way. On 14th May 1933 the father of defendants 1 to 3 executed a registered lease deed of the said lands in favour of defendants 7 and 8 for a period of five years commencing from Fasli 1343. The rent reserved thereunder was ten putties of paddy and eighty bundles of hay worth Rs. 10. Defendant 6 in execution of a money decree obtained by him against defendants 1 to 3 as representatives of their father in O. S. No. 149 of 1934 on the file of the District Munsif's Court of Nellore attached the immovable properties which were comprised in the deeds of mortgage. Objections were raised as regards the sale of the properties in pursuance of that attachment and the matter was compromised by the mother of defendants 1 to 3 executing a deed of transfer of the said lease in favour of defendant 6 for the unexpired period of three years in satisfaction of his decree and the sale and other proceedings were stayed. The deed of transfer is dated 24th September 1935. Defendant 6 full well knew that the property comprised in the lease deed was subject to the two mortgages in favour of the plaintiff because it was distinctly recited in the counter-affidavit filed by the guardian of defendants 1 to 3 objecting to the sale that the property was subject to two mortgages in favour of the plaintiff.

The plaintiff also obtained a money decree against defendants 1 to 3 in S. C. S. No. 117 of 1934 on the file of the District Munsif's Court of Nellore in respect of an unsecured debt due by their father and in execution of that decree attached the standing crops on the lands which were the subject-matter of the lease. Two claim petitions were put in, one by the tenants defendants 7 and 8 and other by defendant 6. Both the claims were allowed on the ground that the possession of crops was not with the plaintiff. The crops were thereafter harvested and before they could be removed they were again attached by defendant 11 in execution of a money decree. The plaintiff filed the present action and applied for the appointment of a receiver to take possession of the said crops. By an order dated 7th July 1936 the crops were directed to be sold and after meeting certain outgoings the balance was directed to be deposited into Court and from and out of the amount so deposited defendants 7 and 8 were asked to take their lessees' share. It is with respect to the remaining amount that a controversy has arisen between the plaintiff and defendant 6. Under both the deeds of mortgage the plaintiff is given security over the produce. Under S. 3, T. P. Act, immovable property does not include growing crops. Therefore the deeds of mortgage will operate in respect of the produce on the land as a mortgage of moveable property. Under the Indian law there can be a valid mortgage of moveable property: *vide* 13 Cal 262.[1] The moment the crop comes into existence the mortgagee gets title to the crop. The principle of law that is usually applied is that enunciated by Jessel M. R. in (1882) 19 Ch D 342,[2] namely:

> A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done fastens upon that property, and the contract to assign them becomes a complete arrangement.

This principle was applied in a case reported in 31 Cal 667,[3] where the validity of a mortgage of the produce of a factory, namely indigo cakes that were manufactured, came into question. The learned Judges Brett and Mitra JJ., referring to (1882) 19 Ch D 342[2] observed thus:

> The property hypothecated was the indigo cakes manufactured every season by the Pupri Indigo Factory from the crops grown on the lands of the factory from the date of the mortgage deeds, until such time as the total mortgage money with interests and costs of Court shall be paid by the mortgagor.

They held in that case that the title secured under such mortgage would prevail over the title of a purchaser under a later mortgage of the said cakes. The facts of that case were as follows: On 22nd September 1891 there were two mortgages executed of the factory and its produce by the proprietor Mr. Wilson in favour of one Chowdhry Mahadeo Pershad who obtained decrees thereon and thereafter assigned his interest in those decrees to Messrs. Moran & Co. Messrs. Moran & Co., subsequently became bankrupt and the interest of the firm was represented by the Official Assignee. In 1896 Mr. Wilson mortgaged only the indigo cakes to be manufactured in 1895 and 1896 and in 1896 and 1897 to the

---

1. ('86) 13 Cal 262, Misri Lal v. Morzhar Hossain.
2. (1882) 19 Ch D 342 = 51 L J Ch 14 = 45 L T 567=30 W R 70, Colyer v. Issacs.
3. ('04) 31 Cal 667, Baldeo Prasad Sahu v. A. B. Miller.

plaintiffs who were aware of the prior mortgage in favour of Chowdhry Mahadeo Pershad. Subsequent to the date of mortgage in 1896, Mr. Wilson made over to the plaintiffs in that case a quantity of indigo cakes manufactured in 1896 and 1897. The Official Assignee intervened and claimed them and the question of title was made the subject-matter of a legal proceeding. Pending the adjudication the cakes were sold and the money was brought into Court. It was held that the Official Assignee was entitled to the money in preference to the plaintiffs. The ground on which the learned Judges decided is thus put :

> We think that it is clear that where, as in this case, there were mortgages to the creditor of property which was to come into existence in future, and when the creditor had already paid the consideration, the property, that is to say, the indigo cakes, were bound from the moment that Mr. Wilson acquired them and from that moment he became the trustee of the property for the creditor, who as *cestui que trust* acquired an equitable estate or interest in the property. The delivery after acquisition of the cakes to the plaintiff's servant, if there was in fact such a delivery, could not have destroyed the equitable interest of Messrs. Moran and Co., already existing in them, unless indeed the plaintiffs were bona fide transferees for value without notice.

It seems to us that the principle of this decision would apply to the present case. Defendant 6 took the assignment with notice of the mortgages in favour of the plaintiff. The standing crop on the land before it was removed was claimed by the plaintiff. Therefore, the plaintiff's title to the moneys in Court must prevail over that of defendant 6. But it is contended by Mr. Ramachandra Rao that so long as the plaintiff as mortgagee did not take possession of the crop, the mortgagor would be entitled to deal and dispose of it and in this case as the mortgagee never interfered with the possession of the mortgagors defendant 6 was entitled to receive the rent and the crop and in lieu thereof its value in preference to the plaintiff and he relied on a case in (1881) 16 Ch D 104,[4] where Jessel M. R. stated that under the ordinary law prevailing in England rents and profits of land in mortgage belong to the mortgagor so long as he is allowed to remain in possession and therefore the mortgagor is entitled to sever the crops, which when severed became chattels under the deed and vested in his trustee in bankruptcy. It seems to us that before applying the principle of the English decision we must make note of the fact that in England the growing crop is treated as an interest in land and therefore immovable property. Jessel M. R. recognizes this in the decision relied on. A mortgage of land operates as an absolute conveyance of the property. But in India mortgages such as these in question in the suit do not operate as an absolute conveyance of the property mortgaged. Further, the mortgagee is not entitled to possession of the property unless possession is stipulated for as in the case of a usufructuary mortgage. Having regard to these differences, let us see how far the contention of Mr. Ramchandra Rao is well founded. Even in English law, in the case of a mortgage of a growing crop on the land, a mortgagee is not entitled to claim the crop when it has been removed by the mortgagor but before removal if the mortgagor intervenes and claims it and takes appropriate proceedings, the mortgagee will become entitled to it: *vide* Fisher on Mortgage, Edn. 8, p. 716. In (1872) 14 Eq 32[5] at p. 40, Vice-Chancellor Malins defines the right of a mortgagee thus :

> We know perfectly well that the mortgagee of rent has a right from the very day of his mortgage to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some action on the part of the mortgagee.

Here the mortgagee has really intercepted defendant 6 from removing the crops. Again, the argument based on the question of possession is not sound. Even in English law a distinction is drawn between a case of mortgage of chattels and a case of mortgage of lands. In (1887) 18 Q B D 222,[6] Cotton L. J. in considering the exact rights of sale which a mortgagee of personal chattels possesses remarked thus :

> A pledge of personal chattels as a rule is and must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring . . . . A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt.

Much more so in India where, as pointed out above, the plaintiff mortgagee will not be entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a receiver to secure possession of it in order that his security may be realised. He applied for the appointment of a receiver before the crops were removed from the land and it was on this application for the appointment of a receiver that a consent order was made by which the crops were sold and the sale proceeds deposited into Court. It may be that so long as he allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights will not also prevail against a bona fide assignee from the mortgagor without notice of the mortgage in favour of the plaintiff. Therefore the case in (1881) 16 Ch D 104[4] is not of much assistance to defendant 6. In the result we set aside the judgment of the lower Court in this behalf and allow the appeal with costs, Rs. 100 to be paid by the respondent in the appeal. He will pay back whatever costs were paid by the appellant to the respondent in the lower Court.

---

[4] (1881) 16 Ch D 104 = 50 L J Ch 23.=44 L T 265=29 W R 227, Ex parte National Mercantile Bank, In re Phillips.

[5] (1872) 14 Eq 32=41 L J Ch 423=26 L T 346 =20 W R 436, Wilson v. Wilson.

[6] (1887) 18 Q B D 222=56 L J Q B 139=56 L T 42 = 35 W R 277, Ex parte Official Receiver, In re Moorit.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1940 Madras 932

SOMAYYA J.

Govada Balabharathi Co-operative Credit Society, Govada — Petitioner.

v.

Alapati Venkatakrishnayya and another — Respondents.

Civil Revn. Petn. No. 245 of 1936, Decided on 15th March 1939, to revise order of Dist. Court, Guntur, in C. M. A. No. 53 of 1935.

(a) Madras Co-operative Societies Act (6 of 1932), S. 51—Registrar or arbitrator in passing award acts as Court—Proceeding under Act is suit—Award under Act is decree within meaning of S. 51 (1), Provincial Insolvency Act — Decree-holder under award under Act is on no higher footing than ordinary decree-holder.

The registrar or the arbitrator in passing the award under the Act certainly acts as a Court. The procedure laid down under the Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are satisfied in a proceeding under the Act. An award under the Act is a decree as used in S. 51 (1), Provincial Insolvency Act. But there is no reason to suppose that a decree-holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder. [P 933 C 1, 2; P 934 C 1]

(b) Provincial Insolvency Act (1920), S. 51 (1) and (3)—S. 51 (3) applies to sales in execution in general and is not restricted to sale in execution of decree—Both S. 51 (1) and S. 51 (3) refer to same classes of cases.

Section 51 (3) does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore the sale in execution of an award of the registrar or the arbitrator under the Madras Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the receiver, in insolvency. Both Ss. 51 (1) and 51 (3) refer to the same classes of cases: *A I R 1934 Mad 103 (F B), Expl. and disting.* [P 934 C 1]

V. Subramaniam and V. Satyanarayana — *for Petitioner.*

K. Kotayya — *for Respondents.*

Order. — Bala Bharathi Co-operative Credit Society of Govada had to get some money from one Ramatulasamma. The Society proceeded under S. 51, Madras Co-operative Societies Act of 1932, to recover the dues and an award was passed directing payment of the sum due. The award was being executed against the property of the debtor. At that stage, another creditor of the debtor who is respondent 1 in this civil revision petition filed I. P. No. 105 of 1934 to adjudicate Ramatulasamma as an insolvent and applied for the appointment of a receiver under S. 20, Provincial Insolvency Act. The Subordinate Judge before whom the application was made rejected the application holding that the Co-operative Credit Society had a first charge upon the entire estate of the debtor. The matter was taken up on appeal, and the District Judge held that the Co-operative Society had no prior charge over the general estate of the debtor and that the prior charge refers only to the interest of the member in the share capital of the Society. By the time the appeal was decided by the District Judge, the properties of Ramatulasamma had been sold by the sale officer under R. 22 of the rules made under the Act, and hence there was no scope for the appointment of a receiver of the properties. The District Judge therefore dismissed the appeal with a direction that the appellant before him might take necessary steps as regards the sale proceeds in the hands of the Society.

The application out of which the present revision arises, was filed in the Subordinate Judge's Court under S. 51 (1), Provincial Insolvency Act, and S. 151, Civil P. C., requesting the Court to call for the entire sale proceeds of about Rs. 2100 or at least the balance due after deducting the amount due to the Society. The Subordinate Judge dismissed the application holding that neither S. 51 (1), Provincial Insolvency Act nor S. 151, Civil P. C., applied to this case. On appeal, the District Judge came to the conclusion that S. 51 (1), Provincial Insolvency Act, applies and that the Co-operative Society was bound to remit the sale proceeds to the Insolvency Court. The Appellate Court held that the Co-operative Society is not entitled to the benefit of the execution against the receiver in the insolvency because the assets were realized after the date of the admission of the insolvency petition. This revision petition is filed in this Court by the Co-operative Credit Society. It is argued that S. 51 (1), Provincial Insolvency Act, applies only where execution of a decree has issued against the properties of the judgment-debtor. It is said that in this case the property was sold not in execution of a decree but that it was sold in execution of an award under the Co-operative Societies Act (Madras Act 6 of 1932). The expression "decree" is not defined in the Provincial Insolvency Act and under S. 2, cl. 2 of the Act

> Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908 and not herein before defined shall have the same meanings as those respectively attributed to them by the said Code.

Under S. 2 (2), Civil P. C., decree means:

> The formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

What is urged is that the registrar or arbitrator is not deciding a suit. The registrar or the arbitrator in passing the award under the Act is certainly acting as a Court. So, the real question is whether a proceeding under the Act is a 'suit.' The procedure laid down under the Co-operative Societies Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are, I think, satisfied in a proceeding under the Co-operative Societies Act. Under R. 15, cl. (1) of the rules made under the Madras Co-operative Societies Act the reference under S. 51 of the Act is required to be in writing. This corresponds to the plaint in an ordinary suit; the other clauses of R. 15 show that the subsequent procedure is substantially the same as that followed in an ordinary suit. But Mr. V. Subramaniam, the learned counsel for the petitioner, relies upon the decision of the Full Bench in 57 Mad 271.[1] The decision was rendered under the Hindu Religious Endowments Act and it was held that a proceeding under S. 84 (2) of the Act was not a suit. There are various provisions in that Act where the proceedings are referred to as suits, but the proceeding under S. 84 (2) is referred to as a petition and the decision of the Full Bench may be distinguishable on this ground. But the decision lays down that an adjudication in a proceeding will be a decree only where the proceeding starts with a plaint. I do not therefore wish to base my judgment on the question whether a proceeding under the Madras Co-operative Societies Act is or is not a decree within the meaning of S. 2 (2), Civil P. C., and therefore covered by S. 51 (1), Provincial Insolvency Act, though, my own view is that an award under the Madras Co-operative Societies Act is a decree as used in S. 51 (1), Provincial Insolvency Act.

Under S. 28 (7), Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the petition. Under S. 28 (2) on the making of an order of adjudication the whole property of the insolvent vests in the Court or in the receiver and shall be divisible among the creditors. Reading S. 28 (2) and S. 28 (7) together, the result is that on an adjudication the properties of the insolvent vest in the receiver with effect from the date of the presentation of the petition. There are similar provisions in Presidency Towns Insolvency Act and in the English Bankruptcy Act. If matters stood there, all dealings with the property after the date of the insolvency petition would be null and void but certain provisions are enacted to protect persons who deal bona fide with the insolvent before the date of actual adjudication. A payment by the insolvent to any of his creditors, a payment or delivery to the insolvent, any transfer by the insolvent for valuable consideration and any contract or dealing by or with the insolvent for valuable consideration, are protected provided that the transaction took place before the date of the order of adjudication and the person with whom such transaction takes place had not at that time notice of the presentation of any insolvency petition by or against the debtor: *see* S. 55, Provincial Insolvency Act. Then we have S. 51 of the Act which provides for sales in execution of the property of the insolvent. Under S. 51 (3)

> a person who in good faith purchases the property of the debtor under a sale in execution shall in all cases acquire a good title to it against the receiv

---

[1] ('34) 21 AIR 1934 Mad 103=147 I C 614=57 Mad 271 = 66 M L J 43 (F B), Rajagopala Chettiar v. Hindu Religious Endowments Board.

This does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the registrar or the arbitrator under the Madras Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the receiver in insolvency. S. 51 (1) deals with the assets realized in execution. The clause itself begins with the expression "where execution of a decree has issued against the property of the debtor" and provides that in such a case no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in course of the execution by sale or otherwise before the date of the admission of the petition. It appears to me that both Ss. 51 (1) and 51 (3) refer to the same classes of cases; under cl. (3) the sale itself is good and under cl. (1) the sale proceeds go to the receiver if realized after the date of the admission of the petition and to the creditor if realized before that date. There is no reason to suppose that a decree-holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder.

If the contention advanced by Mr. Subramanian is correct, then the protection given under S. 51 (1) will not apply. If the award under the Madras Co-operative Societies Act is not a decree, then the whole of S. 51 (1) becomes inapplicable. In such a case there is no other provision in the Act which will give the Society any immunity even to the extent to which such immunity is provided in the case of executions of decrees by S. 51 (1). The acceptance of the argument far from benefiting the petitioner, is against him. I think therefore that S. 51 (1) should be held to apply to all execution sales and should not be confined to assets realized in execution of "decrees" as restricted by the decision of the Full Bench in 57 Mad 271.[1] In either view therefore whether the word "decree" as used in S. 51, Provincial Insolvency Act, is to be understood in a general sense or in the restricted sense, I think the same result follows so far as this revision is concerned. This civil revision petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1940 Madras 934

PANDRANG ROW AND ABDUR RAHMAN JJ.

Venugopal Pillai and others — Appellants.

v.

Thirugnanavalli Ammal—Respondent.

Appeal No. 338 of 1937, Decided on 2nd August 1940, against decree of Sub-Judge, Cuddalore, in O. S. No. 4 of 1933.

(a) Civil P. C. (1908), O. 2, R. 2 — Suit for possession of property—Past mesne profits need not be claimed—Separate suit for mesne profits is competent.

A claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed and the same is not barred by reason of O. 2, R. 2. Separate suit for mesne profits is competent: *A I R 1915 Mad 912 held correctly decided and followed; A I R 1931 P C 229, Disting.; A I R 1937 Mad 849, Approved; Case law referred.* [P 935 C 1; P 936 C 1]

(b) Civil P. C. (1908), S. 149—Court improperly and without sufficient cause granting time for payment of court-fee after presentation of plaint—Plaint takes effect as if presented with full court-fee on date of its first presentation — No question of limitation arises where plaint as originally filed is within time.

Even where the Court improperly and without sufficient cause grants time for payment of court-fee after the plaint has been presented, the effect of the grant of such time is that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation and no question of limitation can arise where the plaint as originally presented is within time: *A I R 1926 Mad 676, Rel. on.* [P 936 C 2]

(c) Civil P. C. (1908), S. 2 (12)—Mesne profits — Interest on, can be awarded as mesne profits.

Interest on mesne profits can rightly be awarded by the Court as mesne profits. The fact that by the delay in the filing of the suit for mesne profits the claim on the score of interest thereon had proved to be much larger in amount than it would otherwise have been cannot deprive the plaintiff of the interest claimed. [P 937 C 1]

J. R. Gundappa Rao — *for Appellants.*

T. E. Ramabhadrachari — *for Respondent.*

Pandrang Row J. — This is an appeal by defendants 1 and 3 to 6 from the decree of the Subordinate Judge of Cuddalore dated 11th October 1937 in O. S. No. 4 of 1933, a suit to recover mesne profits for Fasli 1333 in respect of certain properties together with interest thereon. There was an earlier suit between the parties which related to these very properties for cancelling a certain lease granted in respect of them by the plaintiff's great grandmother (defendant 2) on 8th August 1923 for three years in favour of defendant 1. The properties in question belonged to the plaintiff who was then a minor under the testamentary guardianship of defendant 2, the great grandmother who had been appointed to manage the properties by the will of the plaintiff's father, one Thangaswami, dated 6th July 1915. The testator died a few days later and in the previous suit there was no dispute as to the genuineness of the will. That suit was decreed and the appeal from the decree of the first Court was dismissed by the High Court on 30th August 1932. There was some attempt made to take the matter to the Privy Council but the idea was finally abandoned and the decree of the High Court which dismissed the appeal with costs was the final decision in that suit. The present suit was instituted on 14th October 1932, that is to say, one and a half month after the High Court had decided the suit in favour of the plaintiff who claims to have attained majority, being till then a ward of the Court under the Guardians and Wards Act, only after attaining her 21st year which, according to her, was on 15th October 1929. The present suit was thus instituted just before the lapse of the period of three years after attaining majority. The suit has been decreed by the Subordinate Judge and the present appeal is, as stated already, by defendants 1 and 3 to 6.

As in the Court below, in this appeal also, a good deal of argument has been directed to the point of the alleged bar imposed by O. 2, R. 2, Civil P. C., to the present suit, the appellants' contention being that the present claim for mesne profits for Fasli 1333 should either have been included or had actually been included in the earlier suit inasmuch as it arose out of the same cause of action. This point has been discussed by the Court below some what briefly and rightly so because the point is really concluded by the Full Bench decision in 38 Mad 829[1] which has been subsequently followed in 51 M L J 252[2] and it may also be added that no other High Court has taken a different view, and on the other hand there are several decisions of other High Courts which take the same view, namely that a claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed by reason of O. 2, R. 2, Civil P. C. The only important reason given to us by the learned advocate for the appellants for not accepting the view of the lower Court on this point which merely followed the Full Bench decision in 38 Mad 829[1] is that in view of certain observations and the decision in a later Privy Council case 61 M L J 294,[3] it must be held that the view taken by the Full Bench in 38 Mad 829[1] is not correct. No doubt it was also argued that as a matter of fact the claim to past mesne profits had been made in the earlier suit and therefore the present claim was not maintainable. There is, however, no substance in this contention. A perusal of the plaint in the former suit makes it perfectly clear that in so many words the past mesne profits due to the plaintiff in respect of the plaint properties was not included in the suit and that the plaintiff intended to bring a separate suit in respect of the same. In view of this specific statement, and in the absence of any language in the prayer portion of the plaint to show that any claim to past mesne profits was included in the plaint, it is impossible to accept this contention.

As regards the main argument, namely that the Full Bench decision in 38 Mad 829[1] is not good law, it is enough to say that nothing in the Privy Council judgment in 61 M L J 294[3] is really contrary to what has been stated by the Full Bench decision in 38 Mad 829.[1] The Privy Council case does not deal with a claim to mesne profits in the first place. Secondly it is a case in which the prayer that was made in the subsequent suit, namely for taking accounts, was a prayer that could have been made on the same foundation of fact and law as the claim in the earlier case which was to declare that a certain trust existed and for reconveyance of certain properties. It is not as if this contention that the Full Bench decision in 38 Mad 829[1] is not correct in view of the Privy Council decision in 61 M L J 294[3] is a new argument put forward for the first time. A similar contention appears to have been pressed in A I R 1937 Mad 849[4] and repelled in that case by Venkataramana Rao J. It is not necessary to repeat the reasons given by the learned Judge for repelling this contention. We are in general

---

1. ('15) 2 A I R 1915 Mad 912=27 I C 679=38 Mad 829=28 M L J 127 (F B), Ponnammal v. Ramamirda Aiyar.
2. ('26) 13 AIR 1926 Mad 1015=97 I C 389=51 M L J 252, Khuddus v. Mohammad Hussain.
3. ('31) 18 AIR 1931 P C 229 = 134 I C 654 = 61 M L J 294 (P C), Naba Kumar v. Radhashyam.
4. ('37) 24 AIR 1937 Mad 849 = 174 I C 181 = (1938) 1 M L J 320, Ramiah v. Thathiah.

agreement with what he has said in that case and we need only repeat some of the references which he has made in the judgment, namely 71 M L J 677,[5] 59 Bom 454[6] and 53 All 951.[7] In the last of these cases, there is a comparatively full discussion of the subject. It is enough to add that the law as laid down by the decision in 38 Mad 829[1] merely reiterated and re-affirmed the law prevailing in Madras since 11 Mad 210[8] which is a case of 1888 and the Full Bench decision in 38 Mad 829[1] which is a case of 1914 has held the field without any judicial expression of any doubt regarding its correctness all these years. A further point is that no other High Court has sounded a different note, and on other hand there are several decisions which take the same view. In these circumstances and having regard to the state of the authorities which are practically unanimous for so many years, it is impossible for us to accept the contention put forward on behalf of the appellants in this case. We therefore find that there is no bar imposed by O. 2, R. 2, Civil P. C., on the plaintiff's claim for mesne profits in this case.

The other points raised in this appeal on behalf of the appellants can be disposed of somewhat briefly because there is really no substance in them. One of the two points is one of limitation which was sought to be based on two grounds. These are dealt with in paras. 64 to 86 of the lower Court's judgment and para. 88 respectively, and there is little to add to what the lower Court has said on these points. The first ground is a pure question of fact, namely the date of the birth of the plaintiff. There is an extract from the birth register which is not attacked on the ground of forgery or the like which shows that the plaintiff was born as alleged by her on 15th October 1908. This practically unimpeachable evidence and other evidence which points in the same direction has been sought to be attacked on the ground that the birth register extract relates not to the plaintiff but to a younger sister of hers who died a few days after birth. This story has been sought to be established by the evidence of witnesses who were not accepted by the lower Court as witnesses of the truth. No attempt was made to file any extract of the birth register or death register relating to this alleged younger sister of the plaintiff, and as the learned Subordinate Judge points out, if for any reason such an extract could not be got, it was open to the appellants to have examined at least the village munsif of the village in which the plaintiff, according to the appellants, is alleged to have been born, namely the village Movur. On the whole, we see no reason to differ from the conclusion come to by the trial Judge on this pure question of fact and in respect of which unimpeachable documentary evidence is all on the side of the plaintiff and there is only unreliable oral evidence on the side of the appellants.

As regards the other ground, very little was said to us in support of the contention and obviously the contention is without force. The contention is that the suit is barred by limitation because the Court gave improperly and without sufficient cause time for payment of court-fee after the plaint had been presented. Whatever might have been the reasons for the Court's granting time, the effect of the grant of such time is clear, namely that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation, a proposition put beyond doubt by S. 149 of the Code: *vide* also the decision in 51 M L J 90.[9] The contention therefore that this claim is barred by limitation has no substance and must be repelled.

The remaining point of any substance is that the value of paddy fixed by the Court below is excessive. The value has been fixed at Rs. 2-10-0 per kalam, a kalam being said to be 24 measures. This estimate is, in our opinion, in accordance with the weight of the evidence which has been fully discussed. There has been no omission on the part of the Court below to deal with any material part of the evidence bearing on this point and we do not see any error of judgment, in assessing the value to be given to the evidence on both sides. It is a point worthy of mention that defendant 1 himself when he claimed rent in respect of these very properties from his sub-tenants claimed the value of paddy at Rs. 4 and at Rs. 3-8-0. Even allowing for some exaggeration, it is impossible for it to be contended now that Rs. 2-10-0 is excessive. The estimate is mainly based on the evidence given in the previous suit by a clerk of a paddy merchant whose disinterestedness is not unquestioned and his evidence was obviously based on the accounts which he had in his possession. That is really the best evidence available in the present case on this point, and the lower Court could not be said to have gone wrong in relying mainly on that evidence.

---

[5] ('37) 24 A I R 1937 Mad 46 = 165 I C 972 = I L R (1937) Mad 284=71 M L J 677, In re Ekanthalingaswami Koil.

[6] ('35) 22 AIR 1935 Bom 306=157 I C 634=59 Bom 454=37 Bom L R 336, Rama Kallappa v. Saidappa Sidrama.

[7] ('31) 18 AIR 1931 All 429=133 I C 298=53 All 951 = 1931 A L J 673 (SB), Ram Karan Singh v. Nakchhed Ahir.

[8] ('88) 11 Mad 210, Tirupati v. Narasimha.

[9] ('26) 13 A I R 1926 Mad 676=95 I C 439 = 51 M L J 90, Basavayya v. Venkatappayya.

Something was said to us on the award of interest on the amount of mesne profits, calculated on this basis, namely Rs. 2-10-0 a kalam in the lower Court's decree. The definition of 'mesne profits' in the Civil Procedure Code itself shows that interest is included; in other words, interest can rightly be awarded by the Court as mesne profits. It was also stated that by the delay in the filing of the present suit, the claim on the score of interest has proved to be much larger in amount than it would otherwise have been. This does not however show that the plaintiff is not entitled to the interest which she claims. On the other hand, the appellants, have, in our opinion, not the slightest claim on the indulgence of this Court. Their conduct as found in the previous suit was extremely reprehensible. There was a conspiracy to defeat the rights of the plaintiff who was then a minor to which her testamentary guardian herself was a party. A grosser case of fraud could hardly be imagined and the present suit is practically for mesne profits in respect of the very property which was attempted to be alienated by means of a lease for a very low rent in favour of one of the appellants, namely defendant 1. We see therefore no reason whatever to interfere with the decree of the Court below. That decree is affirmed and this appeal is dismissed with costs of the respondent (plaintiff). We are informed that an application has been made to scale down the decree-debt in the Court below, and it is enough to say in connexion with this that the decree in this appeal will not prejudice in any way the disposal of the application, if any, to scale down the debt.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 937

KING J.

V. Srinivasachariar and another — Petitioners.

v.

The Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd. —Respondent.

Civil Revn. Petn. No. 1841 of 1939, Decided on 14th August 1940, to revise order of District Munsif, Chingleput, D/- 4th October 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (iii)—Word "liability" is not limited to liability incurred only by borrower who is guilty of no act of default.

It is wrong to say that the Legislature in drafting S. 10 (2) (iii) is dealing only with the primary rate of interest charged and that the Section cannot apply to any rate which is chargeable in case of default. The word "liability" cannot be limited to a liability incurred only by a borrower who is guilty of no act of default. [P 938 C 1]

(b) Debtor and creditor—Interest—Meaning explained.

When money is borrowed and a larger sum is to be repaid the excess over the principal must be treated as interest. [P 938 C 1]

D. Ramaswami Ayyangar — *for Petitioners.*

M. E. Rajagopalachari—*for Respondent.*

Order. — The question involved in this civil revision petition is the interpretation of S. 10 (2) (iii) of Madras Act 4 of 1938. The respondent is the Conjeevaram Hodgsonpet Dharmarakshaka Nidhi Ltd., from whom the petitioner borrowed Rs. 1500 in February 1927 upon a mortgage bond. The suit is brought upon this mortgage bond in March 1932 and a decree has been granted to the respondent and the mortgage property has been sold. The petitioner has applied under S. 23 of the Act to have the sale set aside. He will not be entitled to this relief if in the words of the sub-section with which we have to deal the interest payable in respect of his liability is not more than nine per cent. per annum as the respondent here is a public company as defined in the Companies Act. The terms of the bond are somewhat complicated. The interest chargeable upon the money borrowed is only $6\frac{1}{4}$ per cent. in the first instance but it is payable at the end of every month and there are provisions also that subscriptions are to be made to the company and those subscriptions are to be credited towards repayment of the principal. If there is no default in the payment of interest and the payment of those subscriptions there is no question but that the rate of interest will be only $6\frac{1}{4}$ per cent., but on default further interest is chargeable on both interest and the amount due for subscriptions. The learned District Munsif who tried the suit in the first instance has held that Sec. 10 (2) (iii) prevents the petitioner from taking advantage of the provisions of the Act. He says that the Legislature in drafting this sub-section is dealing only with the primary rate of interest charged and that the Section cannot apply to any rate which is chargeable in case of default. I am unable to accept this view of the Section as correct. It seems to me contrary to all logic and all principles of interpretation to limit so general a word as liability to a liability incurred only by a borrower who is guilty of no act of default. Clearly, the liability in my opinion must mean whatever liability may fasten upon the borrower under the terms of the bond.

I am prepared, however, to concede that this matter should not be disposed of merely upon a strict interpretation of the terms of the bond and the liability which might arise in certain hypothetical circumstances but should be determined upon an examination of the actual state of accounts as between the two parties. I proceed therefore to such an examination and I find that towards the sum of Rs. 1500 borrowed in February 1927 a sum of Rs. 1396-3-3 has been credited as part repayment. The suit is for the balance namely Rs. 807-13-2, and the accounts have been closed shortly before the filing of the suit in March 1932. The result then is that for a debt of Rs. 1500 incurred in February 1927 a total sum of Rs. 1396-3-3 plus Rs. 807-13-2 that is Rs. 2204-0-5 has to be repaid and this repayment is related to a period of just over five years. Of this sum Rs. 1500 of course represents the principal and the remaining Rs. 704 represents what is claimable in addition to the principal. It is argued for the respondent that this may not be interest in the strict sense of the word because of the provision relating to the monthly payment of subscriptions. But when we probe into the heart of the transaction it seems to me clear that is in all respects analogous to the payment of interest. When money is borrowed and a larger sum is to be repaid the excess over the principal must in my opinion be treated as interest. Therefore in this matter the sum of Rs. 704 represents the interest charged under the terms of this bond on a debt of Rs. 1500 for a period of just over five years. Arithmetical calculation will show that this interest represents a rate of slightly more than nine per cent. per annum. It seems to me therefore that with respect to the present claim as the interest works out at more than 9 per cent. per annum the respondent cannot successfully argue that S. 10 (2) (iii) applies. If it does not apply, then of course the petitioner on the assumption that he is an agriculturist can claim to have the debt scaled down under S. 8 and being thus entitled to the benefits of this Act can make an application under S. 23.

In the result therefore this petition will be allowed and the petitioner's application remanded to the learned District Munsif for being allowed or dismissed according as he finds the petitioner to be an agriculturist or not. The respondent must pay the costs of the petitioner in this petition.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 938

LAKSHMANA RAO J.

In re Pudukodu Iswara Subramanya Iyer — Petitioner.

Criminal Revn. No. 110 of 1940 and Cr. Rev. Petn. No. 107 of 1940, Decided on 11th April 1940, to revise the judgment of Sub-Divisional Magistrate, Vizagapatam, in Cri. App. No. 57 of 1939.

Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (b)—Adulterated ghee stored for preparing eatables for sale — Ghee is not stored or offered for sale within meaning of Section 5 (1) (b).

Adulterated ghee stored for the preparation of eatables for sale in a restaurant cannot be said to be stored or offered for sale and therefore conviction under S. 5 (1) (b) cannot be sustained. [P 939 C 1]

V. Rajagopala Mudaliar—*for Petitioner.*

Public Prosecutor — *for the Crown.*

Facts.—The petitioner was found guilty by the Taluk Magistrate, Vizagapatam of an offence under S. 5 (1) (b) and Rule 28 under S. 20 (2) (f) of Madras Act, 3 of 1918 for storing adulterated ghee intended for the preparation of eatables in his restaurant known as Palghat Coffee Club, and was convicted and sentenced to pay a fine. In appeal to the Sub-Divisional Magistrate the petitioner contended that he did not sell the ghee as ghee and so no offence was committed. But the Sub-Divisional Magistrate confirmed the conviction because he held that the ghee was intended for preparing eatables and the price of the ghee was necessarily included in the price of the eatables and that even storing adulterated ghee was an offence under S. 5 (1) (b) and R. 28 framed under S. 20 (2) (f) of the Act.

Against this decision the present revision petition is filed.

Order. — The ghee was not stored or offered for sale, and the conviction under S. 5 (1) (b), Madras Prevention of Adulteration Act, (Act 3 of 1918) is unsustainable. It is therefore set aside and the fine if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

A. I. R. 1940 Madras 939

WADSWORTH AND PATANJALI SASTRI JJ.

Vasudevan Nambudri — Petitioner.

v.

Raman Nambudri — Respondent.

Civil Revn. Petn. No. 824 of 1939, Decided on 11th September 1940, to revise order of District Munsif, Walluvanad, D/- 11th November 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 15—Possessory mortgage—Surplus reserved as payable to mortgagor after appropriating part of usufruct in lieu of interest does not fall within mischief of S. 15.

The surplus reserved as payable to the mortgagor under a possessory mortgage after appropriating part of the usufruct in lieu of interest due on the mortgage money is not "rent" in the proper sense of the term and does not fall within the mischief of S. 15 : *2 Mad 187 and A I R 1930 Mad 160, Rel. on.* [P 939 C 1; P 940 C 1]

P. Govinda Menon — *for Petitioner.*

D. H. Nambudripad — *for Respondent.*

Patanjali Sastri J.—The question that falls to be decided in this civil revision petition is whether S. 15, Madras Agriculturists Relief Act, is applicable to the surplus reserved as payable to the mortgagor under a possessory mortgage after appropriating part of the usufruct in lieu of interest due on the mortgage money. The petitioner's predecessor-in-interest held the lands here in question on a kanom granted by the respondent on 25th May 1911 for Rs. 1137-2-4. In consideration of a further advance of Rs. 862-13-8 making up a total of Rs. 2000, the respondent executed on 17th August 1925 the deed (Ex. A) styled "kaivasam panayam" (possessory mortgage) under which the mortgagee was to appropriate, out of an estimated yield of 490 paras of paddy, 200 paras in lieu of interest on the mortgage money, pay 60 paras. for assessment on the property and then pay the balance of 230 paras to the respondent as "panaya purappad" in two instalments during the harvest season. The document further provided that if the 'panaya purappad' and assessment were allowed to fall into arrears, such arrears together with interest at the rate fixed should be applied in payment of the mortgage money, the value of paddy being calculated at the current market rate. There was also a provision charging such arrears of purappad, assessment and interest on the crops standing on the properties, the improvements thereon, and also the mortgage money. The panaya purappad fell into arrears and the petitioner who purchased the mortgagee's rights in execution sale and obtained delivery of the properties claims the benefit of S. 15, Madras Act, 4 of 1938, depositing the purappad due for the year 1937-38. It is not disputed that the petitioner is an agriculturist within the meaning of the Act and the only question is whether the purappad reserved under the panayam deed as payable to the jenmi is "rent" within the meaning of the definition in S. 3, cl. (3) of the Act, so as to entitle the petitioner to the benefit of S. 15. The Court below held that it was not and dismissed the petitioner's application. This revision petition is directed against that order.

It is argued for the petitioner that the transaction embodied in Ex. A though styled a possessory mortgage operates also as a lease as far as the amount of paddy fixed as payable to the jenmi is concerned, and stress is laid on the use of the word 'purappad' (rent) in the document. The respondent on the other hand contends that Ex. A is nothing more than a possessory mortgage with an undertaking by the mortgagee to pay to the mortgagor the estimated surplus profits after paying the assessment due on the land and appropriating a specified portion of the usufruct in lieu of interest. The use of the word 'purappad,' it is urged, is inconclusive and stress is laid on the provision already referred to that if the purappad is allowed to fall into arrears the same with interest shall be applied in payment of the mortgage money. We are of opinion that the contention for the respondent is supported by the authorities cited on his behalf and must prevail. In 2 Mad 187,[1] there was a mortgage with possession for a term of eight years of a piece of ground with a warehouse standing thereon. The rent of the warehouse was fixed at Rs. 16-12-0 per mensem and it was agreed that out of this sum the mortgagee should appropriate Rs. 14, towards the payment of interest on the principal and pay Rs. 2-12-0 as 'rent' to the mortgagor. Sometime after the mortgage, the warehouse was destroyed by fire but not owing to any fault or neglect of the mortgagee who thereupon ceased to pay the rent reserved to the mortgagor. In a suit by the latter to recover the site together with arrears of rent on the ground of default in payment of the rent, the question arose whether there was a contract of tenancy apart from the mortgage and the mortgagor was entitled to call upon the mortgagee to pay the rent reserved notwithstanding the destruction of the premises. The Court held that there was no agreement to let the premises apart from the mortgage and dismissed the suit as the plaintiff was not in a position to redeem the mortgage. Innes J. observed:

---

[1] ('78-80) 2 Mad 187, Venkateshwara v. Kesava Shetti.

> The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to plaintiff.

Muthuswami Ayyer J. put the matter thus:

> The transaction between the parties is really a mortgage with possession for a term of eight years. The contract to pay Rs. 2¾ per mensem is rather a subsidiary arrangement regarding the disposal of the surplus usufruct, or, in other words, an agreement to treat as money had and received for the plaintiff's use the surplus which, as mortgagee, the defendant might otherwise credit to the principal amount of the mortgage, than an independent engagement to pay rent as in an ordinary lease. I take the defendant to have really got into possession not as a tenant, not because he engaged to pay the plaintiff Rs. 2¾ a month for the use of the warehouse, but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem.

The other decision cited for the respondent, 57 M L J 800,[2] takes more or less the same view of a transaction of the kind now before us. Both the learned Judges held that it was only a possessory mortgage and not a lease. In view of these decisions, we hold that the amount which the petitioner was bound to pay under Ex. A is not 'rent' in the proper sense of the term, and does not fall within the mischief of S. 15, Madras Agriculturists Relief Act. The civil revision petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

---

[2] ('30) 17 A I R 1930 Mad 160=124 I C 282=57 M L J 800, Seshayya v. Lakshminarasimha Rao Pantulu.

A. I. R. 1940 Madras 940

WADSWORTH AND PATANJALI SASTRI JJ.

Chittapragada Veerraju and another — Petitioners.

v.

Muppala Rayanim Dora Garu and others — Respondents.

Civil Revn. Petn. No. 603 of 1939, Decided on 22nd August 1940, to revise order of Sub-Judge, Cocanada, D/- 25th August 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9, 12 and 19 — Mortgage executed in 1920 in discharge of earlier promissory notes—Payments made towards mortgage in 1923 and 1924 and appropriated — Decree on mortgage in 1936 — Decree how should be scaled down stated.

A decree dated 26th September 1936 was passed on a mortgage of 1920. The mortgage was for a sum of Rs. 5570 made up by the discharge of four earlier promissory notes. Towards this mortgage there were three payments before suit. On 5th April 1923 a sum of Rs. 1200 was paid and appropriated for interest and on 6th June 1923 a sum of Rs. 400 was paid and of this sum rupees 211-14-0 were appropriated for interest and the balance for principal. On 4th October 1924 a payment of Rs. 3367 was made and the endorsement was that it was made towards principal and interest of the debt; that is to say, there was apparently no specific appropriation towards either principal or interest:

Held that the payments actually appropriated before 1st October 1937 would stand appropriated. The payment made on 4th October 1924 which had not been specifically appropriated would be disregarded in calculating the amount of interest outstanding on 1st October 1937 unless it could be established that there had been a specific appropriation before 1st October 1937, no fresh evidence being admissible. After calculating the amount of interest outstanding on 1st October 1937 and treating as discharged, the balance of the debt would be scaled down on the basis that the principal remaining bears interest at the rate laid down in S. 12 from 1st October 1937 and the interest on costs would be scaled down with regard to the provisions of S. 9. [P 941 C 1]

M. Appa Rao — *for Petitioners.*

V. Viyanna and K. Bhimasankaran — *for Respondents.*

Wadsworth J.—This petition arises out of an application under S. 19 of Madras Act 4 of 1938. The applicants, who are the petitioners here, sought to scale down a decree, dated 26th September 1936, passed on a mortgage of 8th November 1920. The mortgage was for a sum of Rs. 5570 made up by the discharge of four earlier promissory notes, the principal of which totalled to Rs. 4300, with interest thereon and a small fresh advance. Towards this mortgage there were three payments before suit. On 5th April 1923 a sum of Rs. 1200 was paid and appropriated for interest and on 6th June 1923 a sum of Rs. 400 was paid and of this sum Rs. 211-14-0 were appropriated for interest and the balance for principal. On 4th October 1924 a payment of Rs. 3367 was made and the endorsement is that it was made towards principal and interest of the debt; that is to say, there was apparently no specific appropriation towards either principal or interest. On the basis of our previous decisions, the decree has clearly to be scaled down in the following way. The principal will be Rs. 4300, the principal of the original notes renewed in the mortgage. The payments actually appropriated before 1st October 1937 will stand appropriated. The payment made on 4th October 1924 which has not been specifically appropriated will be disregarded in calculating the amount of interest outstanding on 1st October 1937 unless it can be established that there has been a specific appropriation before 1st October 1937, no fresh evidence being admissible. After calculating the amount of interest outstanding on 1st October 1937 and treating as discharged, the balance of the debt will be scaled down on the basis that the principal remaining bears interest at the rate laid down in S. 12 from 1st October 1937 and the interest on costs will be scaled down with regard to the provisions of S. 9; that is to say, interest will run at 5 per cent. per annum up to 22nd March 1938 and thereafter at the decree rate of 6 per cent. The petitioner is entitled to his costs in revision from respondents 1 and 2. The application is remitted to the lower Court for disposal in the light of this judgment.

C.R.K./D.S. *Application remitted.*

A. I. R. 1940 Madras 941

WADSWORTH AND PATANJALI SASTRI JJ.

Subburamier — Petitioner.

v.

Venkatachalapathi Ayyar and others
Respondents.

Civil Revn. Petn. No. 513 of 1939, Decided on 19th August 1940, to revise order of Sub-Judge, Madura, D/- 6th October 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) (a)—Simple mortgagee of agricultural land is 'agriculturist'.

A simple mortgagee of agricultural land has a saleable interest therein, so as to bring him within the definition of the term, 'agriculturist,' in S. 3 (ii) (a). [P 941 C 2]

O. V. Baluswamy — *for Petitioner.*

K. Vaidhyanathan — *for Respondents.*

Wadsworth J. — The question in this revision petition is whether a simple mortgagee of agricultural land has a saleable interest therein, so as to being him within the definition of the term, 'agriculturist,' in S. 3 (ii)(a) of Madras Act 4 of 1938. A mortgage is certainly an interest in immovable property and it is certainly saleable, so that, on the plain language of the section, it would seem to follow that a simple mortgagee of agricultural land is an agriculturist. The contention which has found favour with the lower Court and which is urged before us is, that the words, "has a saleable interest in land" mean, has a right to sell the land, and it is argued that it could not have been the intention of the Legislature to give to a money-lender the rights and benefits of an agriculturist debtor. With reference to this argument, it need only be said that possibly the definition of the word 'agriculturist' has been framed too widely so as to bring within the benefits of the Act those whom the Legislature did not intend to benefit, but if so, the remedy is to amend the Act and not to qualify its words by putting in words we do not find in the section. As the definition is drafted, we take it to include a simple mortgagee. The civil revision petition is therefore allowed with costs and the application is remitted to the trial Court for disposal.

Patanjali Sastri J. — I agree with my learned brother, and only wish to add that I was at first inclined to think that the opening words of the section, "unless there is anything repugnant in the subject or context", might serve to exclude the petitioner in this case from the scope of the definition, as it does seem somewhat repugnant to the natural sense of the word, 'agriculturist' to hold that it includes a simple mortgagee, who is only a creditor holding immovable property as security for his debt; but, having regard to the various classes of persons who cannot be said to be agriculturists in the strict sense of the term, but who are clearly intended to be benefited by the Act, I hesitate to base any conclusion on the repugnancy clause.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1940 Madras 942

SPECIAL BENCH

LEACH C. J., KING AND
PATANJALI SASTRI JJ.

The Commissioner of Income-tax, Madras — Petitioner.

v.

A. V. P. MR. M. Lakshmanan Chettiar, late of Karaikudi Ramnad District (deceased) — Respondent.

O. P. No. 68 of 1940, Decided on 24th September 1940; reference made by the Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 3—Assessee joint with father until father's death — Assessee and his step-mother the only surviving members constitute joint family within meaning of S. 3, Hindu Women's Rights to Property Act—Assessee can be taxed only as representative of Hindu undivided family.

Where the assessee was joint with his father until the father's death and the only surviving members of the family were the assessee and his step mother :

Held that the assessee and his step-mother constituted a joint Hindu family within the meaning of S. 3, Hindu Women's Rights to Property Act and the assessee could be taxed only as representative of Hindu undivided family and not as an individual: *A I R 1932 Mad 733, Ref.; A I R 1937 P C 36, Expl. and Disting.* [P 942 C 1 ; P 943 C 1]

K. V. Sesha Ayyangar — *for Petitioner.*

P. R. Srinivasan — *for Respondent.*

Leach C. J. — This reference, which the Commissioner of Income-tax has made suo motu under the provisions of S. 66 (1), Income-tax Act, raises an interesting question of law. The assessee is a Nattukottai Chettiar and he was assessed to income-tax by the income-tax officer, Karaikudi, I Circle, on an income of Rs. 65,865 for the year 1938-39. If this assessment is to be regarded as being on the assessee as an individual he will be required to pay super tax, but if the assessment is on him as the representative of a joint Hindu family super tax will not be payable, because, in the case of an undivided Hindu family, super tax is not leviable until the income exceeds Rs. 75,000. The assessee was joint with his father Murugappa Chettiar until the father's death on 18th January 1938. The only surviving members of the family are the assessee and his step-mother. The question referred is this :

> Whether on the facts stated the assessment should be made on the assessee as an individual or on the assessee and his step-mother as a Hindu undivided family or on the assessee and his step-mother as an association of individuals.

In the sense known to Hindu law the assessee and his step-mother are members of an undivided family. This question was raised and settled by this Court in 56 Mad 1.[1] There a family consisted of a single male member and the widows of deceased coparceners, and it was held that they constituted an undivided family. Sir George Rankin, in delivering the judgment of the Privy Council in 64 I A 28=I L R (1937) 1 Cal 653=10 I T C 163,[2] said :

> The phrase 'Hindu undivided family' is used in the statute (the Income-tax Act) with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words 'Hindu coparcenery'—all the more that it is not possible to say on the face of the Act that no female can be a member.

In this case the Judicial Committee held that under the Mitakshara law the mere fact that a man has a wife and a daughter does not make ancestral property joint and income of such property assessable as income of an undivided Hindu family. If we had not to look beyond that case, there would be no doubt that in the present case the assessment would have to be regarded as an assessment made on the assessee as an individual and not as representing a joint family. Since the Judicial Committee pronounced judgment in that case, the Hindu Women's Rights to Property Act, 1937 has however been placed upon the Statute Book. S. 3 (i) of that Act says that, when a Hindu governed by the Dayabhag School of Hindu law dies intestate his property, and when a Hindu governed by any other school of Hindu law or by Customary law dies intestate leaving separate property that separate property, shall, subject to the provisions of sub s. (3) devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son. Sub-s. (2) says that, when a Hindu governed by any school of Hindu law other than the Dayabhag School or by Customary law dies intestate, having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had. Sub-s. (3) states that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's

---

1. ('32) 19 A I R 1932 Mad 733=140 I C 17=56 Mad 1 = 63 M L J 542 (SB), Vedathanni v. Commr. of Income-tax, Madras.
2. ('37) 24 A I R 1937 P C 36=166 I C 445 = 64 I A 28=I L R (1937) 1 Cal 653=10 I T C 163 (PC), Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal.

estate, provided however that she shall have the same right of claiming partition as a male owner. It is not necessary to decide whether the effect of this section is to make the widow a coparcener in the full sense of the word, but it is quite clear that she obtains an interest in the joint family property and, as she is a member of the joint family, the income of the property must be regarded as income of the family. This being the state of the law, the income here must be regarded as the income of a joint family composed of the assessee and his step-mother. This is the view which the Commissioner of Income-tax has himself expressed in making this reference, and we agree that it is the right view. The answer to the reference is that the assessment should be made on the assessee and his step-mother as a Hindu undivided family. There will be no order as to costs.

C.R.K./G.N. *Answer accordingly.*

A. I. R. 1940 Madras 943

WADSWORTH AND PATANJALI SASTRI JJ.

P. S. Poovanalingam Pillai — Petitioner.

v.

Nagaratnam Pillai — Respondent.

Civil Revn. Petn. No. 1733 of 1939, Decided on 28th August 1940, to revise order of Dist. Munsif, Manamadura, D/- 10th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 9 — Promissory note executed in 1924 by *A* in favour of *B* — Promissory note endorsed in 1933 by *B* in favour of *C* — Application by *B* for scaling down—Debt held incurred after 1st October 1932 and must be scaled down under Section 9.

A promissory note was executed on 23rd January 1924 by *A* in favour of *B*. On 26th January 1933, *B* endorsed the promissory note to *C*, who sued upon it and got a decree both against the original promissor and the endorser. *B* filed the application to scale down the decree :

Held that the debt, so far as *B* was concerned, was incurred on 26th January 1933, the date of his endorsement to *C*. It was therefore a debt incurred after 1st October 1932 and had to be scaled down under S. 9: *A I R 1939 Mad 186, Not applied.* [P 943 C 1, 2]

V. Ramaswami Ayyar — *for Petitioner.*

K. V. Srinivasa Ayyar—*for Respondent.*

Wadsworth J. — This revision petition arises out of an application under Ss. 8 and 19 of Madras Act 4 of 1938, to scale down the debt on a decree dated 29th August 1936 in a promissory note suit. The present petitioner is the decree-holder. The original promissory note was executed on 23rd January 1924 by defendant 1 in favour of defendant 2. On 26th January 1933, defendant 2 endorsed the promissory note to the plaintiff, who sued upon it and got a decree both against the original promissor and the endorser. It was defendant 2 (the endorser) who filed the application to scale down the decree. The only question raised in revision is whether the debt, so far as the endorser is concerned, was incurred on 23rd January 1924, the date of the original promissory note in his favour, or on 26th January 1933, the date of his endorsement to the plaintiff. It is contended on behalf of the applicant (respondent here) that the principle of the decision in I L R (1939) Mad 218[1] must govern the case. That was a case in which a purchaser of the hypotheca was made a defendant in a suit on the mortgage and the learned Judges decided that he was a person having a liability towards the mortgagee by reason of his purchase of the land, that the purchase was not the basis of any new liability and that the liability then sought to be enforced was the liability arising out of the mortgage itself.

It seems to us that the reasoning of that decision is not applicable to the facts of the present case. We are not here concerned with a liability charged on land, which becomes the liability of the purchaser of that land. Here, there is an original promissory note under which the applicant had no liability whatever. His liability was first incurred by reason of his endorsement of that promissory note and the date on which he incurred that liability is the date of his endorsement. It is true that the extent of his liability is measured by the extent of the liability of the original promissor. But, so far as the applicant is concerned, he incurred a liability for the first time on 26th January 1933. That liability was a personal liability, the basis of which was his endorsement of the pre-existing promissory note. It is therefore a debt incurred after 1st October 1932 and has to be scaled down under S. 9 of Madras Act 4 of 1938. The revision petition is therefore allowed and the application is remitted to the lower Court for fresh disposal in the light of this judgment. In the circumstances of the case, we make no order as to costs.

C.R.K./D.S. *Petition allowed.*

---

[1] ('39) 26 A I R 1939 Mad 186 = 182 I C 879 = I L R (1939) Mad 218=(1938) 2 M L J 1068, Perianna v. Sellappa.

A. I. R. 1940 Madras 944

WADSWORTH AND PATANJALI SASTRI JJ.

Ayipuzha Parvathi Amma—Petitioner.

v.

Subramanian Pattar — Respondent.

Civil Revn. Petn. No. 1600 of 1938, Decided on 28th August 1940, to revise order of Sub-Judge, Tellicherry, D/- 29th July 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 23—Subsequent alienee of part of hypotheca is entitled to apply under S. 23.

The liability of a person as a subsequent alienee of part of the hypotheca to discharge the mortgage is a "debt" liable to be scaled down under the provisions of the Act and he is entitled to apply under S. 23. [P 944 C 2]

O. T. G. Nambiar — *for Petitioner.*

K. Kuttikrishna Menon — *for Respondent.*

Patanjali Sastri J.—This is a petition to revise an order of the Subordinate Judge of Tellicherry dismissing the petitioner's application under S. 23, Madras Agriculturists Relief Act to set aside an auction sale of certain immovable properties of which she claimed to be the owner. The facts of the case may be briefly stated. The respondent obtained a mortgage decree for Rs. 3083 against the petitioner and others on a mortgage executed in his favour on 6th August 1931, by one Krishnan Nambi. The mortgage comprised eight items of immovable properties of which he sold items 5 to 8 and part of item 4 under Ex. A, and items 1 and 2 under Ex. B, to one Vishnu Nambudiri on 9th August 1931. He also made a gift of item 3 to his daughter, the petitioner herein, on the same date. The petitioner sued Vishnu Nambudiri in O. S. No. 464 of 1934 on the file of the District Munsif's Court of Taliparamba for recovery of possession of items 1, 2 and 4 to 8, alleging that these properties were sold to him by her father as a benamidar for herself. The suit was decreed by the trial Court, but on appeal it was held that though Vishnu Nambudiri took the sale as a benamidar, the petitioner failed to establish that he was a benamidar for her and the suit was accordingly dismissed. With a view to remove the cloud on the petitioner's title arising from this decision, Krishnan Nambi executed on 24th March 1937 a release deed purporting to release all his rights in items 1,2 and 4 to 8 in favour of the petitioner.

The respondent instituted O. S. No. 2 of 1936 in the lower Court to enforce his mortgage of 1931 impleading Krishnan Nambi the mortgagor as defendant 1, the petitioner as defendant 2 and certain others claiming interest in some of the mortgaged items, and obtained a preliminary decree on 22nd December 1936, and a final decree for sale on 17th August 1937, for Rs. 3083 as stated already. In execution of this decree, the mortgaged properties were sold in one lot on 10th March 1938. With a view to have the decree scaled down under the Madras Agriculturists Relief Act which came into force soon after, the petitioner applied to the Court below on 9th April 1938, for setting aside the auction sale. The learned Subordinate Judge in dismissing the application held (1) that having regard to the terms of the preliminary and final decrees in suit, the petitioner was not a judgment-debtor and therefore was not entitled to apply under S. 23 of the Act, (2) that the petitioner failed to prove that she had any interest in the hypotheca except item 3 which she obtained under the gift deed of her father and (3) that the petitioner was excluded from the benefits of the Act by reason of S. 10 (2) (ii) so far as items 1 and 2 comprised in the sale deed Ex. B, were concerned as the purchase money due in respect of that sale which the vendee was directed to pay to the respondent in discharge of the mortgage remained unpaid and there was a charge for that liability under S. 55 (4) (b), T. P. Act. All these conclusions were canvassed before us in this revision petition.

On the first point, we are clearly of opinion that the petitioner is entitled to apply under S. 23 of the Act. According to the decision in I L R (1939) Mad 218[1] the liability of the petitioner as a subsequent alienee of part of the hypotheca to discharge the mortgage is a 'debt' liable to be scaled down under the provisions of the Act. The respondent's learned counsel however urged that the petitioner was not a 'judgment-debtor' within the meaning of S. 23 as neither the preliminary nor the final decree contained any direction that defendant 2 should pay the amount due to the respondent. It is true that para. 2 (1) of the preliminary decree directs only defendant 1 the mortgagor to pay into Court on or before the date fixed the sum decreed to the respondent, but para. 4, after providing that the money realised by sale of the hypotheca less the expenses of the sale, should be applied in payment of the amount decreed to the respondent directs that the balance, if any, shall be paid to defendant 1 'or other persons entitled to receive the same,' and para. 5 provides that the parties shall have 'liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit.' Again, the final decree recites that the payment directed by the preliminary decree was not made by defendant 1 or any person on his behalf or 'any other person entitled to redeem the mortgage,' and contains a provision in para. 2 that the balance, if any, of the sale proceeds after the satisfaction of the plaintiff's debt be paid to defendant 1 'or other persons entitled to receive the same.'

---

[1] ('39) 26 A I R 1939 Mad 186=182 I C 879= I L R (1939) Mad 218=(1938) 2 M L J 1068, Perianna v. Sellappa.

It cannot for a moment be disputed that the petitioner was a person entitled to redeem the respondent's mortgage under S. 91, T. P. Act, and it is obvious that she was impleaded by the respondent in the mortgage suit with a view to bind her interest in the hypotheca by the decree. It was said that the respondent did not admit her right in the hypotheca but impleaded her and other alienees in the plaint as setting up "pretentions to certain rights in the property subsequent to the mortgage." The mortgagee was not interested in admitting or denying the rights of subsequent alienees in the mortgaged properties as such rights, whatever they might be, were all subject to the mortgage and, indeed, any dispute regarding such rights would be outside the scope of the mortgage suit. As a matter of fact, none of the defendants raised any dispute regarding the petitioner's right to item 3 under the gift of her father. It was because of the interest she claimed in the hypotheca that she also raised a contest in the suit as to the amount payable to the respondent. In these circumstances, it is clear that her interest in the hypotheca, whatever its extent, was bound by the decree and she was a person entitled to redeem the respondent's mortgage or, if there was no redemption, to receive the balance, if any, of the sale proceeds after payment of the decree amount according to the extent of her interest in the hypotheca. We are therefore of opinion that the petitioner is a judgment-debtor as defined in S. 2 (10), Civil P. C., assuming that the term, not having been otherwise defined, is to be understood in no wider sense in the Madras Act 4 of 1938.

The question next arises whether the petitioner is entitled to have the sale not only of item 3 but of the other items in which she claims to be beneficially interested set aside. Learned counsel for the petitioner argued that by reason of the release deed executed by her father after the termination of her suit against her alleged benamidar, the petitioner's title to items 1, 2 and 4 to 8 also must be deemed to have been perfected, and that therefore she was entitled to have the sale of all the items set aside. It is unnecessary however to decide the question whether the release deed (Ex. G) would be sufficient to vest in the petitioner the title to these properties, as we are of opinion that even apart from her right to these items, she is entitled to have the sale of all the items set aside by reason of her interest in item 3 which was never in dispute. As already observed, all the eight items were sold in a single lot for a single price, and in the case of such sale, it is clear from the terms of Ss. 23 and 24 of the Act that the sale has to be set aside in its entirety and the purchase money repaid to the purchaser, even though the applicant may be interested in only one of the items comprised in the sale. It is also unnecessary in this view to consider whether the petitioner is disentitled to the benefits of the Act by reason of S. 10 (2) (ii) as there can be no question of a charge under S. 55 (4), T. P. Act, in respect of item 3. The civil revision petition is therefore allowed and the application (E. A. No. 181 of 1938) is remitted to the lower Court for scaling down the debt in accordance with the provisions of the Act. The petitioner will have her costs here and in the Court below.

C.R.K./D.S. *Revision allowed.*

A. I. R. 1940 Madras 945

LAKSHMANA RAO J.

In re *Ponnuswamy Pillai* — Petitioner.

Criminal Revn. No. 899 and Cri. Revn. Petn. No. 847 of 1939, Decided on 27th October 1939, to revise judgment of Joint Magistrate, Hosur, D/- 17th July 1939.

Criminal Trial—Practice—Prosecution sanctioned by Joint Magistrate—Appeal should not be heard by him except with permission of Court to which appeal lies from his Court.

Where the prosecution of the accused has been sanctioned by the Joint Magistrate the appeal should not be heard by the Joint Magistrate except with the permission of the Court to which an appeal lies from his Court. [P 946 C 1]

T. M. Venugopal Mudaliar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—The prosecution of the petitioner was sanctioned by the Joint Magistrate and the appeal should not have been heard by the Joint Magistrate except with the permission of the Court to which an appeal lies from his Court. This petition is therefore allowed and the appeal is remanded to the District Magistrate of Salem for disposal by him or such other Magistrate as he may direct.

C.R.K./D.S. *Appeal remanded.*

A. I. R. 1940 Madras 946

WADSWORTH AND PATANJALI SASTRI JJ.

Abdul Khadir and others — Petitioners.

v.

V. Subramanya Pattar — Respondent.

Civil Revn. No. 16 of 1939, Decided on 11th September 1940, to revise order of the Sub-Judge, South Kanara, D/- 5th December 1938.

(a) Deed — Construction — Form in which parties have deliberately cast their bargain should not be ignored.

It is no doubt permissible as a matter of construction to look behind the form of a transaction to ascertain its substance and give effect to it according to the intention of the parties but it is a different thing to ignore the form in which the parties have deliberately cast their bargain, when such form is intended to govern their mutual rights and obligations. [P 947 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (i)— Usufructuary mortgage — Lease back to mortgagor as part of same transaction at annual payment of certain amount of paddy—Mortgage containing no stipulation for payment of interest as profits were to be enjoyed in lieu of interest — Suit on mortgage bond — Application for scaling down decree— Mortgage held fell within exception in S. 10 (2) (i) and could not be regarded as simple mortgage.

A person mortgaged certain properties usufructuarily to another person and by a lease of the same date and as part of the same transaction the properties were leased back to the mortgagor at an annual payment of certain amount of paddy. The mortgage contained only a covenant to repay the principal but no stipulation for payment of any interest as the profits were to be enjoyed in lieu of interest. The mortgagee brought a suit on the mortgage bond and obtained a decree. The mortgagor applied for scaling down of the decree :

Held that though the mortgage and the lease back could and must in a case of such kind, be taken to form part of the same transaction, effect must be given to each according to its terms and the Court could not by reading the two together, spell out a transaction totally different in character and incidents. The usufructuary mortgage accompanied by a lease back could not be regarded as a simple mortgage. The mortgage came within the exception in S. 10 (2) (i): *35 All 48 (P C) and A I R 1933 P C 178, Rel. on; Case law referred.* [P 948 C 1; P 949 C 2]

P. Govinda Menon — *for Petitioners.*

K. Kuttikrishna Menon—*for Respondent.*

Patanjali Sastri J. — This is a petition to revise an order of the Subordinate Judge of South Kanara dismissing an application by the petitioners (judgment-debtors) to scale down the decree for Rs. 34,291-10-9 in O. S. No. 70 of 1932 on the file of the lower Court. The suit was brought by the respondent on foot of a mortgage bond (Ex. B) dated 5th June 1925, whereby the judgment-debtors purported to mortgage the properties usufructuarily to the respondent's assignor for Rs. 21,000, out of which only Rs. 20,300 was advanced and a marupat (Ex. C) of the same date under which the mortgaged properties were leased back to them at an annual 'purappad' of 10150 seers of paddy. The mortgage contained only a covenant to repay the principal but no stipulation for payment of any interest as the profits were to be enjoyed in lieu of interest. It is common ground that the usufructuary mortgage and the lease back were parts of the same transaction and the respondent himself in suing for the amount due under both these instruments described the amount due under Ex. C as "interest" payable on the amount advanced under Ex. B. The decree was in the form of an ordinary mortgage decree providing for the payment of Rs. 20,300 as principal and the balance as interest and did not mention any rent as payable thereunder, while the judgment referred to the respondent's claim under Ex. C as "rent or interest" without making any distinction between the two.

It is thus clear that at the time when the suit was filed or the decree was passed, it was really immaterial whether the respondent's claim under Ex. C was regarded as one for interest or for rent but after the passing of the Madras Act 4 of 1938 the question as to the true nature and incidents of the transaction represented by Exs. B and C has become one of considerable importance to the parties and has accordingly been the subject of keen debate in these proceedings. In support of their application to scale down the decree, the petitioners contend that Exs. B and C together amounted in substance to a simple mortgage providing for interest at the rate of half seer of paddy per rupee per year and that accordingly the interest payable under the decree should be scaled down, while the respondent invokes the exception in S. 10 (2) (i) of the Act, urging that he was in possession as mortgagee under Ex. B, through the petitioners as his tenants under the marupat Ex. C, the annual payment reserved thereunder being rent and not interest.

Before considering this question, it will be convenient to dispose of a minor point raised by the petitioner's learned counsel that it is not open to the respondent to raise the contention referred to above. It is argued that the Court must be taken to have decided in the suit itself that the amount payable under Ex. C was interest and not rent. This argument is based on para. 98 of the judgment where dealing with the question whether the stipulation to pay interest on the purappad reserved in Ex. C was penal and unenforceable, the Court held that it was, treating it as interest on interest. We find it however difficult to hold that this amounts to a definite decision concluding the question now arising for consideration in favour of the petitioners. As already observed, the learned Judge uses the expression "rent or interest" throughout the judgment in referring to the sum payable under Ex. C, and even for the purpose of his finding on the issue as to penalty, it was immaterial to determine whether such sum was "rent" or "interest", for, if, as the learned Judge thought, the rate of interest fixed for unpaid purappad was exorbitant, it could be relieved against as penalty under S. 74, Contract Act even if the purappad were to be regarded as "rent" and not as "interest" : *see* A I R 1917 Cal 737[1] and A I R 1918 Cal 334.[2] We hold therefore that the respondent is not precluded by anything contained in the judgment or decree in O. S. No. 70 of 1932 from contending that the sum reserved as payable to the mortgagee under Ex. C was "rent" and not "interest". Turning now to the main question, it is no doubt perfectly clear that the mortgage and the marupat were intended to be parts of one and the same transaction and the mortgage itself recites that :

> For the necessities of our tavazhi tarwad we ourselves have, as per marupat of this day taken back the properties delivered to you under this document as detailed above.

Both the documents must therefore be read together to ascertain the nature and incidents of the transaction and the respective rights and liabilities of the parties thereunder. This indeed has been conceded by the respondent, but the question remains whether the marupat operates to obliterate the possessory character of the mortgage and convert it into a simple mortgage, contrary to its tenor. We are of opinion that it cannot have that effect. It is no doubt permissible as a matter of construction to look behind the form of a transaction to ascertain its substance and give effect to it according to the intention of the parties but it is a different thing to ignore the form in which the parties have deliberately cast their bargain, when such form is intended to govern their mutual rights and obligations.

Learned counsel for the petitioners cited numerous decisions in support of his contention but none of them can, in our opinion, be said to be an authority on the point now under consideration. On the other hand, we have been shown several authoritative rulings some of them by the Privy Council which lend support to the contention of the respondent. In 35 All 48[3] there was a usufructuary mortgage with a lease back of the properties mortgaged to the mortgagor. The mortgage provided that the profits of the property mortgaged should be enjoyed by the mortgagee in lieu of interest on the mortgage money but the rent reserved under the lease was equivalent to interest at six per cent. per annum on the mortgage money and was less than the annual yield of the properties. As provided in the lease, the mortgagee entered into possession of the properties mortgaged on the mortgagor's default in paying the rent reserved by the lease. In a subsequent suit for redemption, the question arose whether the mortgagee was accountable for the rents and profits received by him from the mortgaged properties in excess of the rent reserved under the lease. The High Court of Allahabad held that he was, on the ground that the mortgage was usufructuary only in form and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. On appeal to the Privy Council, this decision was reversed and the mortgagee was held not accountable for receipts over and above the rent reserved in the lease. Lord Macnaghten who delivered the judgment of the Board observed :

> Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for

---

[1] ('17) 4 A I R 1917 Cal 737=36 I C 404=21 C W N 108, Upendra Lal v. Ataulla.

[2] ('18) 5 A I R 1918 Cal 334 = 39 I C 647, Lal Gopal v. Biswa Nath.

[3] ('13) 35 All 48=17 I C 737 = 40 I A 31 (P C), Abdullah Khan v. Basharat Hussain.

granting a lease on the terms upon which the lease was actually granted.

This, in our opinion, is clear authority for the view that though the mortgage and the lease back can and must in a case of this kind, be taken to form part of the same transaction, effect must be given to each according to its terms and the Court cannot, by reading the two together, spell out a transaction totally different in character and incidents. To the same effect more or less is the decision of the Privy Council in 14 Lah 466.[4] There was a usufructuary mortgage for a term of ten years accompanied by a lease of the mortgaged property to the mortgagor for the same period at a rent which represented interest at a certain rate per cent. on the mortgage debt. On the expiry of the term, the mortgagee sued for possession of the mortgaged property, the mortgage not having been redeemed. The Courts in India refused a decree for possession holding that the transaction was in reality a simple mortgage of the land. Their Lordships reversed the decision holding that there was no reason to construe the mortgage as other than a possessory mortgage as it purported to be. They observed:

> The mortgagee may well have preferred to leave the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the lease were not adhered to. Assuming this is to have been one of the conditions upon which the mortgage was agreed to the mere absence of formal handing over of the land to the mortgagee, and a handing back by him to the mortgagor in the character of lessee is, they think, of little significance.

The principle of these decisions has also been applied in cases under the Income-tax Act relating to the assessability of the income received by the mortgagee-lessor who is a money-lender from the mortgagor-lessee. The contention of the income-tax authorities was that the so-called "rent" was, having regard to the substance of such transactions, really interest received in the course of money lending and assessable to tax as such. This contention was disallowed by a Special Bench of five Judges (Jackson J. dissenting) in 51 Mad 455[5] and by their Lordships of the Privy Council in 14 Pat 623,[6] the Court refusing in each case to regard the amount paid by the mortgagor-lessee as other than rent covered by the exemption relating to agricultural income. Learned counsel for the respondent placed great reliance upon the decision of the Privy Council in 50 Mad 180.[7] The mortgage in that case was a combination of a simple and a usufructuary mortgage and was accompanied as to part of the mortgaged property by a lease back to the mortgagor. The lease provided that upon default in payment of the rent reserved, the arrears should be charged upon the property included in the mortgage deed. The rent had been allowed to fall into arrears, and the question arose in a suit for redemption and possession whether the arrears of rent should also be paid before redemption could be decreed. Their Lordships held that S. 62, T. P. Act, did not apply as the mortgage was not purely and simply usufructuary and that S. 61 of the Act by implication entitled the mortgagee to insist on the payment of arrears of rent also charged on the property as a condition of redemption. The passage relied on for the respondent is as follows:

> It is contended before this Board on behalf of the defendant-appellant that the two deeds, Exs. A and I, should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realizing the interest due on the mortgage . . . . Their Lordships are of opinion that these contentions on behalf of the appellant must prevail (page 190).

We are unable to agree that this passage involves the proposition that a possessory mortgage and a lease back should together be taken to be a simple mortgage carrying interest. As observed by their Lordships in 35 All 48[3] referred to already, that the mortgage and the lease should be viewed as forming parts of one and the same transaction is by no means inconsistent with effect being given to each according to its terms and the reference to the lease as "being in the nature of machinery for the purpose of realizing the interest due on the mortgage" does no more than emphasize the idea of the lease being a component part of the mortgage transaction. In view of the authorities referred to above which in our opinion rule this case, we think it unnecessary to comment in detail upon the other decisions cited in the course of arguments. These decisions are not of much assistance in determining the question now before us, as they relate to other aspects of a possessory mortgage accompanied by a lease of the property to the mortgagor.

---

[4] ('33) 20 A I R 1933 P C 178=143 I C 659=14 Lah 466=60 I A 273 (P C), Feroz Shah v. Sohbat Khan.

[5] ('28) 15 A I R 1928 Mad 543=110 I C 207=51 Mad 455=54 M L J 524 (S B), Ibrahim Rowther v. Commissioner of Income-tax, Madras.

[6] ('35) 22 A I R 1935 P C 172=157 I C 289=14 Pat 623=62 I A 215 (P C), Commissioner of Income-tax, B. & O. v. Maharajadhiraj of Dharbhanga.

[7] ('27) 14 A I R 1927 P C 32=100 I C 86=50 Mad 180=54 I A 68 (P C), Ramarayanimgar v. Maharajah of Venkatagiri.

In 47 M L J 798[8] and 50 M L W 677,[9] for instance, this Court had to consider the question whether a decree obtained for rent under the lease was a claim arising under the mortgage for purposes of O. 34, R. 14, Civil P. C. 63 M L J 672,[10] A I R 1921 Lah 225[11] and A I R 1926 Lah 559[12] are cases where the effect of such transactions had to be considered in connection with O. 2, R. 2, Civil P. C. In 2 M L W 853[13] the question for consideration was whether the mortgagee's claim for arrears of interest due for more than three years was barred when a claim for rent due for the same period under the lease would be barred. It was held that Art. 132 and not Art. 110, was applicable because there was an express recital that the mortgage was given as security not only for the principal amount due but also for the interest due thereon. In 26 Mad 662[14] the Court held reading the instruments of mortgage and lease together that the mortgagee was entitled to maintain a suit for recovery of the mortgage money with interest. In (1883) 22 Ch D 384[15] it was observed that where a mortgagor continued in possession of the mortgaged property under an attornment clause in the mortgage, the relation between the parties was not one of landlord and tenant but one of mortgagor and mortgagee. It was however recognized that when the parties entered into an express agreement for a tenancy its terms must rule. Jessel M. R. observed :

> In an ordinary case there being no rent reserved the tenant at will did not pay any rent and was not liable to pay any, but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present case, in which a monthly tenancy was created at a monthly rent.

All these decisions relied on by the petitioners' learned counsel have no direct bearing on the issue before us and any general observations therein tending to favour the view that a usufructuary mortgage accompanied by a lease back should be regarded as a simple mortgage cannot prevail against the definite pronouncements to the contrary in the decisions cited for the respondent. The civil revision petition therefore fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 949

HORWILL J.

Boppana Rukminamma and another — Petitioners.

v.

Maganti Venkata Ramadas — Respondent.

Civil Revn. Petn. No. 1673 of 1938, Decided on 16th August 1940, to revise decree of Sub-Judge, Masulipatam, in S. C. S. No. 29 of 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 4 (e)—Society formed under Societies Registration Act is corporation — Debts due to it cannot be scaled down.

A registered society formed under the Societies Registration Act of 1860, is a corporation and it has a separate existence apart from its members and can sue and be sued in its corporate capacity. Hence debts due to it by an agriculturist cannot be scaled down. [P 950 C 1]

D. Suryaprakasa Rao — *for Petitioners.*

A. Lakshmayya — *for Respondent.*

Order. — This is a suit on a promissory note brought by a society formed under the Societies Registration Act (Act 21 of 1860) as transferee from the payee, defendant 3. The promissory note was executed by defendant 2, who signed her name above the words as "guardian of defendant 1." The suit promissory note was in renewal of a promissory note dated 10th June 1933, executed by the mother (defendant 2) in the same way. That promissory note was in renewal of a promissory note executed by the father of defendant 1 on 10th June 1930. Three points have been raised in this petition. The first is that the person really liable under the promissory note was defendant 1, who has now become a major, and not defendant 2, who executed the suit promissory note and the promissory note of 1933 as the guardian of defendant 1. The lower Court came to the conclusion from the terms of the promissory note that it was the mother and not the son who was liable. In this revision petition the mother has not chosen to make her son a party, although it is clear that either the mother or the son would be liable. She has therefore sought to avoid liability altogether by the family by omitting to make the son a party. Even if it be true that the legal liability is against the son and not against the mother, I am not willing to interfere in revision to do an inequity.

---

[8] ('25) 12 A I R 1925 Mad 127=82 I C 504=47 M L J 798, Lakshmi Kutti v. Mariathumma.

[9] ('40) 27 AIR 1940 Mad 59=187 IC 852=(1940) 1 M L J 143=50 M L W 677, Chinnappayan v. Narayana Pattar.

[10] ('32) 19 A I R 1932 Mad 466=137 I C 651=63 M L J 672, Krishna Karup v. Mammad.

[11] ('21) 8 A I R 1921 Lah 225=63 I C 928 = 41 P L R 1921, Ralaram v. Divan Chand.

[12] ('26) 13 A I R 1926 Lah 559=97 I C 396 = 27 P L R 620, Diwan Chand v. Ralla Ram.

[13] ('16) 3 A I R 1916 Mad 78 = 30 I C 818 = 2 M L W 853, Vasudevan v. Govinda Menon.

[14] ('03) 26 Mad 662, Madhava Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu.

[15] (1883) 22 Ch D 384=52 L J Ch 370 = 48 L T 398=31 W R 442, Ex parte Isherwood; In re Knight.

The second point is that defendant 3 is not liable because the plaintiff did not give him any notice of the dishonouring of the promissory note by defendant 1 when it was presented to him by the plaintiff for payment. As to this, there is evidence by P. W. 2 that oral notice was given to defendant 3. That evidence has not been controverted, defendant 3 not having gone into the box. The third point relates to the application of Act 4 of 1938. The lower Court found that as the plaintiff was really a registered society formed under the Societies Registration Act, the debt could not be scaled down. It is contended that this society is not a corporation; but I am unable to see why. A perusal of the Societies Registration Act makes it clear that a society formed under that Act is a corporation and that it has a separate existence apart from its members and can sue and be sued in its corporate capacity. On all the points therefore this petition fails and is dismissed with the costs of the plaintiff.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1940 Madras 950

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Vajjula — Appellant.

v.

Hanumanthavajjula Gopalakrishnamma and another — Respondents.

Appeal No. 266 of 1937, Decided on 26th February 1940.

(a) Hindu law—Adoption—Widow—Burden is on widow to prove improper motive on part of sapinda in refusing consent to adoption.

The Court is not entitled to assume that the sapinda had refused his consent to the adoption by the widow with an improper motive. The burdenis on the widow to prove improper motive: *A I R 1920 P C 4, Ref.* [P 950 C 2]

(b) Hindu law — Adoption — Widow — In absence of direct authority from husband, consent of sapindas is necessary—Nearest sapindas improperly refusing consent — Consent of next nearest sapinda is necessary—There is no residuary power to adopt when her husband's sapindas are all dead.

Under the Mitakshara law as interpreted in the Madras Presidency, the widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's sapindas. The consent of the sapindas is necessary in the absence of direct authority from the husband. If the nearest sapindas improperly refuse their consent to an adoption the widow is entitled to seek the consent of the next nearest sapindas. There is no residuary power in a widow to adopt when her husband's sapindas are all dead: *Case law relied on.* [P 950 C 2; P 951 C 1, 2]

K. Kameswara Rao — *for Appellant.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

Leach C. J. — The respondents have not appeared to oppose this appeal but as the Court has decided to allow it the reasons must be stated. The suit out of which the appeal arises was filed by the appellant in the Court of the Subordinate Judge of Rajahmundry for a declaration that the adoption of respondent 1 by respondent 2 was invalid. Respondent 2 is the widow of one Jagappa, alias Jagannatha Sastrulu, who died on 11th December 1868. The adoption took place on 4th July 1929, nearly 61 years after the death of the husband of respondent 2. Respondent 2 was a very young girl when her husband died and was still under the guardianship of her father. There were two defences set up. It was said that the appellant and other sapindas had given their consent to the adoption and that the widow was given power to adopt by a will executed by her deceased husband. The Subordinate Judge held that the appellant was the only living sapinda, that he had not given his consent, and that the alleged will was a forgery, but he dismissed the suit on the ground that the appellant had refused his consent from an improper motive. That the consent has been refused was common ground, but the appellant was not asked why he had refused his consent and there is nothing in the evidence which indicates that he refused his consent improperly. The Subordinate Judge assumed that the appellant had refused his consent on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband and considered that this would be an improper motive. The Subordinate Judge was not entitled to make this assumption. The burden was on the respondents to prove improper motive: *see* 43 Mad 650[1] at p. 658 and as the burden had not been discharged the appellant was entitled to succeed.

Under the Mitakshara law as interpreted in this Province the widow cannot adopt a

---

1. ('20) 7 A I R 1920 P C 4=56 I C 391= 47 I A 99 = 43 Mad 650 (P C), Krishnayya v. Lakshmipathi.

son to her husband unless she has received authority from him or has received the consent of her husband's sapindas. That the consent of the sapindas is necessary in the absence of direct authority from the husband is to be gathered from the decisions of the Privy Council in 12 M I A 397,[2] 1 Mad 174,[3] 41 Mad 998,[4] 43 Mad 650,[1] 69 M L J 388[5] and I L R (1938) Mad 551.[6] A Full Bench decision of this Court of which my learned brother and I were members had to consider the effect of these authorities in the recent case in S. A. No. 174 of 1936[7] and it was there held that they had decided that in the absence of authority from her husband the widow could adopt only with the consent of the nearest agnates, unless consent was improperly withheld, in which case she might lawfully adopt with the consent of the next nearest agnates. If there were no agnates she must look for advice to the cognates, it having been definitely laid down by the Privy Council that she was not competent to decide on an adoption for herself.

In delivering the judgment of the Judicial Committee in I L R (1938) Mad 551,[6] Sir George Lowndes observed that it would be difficult for their Lordships to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas, but as it was not necessary to give a definite pronouncement on the question the discussion stopped there. In my opinion, the effect of the cases which have been decided by the Judicial Committee on appeals from this Court is that a widow has no power to adopt unless she has express authority from her husband or in the absence of such authority she is acting under the advice of her husband's sapindas. In 12 Rang 22[8] a Bench of the Rangoon High Court held that a widow has the same powers to adopt as her husband had in his lifetime when there are no sapindas living, but the learned Judges did not examine the line of cases starting with 12 M I A 397.[2] One of the learned Judges (Das J.) based this opinion on a passage in the judgment of the Privy Council in 22 Mad 398[9] where their Lordships said that in Madras

> it is established . . . . . . that unless there is some express prohibition by the husband, the wife's power, at least with the concurrence of sapindas in cases when that is required, is co-extensive with that of the husband.

In that case the Judicial Committee was merely concerned with the question whether a widow could make an adoption of the only son of a kinsman and was not considering the question now under discussion. The other learned Judge (Dunkley J.) relied on the judgment of the Privy Council in 43 Mad 650[1] but I am unable to read it in the same way as he did. The question which the Privy Council was considering there was whether there could be a lawful adoption when the consent of some of the nearest sapindas had not been sought or obtained. Their Lordships held that the absence of consent on the part of the nearest sapindas could not be made good by the authorization of distant relatives. If the nearest sapindas improperly refuse their consent to an adoption the widow is, however, entitled to seek the consent of the next nearest sapindas. In my judgment the decisions of the Privy Council when fully examined entirely negative the proposition that there is residuary power in a widow to adopt when her husband's sapindas are all dead. It follows that in my opinion respondent 2 had no power to adopt respondent 1 and that the decision of the Subordinate Judge is erroneous. I would allow the appeal and decree the appellant's suit with costs both here and below.

Krishnaswami Ayyangar J.—I agree.

C.R.K./D S. *Appeal allowed.*

A. I. R. 1940 Madras 951

BURN J.

Ranganayaki Ammal—Appellant.

v.

Rajagopalaswami Naidu—Respondent.

Second Appeal No. 367 of 1937, Decided on 26th April, 1940, against decree of Dist. Court, Coimbatore, in A. S. No. 245 of 1936.

---

[2] ('67-69) 12 M I A 397=1 Beng L R 1=10 W R 17=2 Sar 361=2 Suther 135 (P C), Collector of Madura v. Mootoo Ramalinga Sathupathy.

[3] ('76) 1 Mad 174 = 4 I A 1 = 3 Sar 669 (P C), Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi.

[4] ('18) 5 A I R 1918 P C 97=48 I C 706=41 Mad 998=45 I A 265 (P C), Veerabasavaraju v. Balasurya Prasad Rao.

[5] ('35) 22 A I R 1935 P C 190=157 I C 881=69 M L J 388 (P C), Krishnayya Rao v. Venkata Kumara Mahipathi Surya Rao Bahadur.

[6] ('38) 25 A I R 1938 P C 34=172 I C 724=65 I A 93=I L R (1938) Mad 551=32 S L R 328 (P C), Balasubramanya v. Subbaya Thevar.

[7] *Reported in* (1940) 27 A I R 1940 Mad 356=188 I C 250=(1940) 1 M L J 400 (FB), Seshamma v. Venkata Narasimharao.

[8] ('33) 20 A I R 1933 Rang 334=147 I C 716 = 12 Rang 22, Appalasmi v. Moosalaya.

[9] ('99) 22 Mad 398=21 All 460=26 I A 113 = 7 Sar 330 (P C), Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma.

Provincial Insolvency Act (1920), Ss. 34 (2) and 28 (2) — Claim for marriage expenses, arrears of maintenance, lump sum on account of residence, for clothing and for future maintenance against Hindu insolvent is debt provable in insolvency — Suit against insolvent without Court's leave is barred under S. 28 (2).

It cannot be disputed that a claim for (1) marriage expenses (2) arrears of maintenance (3) lump sum on account of residence (4) clothing and (5) future maintenance is a claim for debts provable in insolvency. Consequently a suit against the insolvent in respect of the aforesaid claim without the Insolvency Court's leave is barred under S. 28 (2) : *27 Mad 45 and A I R 1920 Mad 106, Disting.* [P 952 C 1]

V. C. Viraraghavachariar — *for Appellant.*

M. Lakshmana Nayak, M. R. Venkataraman and T. K. Rajagopalan — *for Respondent.*

Judgment.— It cannot be disputed that the claim for (1) marriage expenses (2) arrears of maintenance (3) lump sum on account of residence (4) clothing for plaintiff 1 was a claim for debts provable in insolvency. These together was over 90 per cent. of the claim put forward in the suit. Even as regards the claim for future maintenance I am not satisfied, having reference to the language of S. 34 (2), Provincial Insolvency Act, that it is not a debt provable in insolvency. If it is not, it would seem that no insolvency proceedings against a Hindu with female relations entitled to maintenance, could be taken effectively.

The plaintiff being a creditor to whom the insolvent was indebted in respect of a debt provable under the Act was forbidden by S. 28 (2) of the Act to bring any suit against him without the leave of the Insolvency Court. The cases reported in 27 Mad 45[1] and 43 Mad 635[2] have little, if any, bearing on the question now at issue. They were cases of sales in execution in which delivery was resisted by maintenance holders. Here we are concerned with the legality of the filing of the suit. I agree with the lower Courts that S. 28 (2) of the Provincial Insolvency Act was a bar to this suit. This appeal is dismissed with costs of respondent 3. Court fee to be paid by the appellant. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

---

1. ('04) 27 Mad 45, Jayanti Subbiah v. Alamelu Mangamma.
2. ('20) 7 A I R 1920 Mad 106=56 I C 524=43 Mad 635=38 M L J 433, Suryanarayanarao Naidu v. Balasubramania Mudali.

A. I. R. 1940 Madras 952

SOMAYYA J.

Sofia Bi Bi Saheba — Appellant.

v.

Vasudeva Chetty and another—Respdts.

Appeal No. 68 of 1937, Decided on 2nd May 1940.

Easements Act (1882), S. 33, Explanation II —Owner of house enjoying free light and air through windows in existence for statutory period—Another person blocking them by building wall — Former has right of action even if latter's action has not caused actual damage.

Where an owner of a house has enjoyed free light and air through windows which are in existence for the statutory period he has a right of action against another person who, by building a wall in front of those windows, has blocked up those windows, even if his so doing has not caused actual damage to the plaintiff : *33 Mad 327 and 1 Scott 526, Rel. on.* [P 953 C 2]

N. R. Sesha Ayyar — *for Appellant.*

T. C. A. Bashyam and T. C. A. Tirumalachari — *for Respondents.*

Judgment. — This is an appeal by the plaintiff against the judgment of the Principal City Civil Judge at Madras in O. S. No. 555 of 1935. The suit is for a mandatory injunction directing the defendants to remove the construction on their property so far as is necessary to restore to the plaintiff the free use of her windows and the quantity of light and air that has been coming through them undiminished and for a permanent injunction restraining them from erecting any construction so as to interfere with plaintiff's use of her windows. The plaintiff is the owner of a storied house No. 420 situated on the western row of the Triplicane High Road facing the east. The defendants are owners of the house No. 419 situated next south of the plaintiff's house. The plaintiff alleges that the southern wall on the first floor of her house facing the defendants' house, contains three windows which have been in existence for over fifty years, that she had been enjoying free light and air through those windows for over fifty years, that the defendants began, about a month or two prior to suit, to construct a first floor on their house which consisted uptil then of only a ground floor, that the defendants in so doing put up a wall by the side of the plaintiff's southern wall and as a result completely blocked the easternmost of the three windows, that the defendants' obstruction causes serious danger to the inmates of the plaintiff's house and that the value of her property is thereby diminished. The defendants deny the existence of the windows for over the statutory period and

contend that the plaintiff suffers no substantial privation of light and air and that their act does not amount to an actionable nuisance. The trial Judge found that the three windows were in existence for over the statutory period. It may here be noted that the learned Judge made a personal inspection of the premises on several occasions. He held on the evidence adduced, that there is no such dimunition of light and air as to amount to a nuisance. As regards the westernmost window there is admittedly no obstruction. With respect to the middle window the Judge found that by reason of the roof of the defendants hanging over a portion of it there is no such dimunition as to cause serious discomfort or to render the plaintiff's house uninhabitable. As for the easternmost window it is not disputed that it is completely blocked up. But the learned Judge found that the plaintiff receives sufficient light and air from other sources and holds that even if the easternmost window is closed up, the plaintiff cannot succeed as there is no substantial damage. I agree with the findings of the lower Court. But the real question to be decided is whether under these circumstances the plaintiff has any cause of action against the defendants. S. 33, Easements Act (5 of 1882) which deals with disturbance of easements, runs as follows:

> *33.* The owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.
>
> *Explanation I*:—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by . . . is substantial damage within the meaning of this Section.
>
> *Explanation II*.—Where the easement disturbed is a right to the free passage of light . . . . . . no damage is substantial within the meaning of this section, unless it falls within the first explanation or . . . . . .

Explanation II above says that in respect of an easement of light, damage is substantial if it falls within Expln. I which provides that the doing of any act likely to injure by affecting the evidence of easement is substantial damage. The principle underlying Expln. I is that any act of the defendant which affects the evidence of easement is enough to sustain an action though the plaintiff does not suffer actual damage. In other words there is a wrongful act for which an action lies. In 33 Mad 327=20 MLJ 291,[1] a Bench of this Court laid down at p. 332:

> There can be no doubt that in the present case, the act done by the defendants is likely to injure the plaintiff by affecting the evidence of the easements.

Goddard in the Law of Easements (Edn. 8) at p. 410 says:

> Generally the law will allow presumption of damage to be made in the case of alleged disturbance of easements as distinguished from natural rights, although no actual damage has resulted to the dominant owner, because any disturbance of an easement must be an injury to the right of the owner, as it tends to call his right in question and afford evidence thereafter in derogation of his title.

The learned author notes the case in 1 Scott 526,[2] where the plaintiff's right of way along a stream was obstructed by the defendant who put up a tunnel and it was held that

> though the plaintiff received no damage, his right to the way is injured and if acquiesced in for over 20 years it would become evidence of renunciation and abandonment of the right.

Jones in Law of Easements at p. 701 observes as follows:

> Damages are presumed to have resulted from the violation of the right. The disturbance of the easement is in derogation of the title of the dominant owner, and although he has suffered no actual injury he may maintain action to vindicate his title and have a judgment for nominal damages.

In the present case though the defendant's action did not cause actual damage to the plaintiff, yet the closing of the eastern window constitutes an invasion of the plaintiff's easement; and on the principles stated above, the plaintiff has a right of action against the defendant. The next question is as to the relief which the plaintiff is entitled. S. 35 of the Act provides that an injunction may be granted subject to the provisions of the Specific Relief Act. Having regard to the facts of this case I am inclined to award Rs. 150 as damages to the plaintiff. This sum will carry interest at 6 per cent. per annum from the date of the plaint until payment. In other respects the appeal is dismissed. Each party will bear his or her own costs throughout.

C.R.K./D.S. *Order accordingly.*

---

[1] ('10) 33 Mad 327=4 I C 425=20 M L J 291, Easa Abbas v. Jacob Harron Sait.

[2] 1 Scott 526, Bomer v. Hill.

A. I. R. 1940 Madras 953

LAKSHMANA RAO J.

Chilukuri Veerabhadra Rao

v.

Srupada Krishnamurthy Sastri

Criminal Revn. No. 576 and Petn. No. 535 of 1939, Decided on 3-11-1939.

Penal Code (1860), S. 499—Certain passages in book found to be defamatory—Order for destruction of all copies of entire book is illegal —Only pages containing objectionable passages should be destroyed.

Where certain passages in a book are found to be defamatory, an order directing the destruction of all the copies of the entire book is illegal. Only the pages containing the objectionable passages should be destroyed. [P 954 C 1]

D. Suryaprakasa Rao — *for Petitioner.*

K. Ramamurthy and K. Someswara Rao — *for Respondent.*

Public Prosecutor — *for the Crown.*

Facts. — The respondent preferred a complaint against the petitioner's husband for defamatory statements in a certain book called Mahopadhyaya Brahamasri Kalluri Venkatarama Sasth Garu Jeevita Charitramut, the allegation being that the entire book was defamatory. But at the time of trial only 32 passages were marked for purposes of evidence. Out of 32 passages the lower Court held that only 11 were defamatory and, in appeal the Appellate Court held that only eight out of the 11 were defamatory and made the above order for destruction of all the copies of the entire book and not merely the pages containing the eight defamatory passages. Against the order for the destruction of the entire book the present revision petition is filed by the widow of the deceased.

Order.—The order of the Sessions Judge directing the destruction of the books cannot be sustained but the passages specified in the list appended are objectionable and the pages containing those passages will be destroyed. But the petitioner may if she desires reprint the unobjectionable portion of those pages and insert them in the book.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1940 Madras 954

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Koraka Kannayya Naidu.

v.

Rayapureddi Appala Naidu.

Appeal No. 343 of 1937, Decided on 28th February 1940.

Limitation Act (1908), S. 20 — Undivided Hindu family — Pronote executed by son — Endorsement of payment on pronote by father — Father cannot be presumed to have authority within meaning of S. 20 to make payment on behalf of son in absence of proof of specific authority.

A member of the joint Hindu family cannot, simply because he is a member of that family, without specific authority, pay a debt on behalf of another member of the family or make an endorsement on behalf of the other member so as to enlarge the period of limitation. Consequently in the case of a joint Hindu family an endorsement of payment by the father on a pronote executed by the son cannot be presumed to have been authorized on behalf of the son unless there was something else to show that authority was, in fact, given to the father by the son to pay the debt on his behalf. [P 955 C 1]

C. Rama Rao — *for Appellant.*

Y. Suryanarayana — *for Respondent.*

Abdur Rahman J. — This appeal arises out of a suit brought on the basis of a promissory note executed by one R. Appala Naidu in favour of the plaintiff on 8th August 1930 (Ex. A) for Rs. 680-2-9. Several defences were raised to this suit. But the main defence, with which we are now concerned, is that of limitation. The lower Court held the suit to be barred by time and dismissed it. The plaintiff appeals. Since the suit was instituted more than three years after the execution of the promissory note it would ordinarily be barred by limitation. But it is contended on behalf of the plaintiff that a payment of Rs. 145 which was made on 23rd July 1933 on behalf of the executant of the promissory note by his father brings the suit within time. As there is an endorsement of payment of Rs. 145 on the back of the promissory note signed by the defendant's father on 23rd July 1933 it has to be conceded that this payment was made by him in respect of the promissory note in suit. But the real question to decide is if the father was, as required by S. 20, Limitation Act, duly authorized on behalf of his son to pay this amount. So far as the endorsement is concerned, there is nothing in it which would show that the father was authorized to pay the money on behalf of his son. There is a reference in it to his (i. e., the father's) being a member of an undivided family with his son; but this is a different matter and we shall advert to it later. The father was not examined by the plaintiff although we are conscious of the reasons why the appellant did not summon him to give evidence. That does not however solve the plaintiff's difficulty. The onus of establishing that the payment by the father was made under the authority of the son has to be discharged by the plaintiff and unless we find it to have been discharged, he must fail. There is a reference in the statement of P. W. 2 that the plaintiff's brother was sent by the plaintiff to make a demand and the defendant when approached said in reply that he would send the money through his father. The plaintiff failed to produce his brother and the defendant's statement remained unproved. We have thus been left to depend on the oral testimony of the plaintiff and that of P. W. 2. Having regard to the fact that there is nothing in the endorsement which corroborates the statements of these witnesses, we are not inclined to place any credit, like the lower Court, on their testimony.

The next question is, if there is anything in the endorsement itself which would show that the father was authorized to pay the money on behalf of the son. Mr. Rama Rao naturally laid a great deal of emphasis on the word 'undivided' appearing in the endorsement. His contention was that since the father and the son were members of a joint family, the father must be presumed to have been authorized on behalf of the son to make the payment. We are afraid it would be impossible for us to do so, unless there was something else to show that authority was, in fact, given to the father by the son to pay the debt on his behalf. A member of the joint Hindu family cannot, simply because he is a member of that family, without specific authority, pay a debt on behalf of another member of the family or make an endorsement on behalf of the other member so as to enlarge the period of limitation. In the absence of any other facts from which an authority may be inferred our decision must be that the plaintiff has failed to establish that the suit was within time. The dismissal of the suit by the lower Court was thus correct and its decision must be upheld. The appeal accordingly fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1940 Madras 955

WADSWORTH J.

Abdul Kudus and others — Petitioners.

v.

Abdul Gani and others — Respondents.

Civil Revn. Petn. No. 1052 of 1938, Decided on 11th April 1940.

Court-fee — Decree for possession subject to payment of certain sum — Plaintiff appealing against order of payment — Appeal should be valued at amount of that sum of money.

The appellant who seeks only to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. Hence in an appeal preferred by the plaintiff against an order requiring him to pay certain sum being his share of debts binding the property, the possession of which has been decreed to him subject to this payment the appeal should be valued at the amount of that sum of money : *A I R 1922 Mad 211; A I R 1939 Mad 49 and A I R 1926 Mad 225, Rel. on ; Obiter dictum in A I R 1925 Mad 323, Dissent.* [P 956 C 1]

D. R. Krishna Rao — *for Petitioners.*

B. Sitarama Rao (Government Pleader), M. S. Ramachandra Rao and A. Bhujanga Rao — *for Respondents.*

Order. — This petition raises a question of the court-fee payable on an appeal preferred by the plaintiff against an order requiring him to pay a sum of Rs. 3000 odd being his share of debts binding the property, the possession of which has been decreed to him subject to this payment. The question is whether the plaintiff should value his appeal on the same basis as he valued his suit, namely as if possession were the subject-matter, or whether he should value it on the basis of the value of the order which he seeks to get rid of in the appeal. Obviously, a contention such as that which has been raised before me would never be raised were it not for the fact that the suit itself has been filed on a fictitious value much less than its real value. Consequently, it is to the advantage of the petitioner to get the appeal relating to only a portion of the subject-matter of the suit valued at the value of the whole of the subject-matter of the suit. The absurdity of this position should not, in my opinion, govern the decision of the question at issue. What is it which the appellant seeks to get rid of by means of his appeal? Quite clearly, it is not a decree refusing him possession, but a decree which, while recognizing his right to possession, requires him to pay Rs. 3000 odd as a condition precedent to getting possession. Logically therefore the appeal should be valued at the value of the payment the necessity for which he desires to remove. Once this necessity is removed, the decree for possession which has already been granted to him remains.

Numerous cases have been quoted before me. Those upon which the petitioner relies are all of them cases in which the defendant has been granted a certain sum as compensation and appeals against the decree generally, asking for a larger sum of compensation or alternatively for the dismissal of the suit. In such cases, quite clearly since the defendant asks for the dismissal of the suit the subject-matter of the appeal must be the subject-matter of the suit, the amount payable as compensation being merely incidental thereto. Such cases are (reference under Court-fees Act, S. 55), 48 Mad 652[1] and A I R 1928 Mad 929.[2] The first case quoted contains an obiter dictum to the effect that even though the only question raised in the appeal is the value of improvements the subject-matter of the appeal would be the possession of the property. The decision has been frequently quoted and in several instances, it has been pointed out that this observation is obiter and need not be followed. On the other hand, I have been referred to three cases in which the plaintiff is the appellant and seeks to get rid of that portion of the decree which requires him to pay a sum of money as a condition precedent to the enforcement of his decree for possession which amount has been held to determine the value of the appeal. The case in 45 Mad 246[3] is the decision of a Single Judge on facts almost identical with those before me. The decision of the Bench in I L R (1939) Mad 328[4] relates to a Malabar compensation case, but the point is essentially the same, the plaintiff being the appellant. The learned Judges who decided this case criticise the obiter dictum in 23 Mad 84.[5] They also follow another Bench decision in a case arising out of the redemption of a kanom where the plaintiff appealed against the order requiring him to pay compensation for improvements: *vide* A I R 1926 Mad 225 corresponding to 22 M L W 691.[6] This latter decision also criticises the obiter dictum referred to and approves the decision of Kumaraswami Sastri J., in 45 Mad 246[3] that the value of the appeal is the value of the payment to which the appellant objects.

---

[1] ('25) 12 A I R 1925 Mad 323=85 I C 405= 48 Mad 652=47 M L J 919, In re Seethayamma.

[2] ('28) 15 A I R 1928 Mad 929 = 110 I C 752 Pathumma Umma v. A. Mohideen.

Thus it will be seen that there is ample authority for adopting that which appears to me to be the logical view, namely that the appellant-plaintiff who seeks only to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. This is the view taken by the Court below. The revision petition therefore is dismissed with costs of the Government Pleader. Time allowed till the reopening day of the lower Court after the summer recess for payment of the deficit court-fee.

C.R.K./D.S. *Petition dismissed.*

---

[3] ('22) 9 A I R 1922 Mad 211 = 68 I C 444 = 45 Mad 246 = 41 M L J 587, In re Porkodi Achi.

[4] ('39) 26 A I R 1939 Mad 49 = 179 I C 421 = I L R (1939) Mad 328 = (1938) 2 M L J 840, Mahadevi v. Kovilakath Kulapura Tawazhi.

[5] (1900) 23 Mad 84, Reference under Court-fees Act, S. 5.

[6] ('26) 13 A I R 1926 Mad 225 = 92 I C 624 = 22 M L W 691, In re Paidal Nayar.

A. I. R. 1940 Madras 956

HORWILL J.

Vemuri Ramjee Rao

v.

The Municipal Council, Masulipatam.

Second Appeal No. 70 of 1937, Decided on 29th February 1940.

Contract Act (1872), S. 72 — Person paying tax under misapprehension as to his liability cannot recover it back either under S. 72 or under equitable principles.

Payments made by mistake of law cannot be recovered. Hence a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, either under S. 72 or under equitable principle: *Case law referred.* [P 957 C 2]

Ch. Raghava Rao and V. V. Sastry — *for Appellant.*

V. Govindarajachari — *for Respondent.*

Judgment. — The only question that arises in this appeal is whether the plaintiff, who had paid property tax to the defendant Municipality upon demand in a wrong belief that he was bound to pay that tax, is entitled to have it refunded. Both the lower Courts held that as the payment was a voluntary one, he is not entitled to have any such refund. His suit was therefore dismissed and his appeal to the Subordinate Judge, Masulipatam, was also dismissed. Mr. Raghava Rao, in his very able argument, has put forward two contentions. They are that under S. 72, Contract Act, the plaintiff is entitled to a refund of money paid by mistake of law and that even though S. 72 would debar a person from recovering money paid under a mistake of law in a quasi-contract, there would still be open to such a person the equitable relief that a Court can give to a person who has wrongly parted with money independently of any contract. 52 Mad 207[1] is a decision on which Mr. Raghava Rao has placed great reliance. It discusses the English principles to be applied in a case somewhat similar to the present one, in which a person made a payment to a corporate body under protest and then claimed it back. The question that arose was whether the suit was in time; because it had been filed more than six months after the payment had been made, six months being the period allowed by S. 350, Madras District Municipalities Act, for bringing a suit against a municipality in certain classes of suits. Both Couts-Trotter C. J. and Madhavan Nair J. held that the suit claim was not one arising out of a contract and that therefore principles of the English Courts of Equity could be applied; for, in Indian Courts no distinction had ever been drawn between equitable jurisdiction and legal. Such equitable principles being applied, it was considered by these learned Judges that the suit was one for "money had and received" and not an action for damages and compensation. It was held therefore that S. 350, Madras District Municipalities Act, did not apply, but Art. 62, Limitation Act. It has therefore been argued by Mr. Raghava Rao that it is unnecessary to apply the principles of the Common Law Courts of England, which, he says, have been reproduced in S. 72, Contract Act, and that this suit may be looked upon as one in the general equitable jurisdiction of Civil Courts. 52 Mad 207[1] may be regarded as an authority for the position that either a cause of action arises independently of S. 72, Contract Act, or that when applying S. 72, Contract Act, one should not be bound by the somewhat narrower principles of the Common Law Courts of England; but may well have regard to the decisions of the Court of Equity.

---

[1] ('29) 16 A I R 1929 Mad 409 = 120 I C 867 = 52 Mad 207 = 56 M L J 525, Municipal Council, Dindigul v. Bombay Co. Ltd.

That a suit for "money had and received" will lie apart from S. 72, Contract Act, has been held in 25 Mad 548,[2] where a person was obliged to pay his landlord some money which was really not due, in order to avert a summary sale of his land. It was held that although the money was not paid by mistake, yet the person who paid it was entitled to have it back. But even if we regard this suit as one to which S. 72, Contract Act, does not apply, I do not consider that the plaintiff's claim would be any stronger; because Courts have generally held that where a payment is made by mistake of law, there is no room for the application of equitable principles. The person who makes the payment is under no obligation to do so; and if he, of his own free will and accord, having the same opportunity of knowing the general law as the person to whom he pays it, makes such a payment, there is no injustice done which Courts of Equity should remedy. It is pointed out in Halsbury's Laws of England (Vol. 23 at p. 168, in para. 246 and Vol. 7 at p. 278 in para. 249) that it is not an absolute rule that a payment made under a mistake of law cannot be recovered. A few exceptions do exist, especially where the person who makes the payment has much less opportunity of knowing the law than the person to whom he pays it and relies on the word and experience of the person paid. It has however never been held, even by Courts of Equity, that a payment made under circumstances like the present is recoverable in a Court. Mr. Raghava Rao has been at some pains to point out that in more recent decisions in England there has been a tendency to interpret more liberally the rule against the recovery of money paid by mistake of law; but Ramesam J., who was apparently dealing with the same argument in 56 M L J 269,[3] thought that the recent decision of the House of Lords and the remarks of Scrutton L. J. indicated that there had been no modification of the general principle against forcing a person to return money paid under a mistake of law.

Returning to S. 72, Contract Act, it has been held in a number of cases that payments made in India by mistake of law cannot be recovered. 56 M L J 269[3] is a direct authority with regard to a payment of the kind here made. In 52 Mad 12[4] it was held that a wrong payment of income-tax could not be recovered for the same reason. In recent cases the principle that a person who makes payment under a mistake of law cannot recover it back again has been accepted without question: *see* 67 M L J 566[5] and (1937) 1 M L J 496.[6] I have therefore no doubt that as the law stands at present, a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error. The appeal is accordingly dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

[2] ('02) 25 Mad 548, Narayanasami Reddi v. Osuru Reddi.

[3] ('29) 16 AIR 1929 Mad 177=56 MLJ 269, Appavoo Chettiar v. South Indian Railway Co.

[4] ('29) 16 A I R 1929 Mad 179=114 I C 829=52 Mad 12 = 55 M L J 770, Raja of Ramnad v. Secretary of State.

[5] ('34) 21 A I R 1934 Mad 420=150 I C 890=67 M L J 566, Municipal Council Tuticorin v. Ralli Brothers.

[6] ('37) 24 A I R 1937 Mad 559 = 169 I C 330 = (1937) 1 M L J 496, Chairman Municipal Council, Rajahmundry v. Subba Rao.

A. I. R. 1940 Madras 957

WADSWORTH J.

Karnam Subramanya Rao—Petitioner.

v.

Pulla Rami Reddi — Respondent.

Civil Revn. Petn. No. 1252 of 1939, Decided on 2nd August 1940.

Res judicata — Issue made subject of final order — That order cannot be ignored by succeeding Judge.

Section 11 is not exhaustive of the applicability of the principle of res judicata. When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review: *A I R 1921 PC 11 and A I R 1917 Cal 184, Ref.* [P 958 C 1]

P. C. Parthasarathy Ayyangar — *for Petitioner.*

P. Chandra Reddy — *for Respondent.*

Order. — In this case a former District Munsif heard arguments on the question whether the petition under Madras Act 4 of 1938 would lie under S. 19, having regard to the provisions of S. 10 (2) (ii) and he passed a considered order that there was no vendor's lien in respect of the liability and no obstacle under that Section to the application. He then adjourned the matter for further enquiry. He was transferred and his successor instead of proceeding with the matter where his predecessor left it, reopened the issue which had been decided and gave a contrary finding and dismissed the application on that finding. I am of opinion that he had no jurisdiction to do that. Granting that the matter is not precisely covered by S. 11, Civil P. C., that Section is not exhaustive of the applicability of the principle of res judicata: 48 Cal 499.[1] When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review: *vide* 44 Cal 28.[2] If the correctness of this order is to be attacked otherwise, it can only be done by way of appeal against the final order on the application, which remedy is still open. The petition is allowed with costs and the application is remitted to the trial Court for disposal on the merits.

C.R.K./D.S. *Petition allowed.*

---

[1] ('21) 8 AIR 1921 PC 11 = 60 IC 631 = 48 I A 187=48 Cal 499 (PC), Hook v. Administrator-General of Bengal.

[2] ('17) 4 AIR 1917 Cal 184=38 I C 584=44 Cal 28, Basanta Kumar v. Kusum Kumari.

A. I. R. 1940 Madras 958

LEACH C. J. AND HORWILL J.

H. M. Ebrahim Sait — Appellant.

v.

The Mettupalayam Narayani Bank Ltd. and others — Respondents.

Appeal No. 17 of 1939, Decided on 26th July 1940, from order and judgment of Mockett J., D/- 1st May 1939.

(a) Company—Resolution of Board of Directors authorizing director to attend to Court proceedings—He can file petition in insolvency.

Where a resolution of Board of Directors has authorized one of the directors to attend to all affairs and Court proceedings, the director can file petition in insolvency as such petition involves proceedings in Court: *(1915) 1 K B 287 ; (1917) 2 K B 808 and (1824) 3 B & C 178, Expl. and Disting.* [P 959 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 9 (e)—Even if there had already been act of insolvency as result of previous attachment there can be second act of insolvency of same nature.

A debtor can commit more than one act of insolvency. Hence even if there had already been an act of insolvency committed as the result of a previous attachment for more than three weeks there can be a second act of insolvency of the same nature. [P 959 C 1, 2]

T. V. Srinivasan — *for Appellant.*

E. R. Krishnan, M. S. Venkatarama Ayyar, M. Krishna Bharathi, R. Karunakaran and U. Lakshmanna — *for Respondents.*

Leach C. J. — This is an appeal against an order passed by Mockett J., adjudicating the appellant an insolvent. It is said that the person who filed the application for adjudication had no authority in law to do so and that there was no act of insolvency. Both these questions were raised before the learned Judge who has dealt with them fully in his judgment and we agree with his conclusions. The petitioning creditor was the Mettupalayam Narayani Bank Ltd., which had obtained a decree against the appellant in the Court of the Subordinate Judge of Coimbatore for a sum of some Rs. 56,000. The decree was transferred to Madras for execution and execution proceedings were duly instituted. On 4th March 1939 the Bank attached the appellant's residence. The attachment continued until 30th March 1939 when the petition for adjudication was filed. The application was signed by V. Palaniappa Chettiar, who was the director in charge of the Bank and also held the office of Secretary. On 20th October 1937 the Board of Directors passed this resolution:

> M. R. Ry. the Director, V. Palaniappa Chettiar Avergal shall take charge on 28th November 1937 as Director in charge, Secretary and attend to the duties. It has been decided that, till appointment of another Secretary, the said V. Palaniappa Chettiar Avergal himself shall attend to all the affairs and Court proceedings relating to the Nidhi.

This resolution remained in force at the time of the filing of the insolvency petition in this case. The first contention of the appellant is that this resolution gave Palaniappa Chettiar no authority to act in insolvency on behalf of the Bank. It is difficult to imagine what wider power could be given than was given here. Palaniappa Chettiar was authorized to attend to all the affairs of the Bank, including Court proceedings relating to the Bank. Therefore, he had the authority to attend, to institute and conduct all proceedings in Court with which the Bank was concerned. A petition in insolvency involves proceedings in Court and we agree with the learned Judge that Palaniappa Chettiar had full authority to file the petition. Mr. Ramaswamy Iyer has suggested that this view is inconsistent with the decisions of the Courts in England in (1915) 1 K B 287,[1] (1917) 2 K B 808[2] and (1824) 3 B & C 178=107 E R 700.[3] A glance at these cases shows that they have no bearing here. In the first case it was held that a resolution of an incorporated company authorizing one of its officers to present a petition in bankruptcy against a particular debtor did not authorize the officer to present a petition founded on an act of bankruptcy committed after the date of the resolution. The decision in (1917) 2 K B 808[2] far from helping the appellant is against him. There a Division Bench held that a company could give general authority to one of its officers to present a petition in bankruptcy in the future in respect of acts of bankruptcy which might not have been committed at the date when the authority was given. It was pointed out that the decision in (1915) 1 K B 287[1] dealt with the particular set of facts and did not militate against the contention that there could be a general authority to act in bankruptcy proceedings. In (1824) 3 B & C 178 =107 E R 700,[3] authority was given "to sue." It was held that this did not give authority to institute bankruptcy proceedings. In the resolution now under consideration the authority is not confined to the institution of suits. There is no limitation on the agent's powers to institute proceedings in Court.

The second contention is that inasmuch as there were two previous attachments subsisting when the Bank presented its attachment it could not rely on its own attachment. In other words, it is said that because there had already been an act of insolvency committed as the result of a previous attachment for more than three weeks there could not be a second act of insolvency of the same nature. S. 9 (e), Presidency Towns Insolvency Act, says that a debtor commits an act of insolvency if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money. A debtor can commit more than one act of insolvency and the three attachments here constituted three different acts of insolvency. There is no substance whatever in this contention. The appeal will be dismissed with costs in favour of the opposing creditors, one set.

C.R.K./D.S. *Appeal dismissed.*

---

[1] (1915) 1 K B 287=84 L J K B 254 = 112 L T 310, In re a Debtor.

[2] (1917) 2 K B 808=117 L T 574, In re a Debtor; Exparte Petitioning Creditors v. Debtor.

[3] (1824) 3 B & C 178=107 E R 700=5 D & R 24 =3 Stark 158, Guthrie v. Fisk.

A. I. R. 1940 Madras 959

WADSWORTH J.

Kannabhiran Pillai — Petitioner.

v.

Govindaswami Pillai — Respondent.

Civil Revn. Petn. No. 903 of 1940, Decided on 16th August 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Decree passed after Act came into force cannot be scaled down.

A decree passed after the Act came into force cannot be scaled down under S. 19 : *A I R 1940 Mad 910, Foll.* [P 960 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938)—Liability declared in Appellate Court's decree for first time—No written application raising plea for relief under Act before Appellate Court—Proper procedure stated.

When a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under the Act there should be a written application raising this plea before the Appellate Court and on such application the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below. [P 960 C 2]

It is doubtful whether an order reserving a plea under Act 4 of 1938 for subsequent adjudication should be passed in the absence of an express prayer for the benefits of the Act. But the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order as binding upon them : *A I R 1921 Cal 34 (F B) and AIR 1918 Mad 1093, Ref.* [P 960 C 1]

A. V. Viswanatha Sastri and S. Amudachari — *for Petitioner.*

K. V. Srinivasa Aiyar — *for Respondent.*

Order.—This revision petition raises the question of the proper procedure in a matter arising under Madras Act 4 of 1938. The present petitioner was a defendant in a suit which was dismissed on 30th November 1937, that is to say, before the Act came into force. There was an appeal by the plaintiff and the Appellate Court after Act 4 of 1938 came into force reversed the decision of the lower Court and gave a decree.

The last sentence of the judgment of the Appellate Court is as follows :

> This judgment will not preclude the defendants from applying to the lower Court for scaling down the debt under the provisions of Madras Act 4 of 1938 if they are entitled to have such relief.

It is common ground that no formal application under Madras Act 4 of 1938 was before the learned Judge when he disposed of the appeal. It is not clear whether any oral representation was made at the time of passing judgment that the defendants' rights under Act 4 should be reserved. But it seems to me probable that something must have been said to cause the learned Judge to make this reservation in his judgment. After the pronouncement of this judgment a decree was drawn up which contains no provision for a reservation such as the judgment contains. Thereafter the present petitioner applied to the trial Court to scale down the Appellate Court's decree under S. 19 of Act 4. At the time when this application was made there was a good deal of difference of opinion on the question whether a decree passed after the Act came into force could be scaled down. That doubt has, I hope, been finally set at rest by our decision reported in 52 M L W 176.[1] In the light of that decision, it must be held that the application to the lower Court to scale down the Appellate Court's decree under S. 19 was not the proper procedure. At the same time it does not seem equitable merely because the petitioner has adopted a wrong procedure and has not understood what is the right procedure to leave him without a remedy if a legal remedy is open to him.

Now it is doubtful whether the order of the Subordinate Judge reserving a plea under Act 4 of 1938 for subsequent adjudication should have been passed in the absence of an express prayer for the benefits of the Act. Assuming, however, that the Judge had the intention of reserving a plea which was open to the defendants and which would have been taken in writing had the necessity therefor been made plain, the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order of the Subordinate Judge as binding upon them: *vide* 48 Cal 138[2] and 32 M L J 434.[3] The Subordinate Judge having granted the defendants leave to raise in the trial Court the question of the relief to which they may be entitled under Act 4 of 1938 this order binds both parties and cannot be treated as void merely by reason of an alleged irregularity. I would, however, observe that, though no procedure has been laid down in the Act, in a case of this kind when a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under Madras Act 4 of 1938 there should be a written application raising this plea before the Appellate Court and on such application the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below.

On the facts of the present case it seems to me clear that the Court below could not proceed with the enquiry under Act 4 of 1938 in the face of the Appellate Court's decree which makes no provision therefor. The proper procedure therefore appears to be for the petitioner to apply to the Appellate Court to have the decree brought in accordance with the judgment by embodying therein a direction to the trial Court to deal with the application for relief under Act 4 of 1938 and amend the decree according to its decision. If and when the petitioner makes such an application to the Appellate Court it will of course be open to the respondent to urge any objections which may be available to him to the amendment of the decree. Should the Appellate Court carry out the desired amendment, the petitioner will then be at liberty to apply to the trial Court—not under S. 19 which really has no application to a decree passed after the Act came into force—but under Ss. 8 and 9 as in a pending litigation, the matter having been reserved in the appeal for separate disposal. The revision petition against the order of the District Munsif must be dismissed, his order being correct on the frame of the petition, though he might perhaps have given to the petitioner some guidance as to the course which he should follow. In the circumstances, I make no order as to costs.

C.R.K./D.S. *Petition dismissed.*

---

[1] ('40) 27 A I R 1940 Mad 910=(1940) 2 M L J 202=52 M L W 176, Kottayya v. Punnayya.

[2] ('21) 8 A I R 1921 Cal 34=58 I C 806=48 Cal 138=31 C L J 482=24 C W N 723 (F B), Hriday Nath v. Ramachandra.

[3] ('18) 5 A I R 1918 Mad 1093=40 I C 611=32 M L J 434, Tuljaram Rao v. Gopala Iyer.

No ...17723...
Dated ....20-11-50...

END